Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 482

EDWARD SHELDON AND MARGARET AYER BARNES, PETITIONERS,

vs.

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 25, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

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9—Statement entitled "Depreciation—Los Angeles Studio", marked in evidence at folio 891 765

10—Statement as to "interest paid" to Loew's Incorporated. Total $1,559,559.70, marked in evidence at folio 899 765

15—Schedule showing, by numbers and dates, receipt of Exhibitors' contracts, covering "Joan Crawford No. 2 Production 208", ("Letty Lynton"), marked in evidence at folio 971 766

16—Form of contract as entered into with Exhibitors (1932) covering production (as above entitled), marked in evidence at folio 971 767

Defendants' (New York) Exhibits (continued).

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* Exhibits 18 to 18-F constitute the amended account of Metro-Goldwyn Pictures Corporation.

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27-C—List of Officers and Directors of Defendant, Metro-Goldwyn-Mayer Distributing Corporation, marked in evidence at folio 1941 817

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28-A to 28-E—Corporations formerly subsidiary to Culver Export Corporation (now subsidiary to Loew's Incorporated), marked in evidence at folio 1967 ..... 819 to 823

29-A and 29-B—Sales of motion picture rights in plays (1932) made up by witness Sidney R. Fleischer (printed herein at pages 675 to 676), marked in evidence at folio 2024.

30 for Identification—Portions of letter of July 14, 1937, from Ligon Johnson, Esq. to Samuel D. Cohen, containing statement as to runs of plays embraced in Exhibit 29-A to 29-B (printed herein at pages 680 to 685), marked in evidence at folio 2038.

31—Extracts from Certificate of Incorporation and By-Laws of Motion Picture Producers and Distributors of America, marked in evidence at folio 2145 825

32—Resolution of Motion Picture Producers and Distributors of America re dues of members, with application for Class A membership, marked in evidence at folio 2146 828

33—Pages 1 to 51 of Printed Papers embodied contract between Louis B. Mayer Pictures (copartnership) and Metro-Goldwyn Pictures Corporation, Loew's Incorporated, etc., marked in evidence at folio 2157 832

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C-29—Exhibit headed "Schedule A-1 Studio Overhead", marked in evidence at folio 863..... 889

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Defendant, Loew's Incorporated, Exhibits (continued).

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L-2—Weekly statement Metropolitan Theatre, Brooklyn (week ending May 20, 1932), marked in evidence at folio 1401 904

L-3—Computation of overhead as to Metropolitan Theatre, Brooklyn, marked in evidence at folio 1403 905

L-4—Weekly Statement Lexington Theatre (N. Y.) week ending May 20, 1932, marked in evidence at folio 1433 906

L-5—Computation of overhead as to Lexington Theatre (N. Y.), marked in evidence at folio 1435 907

L-6*—Schedule showing Profit or Loss of Theatres operated by corporations wholly owned by Loew's Incorporated, marked in evidence at folio 1484 .. 908

L-7—Overhead expenses of theatres listed in Exhibit L-6, marked in evidence at folio 1487 909

L-8—Schedule showing Profit or Loss of theatres operated by Corporations partly owned by Loew's Incorporated, marked in evidence at folio 1513 .. 910

L-8+—Schedule showing profit as to two additional theatres (omitted from Exhibit L-8), marked in evidence at folio 1594 911

L-9—Overhead expenses of theatres listed in Exhibit L-8, marked in evidence at folio 1514 912

L-10—Schedule showing Profit or Loss of theatres operated by corporations in which Loew's Incorporated have indirect stock ownership, marked in evidence at folio 1587 913

L-11—Overhead Expenses of Theatres listed in Exhibit L-10, marked in evidence at folio 1589 914

*Exhibits L-6 to L-13, inclusive, constitute the account of 100 odd theatres in which Loew's Incorporated had stock interest or otherwise which exhibited the motion picture "Letty Lynton".

Defendant, Loew's Incorporated, Exhibits (continued).

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L-12—Schedule showing Profit or Loss of Theatres Managed by Marcus Loew Booking Agency, marked in evidence at folio 1590..... 915

L-13—Overhead expense of Theatres listed in Defendants' Exhibit L-12, marked in evidence at folio 1591 916

Defendants' exhibit offered before the Special Master from the Proceedings Before Accounting (Prior Printed Record) and marked herein Defendants' Exhibits R-1, R-2, etc., as well as testimony offered before the Special Master from such prior proceedings, are listed separately immediately following the index to Complainants' exhibits.

COMPLAINANTS' EXHIBITS:

B-4, B-11, B-13, B-27, B-29, B-37, B-39 and B-43—Manager's reports as to certain theatres listed on Defendants' Exhibit L-6, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1527....917 to 924

C-3, C-12 and C-13—Manager's reports as to certain theatres listed on Defendants' Exhibit L-8, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1597 .....925 to 927

D, D-4, D-8, D-10 and D-20—Manager's reports as to certain theatres listed on Defendants' Exhibit L-10, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1598.....928 to 932

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E-7—Manager's report of Fox Theatre, Atlanta, Ga., one of the theatres listed on Exhibit L-12 covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1599 933

M—Officers and Directors of Theatre Companies, marked in evidence at folio 2034 934

Statement as to Testimony and Exhibits printed in the Proceedings before Accounting (hereinafter for brevity referred to as P. P. R.) and reoffered in evidence in the Accounting Proceedings before the Special Master.

(Each reference to the prior printed record whether to testimony or exhibits has been given, at the request of the Special Master, a separate reference number, and in the case of exhibits from the prior printed record, separate exhibit numbers, R-1, R-2, etc., have been superadded.)

Reference No. 1—Testimony of Margaret Ayer Barnes (actually incorporated in this record) 631

Reference No. 2—Letter of April 15, 1931 and agreement of April 17, 1931 in relation to purchase of motion picture rights of play "Dishonored Lady" (P. P. R. "Complainants' Exhibit 8", pp. 788-803; marked herein Defendants' Exhibit R-1) 635

Reference No. 3—Testimony of Jesse L. Lasky (actually incorporated in this record) 637

Reference No. 4—"Trial of Madeleine Smith" (Book) (Defendants' Exhibit E of original record, marked herein Defendants' Exhibit R-2; not printed as part of either record, but will be handed up on the argument) 639

References to Record of Proceedings before Accounting (continued).

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Reference No. 5—Manuscript of Complainants' play, "Dishonored Lady" (Complainants' Exhibit 1, of original record, P. P. R., pp. 237-494; marked herein as Defendants' Exhibit R-3) 640

Reference No. 6—Continuity of motion picture "Letty Lynton" (Complainants' Exhibit 3 of original record, P. P. R., pp. 495-622; marked herein as Defendants' Exhibit R-4) 640

Reference No. 7—Novel "Letty Lynton" by Mrs. Belloc Lowndes (Defendants' Exhibit C of original record, marked herein as Defendants' Exhibit R-5, not printed as part of either record, but will be handed up on the argument) 641

Reference No. 8—Assignment of motion picture rights to the novel "Letty Lynton" (Defendants' Exhibit D of original record, P. P. R., pages 826-828, marked herein as Defendants' Exhibit R-6) 641

Reference No. 9—Testimony of Irving Thalberg (P. P. R., pages 73-81) 677

Reference No. 10—Testimony of Hunt Stromberg (P. P. R., pages 81-114) 677

Reference No. 11—Testimony of John Meehan (P. P. R., pages 114-130) 677

Reference No. 12—Testimony of Clarence L. Brown (P. P. R., pages 131-139) 677

Reference No. 13—Testimony of Wanda Tuchok (P. P. R., pages 140-142) 678

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Reference No. 16—Testimony of Gabriel L. Hess (P. P. R., pages 59-71)	686
Reference No. 17—Resolution of Motion Picture Producers and Distributors of America (Defendants' Exhibit A of original record, P. P. R., pages 805-813; marked herein as Defendants' Exhibit R-7)	686
Reference No. 18—Testimony of J. Robert Rubin (actually incorporated in this record)	739

UNITED STATES CIRCUIT COURT OF APPEALS, 1
FOR THE SECOND CIRCUIT.

EDWARD SHELDON and MARGARET AYER BARNES,
Complainants-Appellees and Appellants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Defendants-Appellants and Appellees. 2

(Cross Appeals.)

Statement Under Rule XIII.

This action was commenced by the serving and filing of the bill of complaint on or about June 24, 1932.

Issue was joined by filing of answers of the defendants on July 25, 1932.

The case came up for trial before Hon. John M. Woolsey, United States District Judge for the Southern District of New York, on April 22nd and 23rd, 1933.

Decree dismissing the bill of complaint entered by 3
District Court on August 8, 1934.

Appeal taken from decree of dismissal to Circuit Court of Appeals, Second Circuit, on September 21, 1934.

(The transcript of record filed on such prior appeal, by stipulation of the parties, will herein be called the Proceedings before Accounting and the portions of such record material upon this appeal will be incorporated herein by reference to such prior record.)

Opinion of Circuit Court of Appeals reversing the decree below and directing judgment against the defendants with

Statement Under Rule XIII.

a decree for damages and an accounting filed on January 17th, 1936 (Reported in 81 Fed. 49).

Mandate of the Circuit Court of Appeals issued to District Court on February 5, 1936.

Defendants' petition for certiorari to the United States Supreme Court denied on May 4, 1936 (Reported in 298 U. S. 669).

District Court upon the mandate entered a decree, appointing the Hon. Gordon Auchincloss as Special Master and directing the taking of the accounting, on July 29, 1936.

Hearings before the Special Master began on September 9, 1936 and the final hearing held on March 16, 1938.

Report of Special Master filed on May 9, 1938.

Motion of complainants to confirm, etc. made on June 7, 1938 and argued on July 5, 1938.

Final decree entered on January 7, 1939 and resettled on January 23, 1939.

Appeals from such resettled final decree have been taken both by the defendants and by the complainants—by the defendants on March 27, 1939 and by the complainants on March 29, 1939.

The names of the parties are stated in full in the above title. O'Brien, Driscoll & Raferty appear for complainants. J. Robert Rubin appears for defendants Metro-Goldwyn-Mayer Distributing Corporation and Metro-Goldwyn Pictures Corporation. Leopold Friedman appears for defendant Loew's, Inc. Samuel D. Cohen appears for defendant Culver Export Corporation.

There has been no change of parties or attorneys since the commencement of the within action, except that Leopold Friedman, Esq. and Samuel D. Cohen, Esq. have been substituted as attorneys for the defendants Loew's Incorporated and Culver Export Corporation respectively in place of Nathan Burkan, Esq., deceased, and O'Brien, Driscoll and Raftery have succeeded the firm of O'Brien, Malevinsky and Driscoll as attorneys for the complainants.

Bill of Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity No. E 69-218.

EDWARD SHELDON and MARGARET AYER BARNES,

Complainants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S INC., and CULVER EXPORT CORPORATION,

Respondents.

The complainants herein by their solicitors, O'Brien, Malevinsky & Driscoll, complaining of the respondents, respectfully allege and represent:

FIRST: Complainants invoke the jurisdiction of this court upon the ground that the Copyright Law of the United States is directly involved in this action and upon the ground that the matters and things in controversy embody and include complainants' copyright title as hereinafter set forth.

SECOND: Complainant Margaret Ayer Barnes is a citizen of the United States, residing and having her domicile in the City of Chicago, in the County of Cook, in the State of Illinois.

THIRD: Complainant Edward Sheldon is a citizen of the United States, residing and having his domicile in the Borough of Manhattan, City, County and State of New York.

FOURTH: Respondent Metro-Goldwyn Pictures Corporation is a corporation created and existing under and by virtue of the Laws of the State of Delaware, and has one of its principal offices and place of business where practically all of its officials are domiciled and located at No. 1540 Broadway, in the Borough of Manhattan, City,

10 County and State of New York, and where the major portion of its business activities are transacted and directed.

FIFTH: Respondent Metro-Goldwyn-Mayer Distributing Corporation is a domestic corporation, having its general offices and place of business at 1540 Broadway, in the Borough of Manhattan, City, County and State of New York.

SIXTH: Respondent Loew's Inc. is a corporation created and existing under and by virtue of the Laws of the State of Delaware, and has one of its principal offices where practically all of its officials are domiciled and located at No. 1540 Broadway, in the Borough of Manhattan, City,
11 County and State of New York, and where the major portion of its business activities are transacted and directed.

SEVENTH: Respondent Culver Export Corporation is a domestic corporation having its general offices and place of business at 1540 Broadway, in the Borough of Manhattan City, County and State of New York.

EIGHTH: Respondent Metro-Goldwyn Pictures Corporation is a manufacturer of what is commonly characterized and known as motion pictures and motion picture photoplays, and will hereinafter for all the purposes of this complaint be designated as the "*Manufacturer*".

12 NINTH: Respondent Metro-Goldwyn-Mayer Distributing Corporation is a distributor of what is commonly characterized and known as motion pictures and motion picture photoplays, and will hereinafter for all the purposes of this complaint be designated as the "*Distributor*".

TENTH: Respondent Loew's Inc., upon information and belief, owns one hundred (100%) percent of the stock of Metro-Goldwyn Pictures Corporation and one hundred (100%) percent of the stock of Metro-Goldwyn-Mayer Distributing Corporation, and owns and/or operates and/or maintains and/or controls a large number of motion picture theatres located in the City of New York, State of New York, and divers and sundry other States of the

United States of America, and will hereinafter for all the purposes of this complaint be designated as "*Loew's*". 10a

ELEVENTH: Respondent Culver Export Corporation, upon information and belief, distributes all of the "*manufacturer's*" and "*distributor's*" pictures aforementioned in all foreign countries outside of the United States of America.

TWELFTH: Upon information and belief each and all of the defendants are interwoven in all of their operations of manufacturing and distributing pictures and are jointly and severally tort feasors in respect to the matters and things hereinafter set forth and specified.

11a

THIRTEENTH: That prior to January 18, 1930, complainants created, originated, invented and wrote a new novel play entitled "Dishonored Lady".

FOURTEENTH: That on January 18th, 1930, complainants duly filed, deposited and registered said play with the Librarian of Congress in the Copyright Office of the United States of America, as in such cases by law made and provided, paying the legal fees required by law.

FIFTEENTH: That on January 18th, 1930, there was duly issued to complainants under the seal of the Copyright Office by Thorwald Solberg, Register of Copyrights, pursuant to the Copyright Statutes, a certificate of copyright, reading as follows: 12a

"LIBRARY OF CONGRESS, D2
COPYRIGHT OFFICE
OF THE UNITED STATES OF AMERICA
WASHINGTON

CERTIFICATE OF COPYRIGHT REGISTRATION

THIS IS TO CERTIFY, in conformity with Section 55 of the Act to Amend and Consolidate the Acts respecting Copyright approved March 4, 1909, as amended by the Act approved March 2, 1913, that

10b ONE copy of the DRAMATIC COMPOSITION named herein, not reproduced for sale, has been deposited in this Office under the provisions of the Act of 1909, and that registration of a claim to copyright for the first term of 28 years has been duly made in the name of

Margaret Ayer Barnes, Chicago, Ill., and
Edward Sheldon, New York, N. Y.

"Title of Drama: Dishonored Lady, a Play in Three Acts. By Margaret Ayer Barnes and Edward Sheldon, of the United States.

Copy received Jan. 18, 1930. Entry:

11b Class D, No. 3924.

THORWALD SOLBERG
Register of Copyrights.

(Seal)
Librarian of Congress
Copyright
Office
United States of America."

SIXTEENTH: That under and by virtue of said registration and the issuance of said copyright certificate complainants became and at all times since continued to be and now
12b remain the sole and exclusive owners and holders of the copyright title and of each and every right, title and interest connected with, flowing from, or appertaining thereto as vested in complainants by said copyright title under the Copyright Statutes and Laws of the United States of America, including all of the rights which complainants hereinafter allege have been illegally and unlawfully infringed and violated by the respondents, including the exclusive right:

(a) To print, reprint, publish, copy, and vend the copyrighted work;

(d) To perform or represent the copyrighted work

publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever. 10c

SIXTEENTH (a): That on or about April 17th, 1931, and pursuant to negotiations that had theretofore taken place, complainants had delivered to and there had remained in the possession of the "*manufacturer*" the manuscript of the play "Dishonored Lady". That on or about said date a tentative contract had been prepared wherein and whereby it was proposed that complainants should sell to the "*manufacturer*" the motion picture rights of said play "Dishonored Lady". That "*manufacturer*" had agreed and proposed to pay to complainants the sum of Thirty Thousand Dollars ($30,000) for the motion picture rights of the play "Dishonored Lady". 11c

SIXTEENTH (b): The "*manufacturer*" as well as the "*distributor*" then and there knew and were fully cognizant of the fact that complainants were the authors and proprietors of said play "Dishonored Lady" and the copyright title thereto, and that for motion picture purposes said literary property and dramatic play copyrighted as aforesaid belonged to and was possessed by the complainants. 12c

SEVENTEENTH: Notwithstanding the foregoing the "*manufacturer*" failed to carry out its contract of purchase and shortly thereafter illegally and unlawfully manufactured a picture entitled "Letty Lynton", which the respondents jointly and severally then and there undertook to distribute and sell for profit in the various motion picture houses exhibiting pictures throughout the world.

10d EIGHTEENTH: That the picture manufactured by the "*manufacturer*" entitled "Letty Lynton" is a talking motion picture photoplay; (a) that said photoplay "Letty Lynton" is a deliberate piracy and infringement of complainants' play "Dishonored Lady"; (b) the "*manufacturer*" illegally and unlawfully, wilfully and deliberately, copied complainants' play "Dishonored Lady"; (c) copied and made use of the same technique, dramatic situations and/or episodes, dramatic plot and its treatment, embellishment and detail; (d) copied and made use of the same series of events and episodes with the conscious intention and purpose to excite by presentation and representation in "Letty Lynton" the same emotions in the same sequence with the 11d same casual relation as complainants had invented and created in their play "Dishonored Lady".

NINETEENTH: Complainants have not at any time granted to the respondents, or any of them, any right, license or privilege to produce, present or represent in a talking motion picture, or otherwise, their play "Dishonored Lady", or to make any dramatization of any character whatsoever in picture form of said play.

TWENTIETH: Upon information and belief the respondents and each of them have undertaken and are continuing to undertake to their profit and pecuniary advantage to 12d distribute, license, lease, sell, and use said talking motion picture "Letty Lynton" infringing and pirating complainants' play "Dishonored Lady" throughout the United States of America, and each and every State and dependency thereof, and in all foreign countries of the world.

TWENTY-FIRST: That "*Loew's*" has undertaken to exhibit and is continuing to undertake to exhibit in its motion picture theatres in the State of New York, including the City of New York and in divers and sundry other States of the United States of America, said talking motion picture entitled "Letty Lynton", infringing and pirating complainants' play "Dishonored Lady", and that in that behalf of "*Loew's*" is collecting large sums of money and

securing large profits from the exhibition of said infringed and pirated play. 10c

TWENTY-SECOND: That by virtue of the respondents' illegal and unlawful acts as aforesaid the value of complainants' property is being rapidly destroyed.

TWENTY-THIRD: That the acts of the respondents are wrongful and continuing, consecutive and destructive. Complainants have no adequate remedy at law. The damage to the complainants is immediate; unless the respondents are enjoined and restrained by an injunction pendente lite and permanently, the value of the complainants' property will be dissipated and destroyed and complainants irreparably and irretrievably injured. 11c

TWENTY-FOURTH; Complainants file together with this their Bill of Complaint, the manuscript copy of their play "Dishonored Lady", and demand, pursuant to the Copyright Laws, the Rules of the Supreme Court of the United States and of this Court in such cases made and provided, that the respondents file forthwith with the Clerk of this Court a manuscript or scenario and continuity of their talking motion picture entitled "Letty Lynton," and a positive copy of said talking motion picture entitled "Lefty Lynton" as the same is now being exhibited as aforesaid in order that this honorable court may take cognizance thereof and from an examination and showing of said manuscript, scenario, continuity and positive copy of the said talking motion picture be fully advised in the premises to the end that the complainants' rights in the premises may be fully protected. 12c

WHEREFORE, THE COMPLAINANTS PRAY:

(1) That a writ of subpoena issue out of this court directed to the respondents and each of them, commanding them to appear and answer this Bill of Complaint within twenty (20) days after the service of said writ.

(2) That the respondents and each of them, and all persons, firms or corporations acting under the respondents'

10f direction, control, permission and license be enjoined and restrained pendente lite and permanently and perpetually thereafter from publicly or privately producing, presenting, performing or representing, publishing or advertising, distributing, showing or exhibiting in any manner or form whatsoever at any time or place in the United States of America, or in any other country of the world, their said pirating and infringing talking motion picture at present entitled "Letty Lynton", or permitting said talking motion picture entitled "Letty Lynton" to be publicly or privately produced, presented, performed or represented, published or advertised, distributed, shown or exhibited in any manner or form whatsoever at any time or place in the United 11f States of America, or in any other country of the world.

(3) That the negative and positive prints of the said talking motion picture entitled "Letty Lynton" be impounded under the orders and directions of this honorable court to the end that complainants' rights may not be further infringed by the respondents.

(4) That the respondents and each of them be required to account for and pay over to the complainants any and all profits derived from any and all productions and presentations, showings, or exhibitions of said talking motion picture entitled "Letty Lynton" at any and all places in 12f the United States of America, or other countries of the world, whether such showings or exhibitions, presentations or representations have been public or private, and that to that end and for that purpose the respondents and each of them be required to exhibit their books, documents, papers and accounts in their possession with relation to all funds, moneys and receipts derived from the presentation, exhibition or showing of said talking motion picture entitled "Letty Lynton" and the method of their application.

(5) That the respondents and each of them be required to pay to the complainants any and all damages sustained by the complainants in the premises, and any of the penal-

10g

ties of any and every character imposed by the Copyright Laws of the United States of America.

(6) That the respondents and each of them pay the costs of this court and that a reasonable attorneys' fee be allowed to the complainants.

(7) That the complainants have such other and further relief as the equity of the case may require and conformably to the Copyright Act of the United States in such case made and provided.

O'BRIEN, MALEVINSKY & DRISCOLL,
Solicitors for Complainants,
Office & P. O. Address,
152 West 42nd Street,
Borough of Manhattan,
City of New York.

11g

(Sgd.) MOSES L. MALEVINSKY,
Solicitor for Complainants.

(Verified by Margaret Ayer Barnes, one of the complainants, on June 9, 1932.)

Answer of Defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

12g

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, by their solicitor, J. Robert Rubin, answering the bill of complaint herein:

1. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations

10h

contained in paragraphs "First", "Second", "Third", "Fourteenth" and "Fifteenth" thereof.

2. Upon information and belief, deny each and every allegation contained in paragraphs "Eighth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Sixteenth", "Sixteenth (b)", "Seventeenth", "Eighteenth", "Twentieth", "Twenty-first", "Twenty-second", "Twenty-third" and "Twenty-fourth" thereof.

3. Upon information and belief, deny each and every allegation contained in paragraph "Sixteenth (a)", except

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that the defendants admit, upon information and belief, that on April 17, 1931, a certain tentative contract had been entered into between complainants and others and the defendant Metro-Goldwyn-Mayer Corporation, whereby the said complainants and others agreed to sell to the said Metro-Goldwyn-Mayer Corporation and the said Metro-Goldwyn-Mayer Corporation agreed to purchase from the said complainants and others motion picture rights in and to the play "Dishonored Lady" for the sum of Thirty thousand dollars ($30,000.00), provided and on condition that the Motion Picture Producers & Distributors of America, Inc., would give its consent and approval to the

12h

production of the said motion picture within thirty days; that the said Motion Picture Producers & Distributors of America, Inc., found the said play, "Dishonored Lady", indecent, salacious and immoral and for that reason failed and refused to give its consent to the production of the said motion picture.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE THESE DEFENDANTS ALLEGE:

4. Upon information and belief, that the plaintiffs were not the original and first composers or authors of the dramatic composition entitled "Dishonored Lady"; that the situations, scenes, characters, developments, plot and theme

of said dramatic composition, "Dishonored Lady", had for many years prior to 1927 been in the public domain and particularly in the record and in the various accounts of the trial of one Madeleine Smith, who was tried for murder in Glasgow, Scotland, in or about the year 1857; that the theme, plot, scenes, sequences, characters, situations and developments of the dramatic composition "Dishonored Lady" were not new or original with the plaintiffs. They had all been used many years prior thereto by other dramatists and writers and comprised stock material which had been in frequent use by playwriters, authors and writers for many years prior to the alleged creation of said dramatic composition, "Dishonored Lady"; that by reason of the premises plaintiffs procured no copyright protection in said dramatic composition, "Dishonored Lady", and complainants have no valid copyright therein.

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint, and that the defendants and each of them be awarded a reasonable counsel fee.

J. ROBERT RUBIN,
Solicitor for Defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation,
Office and P. O. Address,
1540 Broadway,
Borough of Manhattan,
City of New York.

(Verified by Edward Bowes, vice-president of Metro-Goldwyn Pictures Corporation, on July 25, 1932.)

Answer of Defendants Loew's Inc. and Culver Export Corporation.

10j UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK.

[SAME TITLE.]

The defendants Loew's Inc. and Culver Export Corporation, by their solicitor, Nathan Burkan, answering the bill of complaint herein;

1. Deny that they have any knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs "First", "Second", "Third", "Fourteenth" and "Fifteenth" thereof;

11j 2. Upon information and belief, deny each and every allegation contained in paragraphs "Eighth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Sixteenth", "Sixteenth (b)", "Seventeenth", "Eighteenth", "Twentieth", "Twenty-first", "Twenty-second", "Twenty-third" and "Twenty-fourth" thereof.

3. Upon information and belief, deny each and every allegation contained in paragraph "Sixteenth (a)", except that the defendants admit, upon information and belief, that on April 17, 1931, a certain tentative contract had been entered into between complainants and others and the defendant Metro-Goldwyn-Mayer Corporation, whereby the
12j said complainants and others agreed to sell to the said Metro-Goldwyn-Mayer Corporation and the said Metro-Goldwyn-Mayer Corporation agreed to purchase from the said complainants and others, motion picture rights in and to the play "Dishonored Lady" for the sum of Thirty thousand dollars ($30,000.00), provided and on condition that the Motion Picture Producers & Distributors of America, Inc., would give its consent and approval to the production of the said motion picture within thirty days; that the said Motion Picture Producers & Distributors of America, Inc., found the said play "Dishonored Lady" indecent, salacious and immoral and for that reason failed and refused to give its consent to the production of the said motion picture.

Answer of Defendants Loew's Inc. and Culver Export Corporation.

FOR A FIRST, SEPARATE AND DISTINCT DEFENSE THESE DEFENDANTS ALLEGE:

10k

4. Upon information and belief, that the plaintiffs were not the original and first composers or authors of the dramatic composition entitled "Dishonored Lady"; that the situations, scenes, characters, developments, plot and theme of said dramatic composition, "Dishonored Lady", had for many years prior to 1927 been in the public domain and particularly in the record and in the various accounts of the trial of one Madeleine Smith, who was tried for murder in Glasgow, Scotland, in or about the year, 1857; that the theme, plot, scenes, sequences, characters, situations and development of the dramatic composition "Dishonored Lady" were not new or original with the plaintiffs. They had all been used many years prior thereto by other 11k
dramatists and writers and comprised stock material which had been in frequent use by playwriters, authors and writers for many years prior to the alleged creation of said dramatic composition, "Dishonored Lady"; that by reason of the premises plaintiffs procured no copyright protection in said dramatic composition, "Dishonored Lady", and complainants have no valid copyright therein.

WHEREFORE, defendants demand judgment dismissing plaintiffs' complaint, and that the defendants and each of them be awarded a reasonable counsel fee.

NATHAN BURKAN,
Solicitor for Defendant Loew's 12k
Inc. and Culver Export Corporation,

Office & P. O. Address,
1450 Broadway,
Borough of Manhattan,
City of New York.

(Verified by Leopold Friedman, secretary of Loew's Inc., and by Lillian Reiss, assistant secretary of Culver Export Corporation, on July 25, 1932.)

[Certified by the Clerk of the United States Circuit Court of Appeals for the Second Circuit, on October 17th, 1939. Original Certification is included in original certified copy of record filed with Clerk of United States Supreme Court.]

Interlocutory Decree.

At a Stated Term of the District Court of the United States for the Southern District of New York, held in the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 29th day of July, 1936.

Present—Hon. John C. Knox, *District Judge.*

In Equity—No. E-69-218.

Edward Sheldon and Margaret Ayer Barnes,

Complainants,

—against—

Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Loew's, Inc. and Culver Export Corporation,

Defendants.

The above-named complainants having appealed to the United States Circuit Court of Appeals for the Second Circuit from the decree made and entered herein on the 8th day of August, 1934, by Hon. John M. Woolsey, District Judge, and the said United States Circuit Court of Appeals for the Second Circuit after hearing said appeal having made its mandate directing this Court to reverse the aforesaid decree dated August 8, 1934, and to grant to the complainants an injunction as prayed for in the bill of complaint, together with a decree for damages and an accounting and to award the complainants an attorney's fee in the United States Circuit Court of Appeals for the Second

Circuit and in this Court, both of said attorneys' fees to be fixed by this Court upon the final decree, and thereafter defendants having petitioned said Circuit Court for a rehearing, which petition was denied, and thereafter having petitioned the Supreme Court of the United States for a writ of certiorari, which petition was denied, and complainants having previously noticed a decree for settlement before Hon. John M. Woolsey, and the defendants having thereupon raised certain questions respecting the jurisdiction of this Court and the scope of the decree to be entered, and the said Hon. John M. Woolsey having overruled the said contentions, and the defendants having thereupon petitioned the Circuit Court of Appeals with respect thereto, which petition was denied, NOW THEREFORE, this Court, in pursuance of said mandate, and after due proceedings had, it is, upon consideration,

ORDERED, ADJUDGED AND DECREED, as follows:

1. That the above-named Edward Sheldon and Margaret Ayer Barnes are the authors of the dramatic composition mentioned in the complainants' bill and entitled "Dishonored Lady".

2. That on January 18, 1930, the complainants duly filed, deposited and registered said play with Register of Copyrights in the Copyright Office of the Library of Congress, of the United States of America, as in such cases by law made and provided, paying the legal fees provided by the law, and that on said 18th day of January, 1930, the said complainants duly obtained copyright as an unpublished work for said dramatic composition known as "Dishonored Lady", as more fully appears by the certificate of Thorvald Solberg, Register of Copyrights, dated January 18, 1930, and registered under Entry Class D No. 3924 in the Copyright Office of the United States of America.

16 3. That the above defendants and each of them have infringed and violated the said copyright and the exclusive rights of said complainants vested in them under the aforesaid copyright by copying the complainants' aforesaid dramatic composition; by manufacturing therefrom a certain talking motion picture entitled "Letty Lynton" and by distributing or selling to third parties licenses to exhibit said talking motion picture "Letty Lynton" throughout the United States and its possessions and elsewhere; by giving and causing to be given or aiding and abetting in the giving of public performances and representations for profit of complainants' dramatic composition "Dishonored Lady" by
17 means of giving and causing to be given or aiding and abetting in the giving of public performances and representations of the aforesaid talking motion picture "Letty Lynton", and by otherwise trafficking in and aling with complainants' dramatic composition for profit throughout the United States of America and other portions of the entire world, all of which has been done without warrant of law and in violation of the complainants' rights in the aforesaid copyright and without permission or license from the complainants.

4. That the complainants recover of the defendants and each of them all damages sustained by them and that the
18 complainants recover of the defendants and each of them all gains and profits made by the defendants and each of them because of the said infringement upon complainants' copyright by copying said dramatic composition or by making the said motion picture "Letty Lynton" and by their use and trafficking in, or in any manner dealing with the said motion picture "Letty Lynton", or in any rights thereto or by giving public performances thereof, or causing, licensing, aiding and abetting or in any other manner assisting in the giving of public performances thereof, or in any other way, form or manner whatsoever.

5. It is hereby referred to Gordon Auchincloss, Esq., counsellor-at-law of 50 Broadway, in the Borough of Manhattan, City of New York, as Special Master, to ascertain and report the amount of complainants' damages herein and the amount of such gains and profits of the defendants and each of them, and in addition, the said Special Master shall report separately the amount of such gains and profits of the defendants, obtained from all sources outside of the United States, and that the complainants, on such accounting, have the right to cause an examination of the defendants and their officers, servants, agents and employees and each of them, and any and all other parties or witnesses who may have any knowledge or information in regard to the subject matter, ore tenus or otherwise, and a right to the production of all the books, vouchers, contracts, documents and records of the defendants and each of them, and the examination of such other witnesses, whose testimony may be material to the issues and to production of their books and records, and that said defendants and other witnesses and each of them attend for such purposes before said Special Master from time to time as said Special Master shall direct.

6. That a writ of injunction issue out of and under the seal of this Court, perpetually restraining and enjoining said defendants and each of them, their agents, employees, servants, workmen and others from publicly performing, presenting, causing, licensing, aiding and abetting to be publicly performed or presented said motion picture entitled "Letty Lynton".

7. That the complainants recover of the defendants and each of them their costs and disbursements in this suit, to be taxed by the Clerk of this Court.

8. Jurisdiction of this suit is retained for the purpose of fixing and awarding to the complainants a reasonable

attorneys' fee both in the United States Circuit Court of Appeals for the Second Circuit and in this Court as part of the costs, and for the purpose of making any further orders necessary to carry into effect this decree and to determine the amount to be awarded the complainants, and any further order necessary or proper to be made to effect a final adjustment and settlement of this controversy between the complainants and the defendants.

JNO. C. KNOX,
U. S. D. J.

Testimony Before Special Master.

New York Hearings.

[SAME TITLE.]

At the offices of the Referee,
No. 50 Broadway,
New York, N. Y.,
September 9, 1936, 10:30 A. M.

Stenographer's Minutes of Proceedings before GORDON AUCHINCLOSS, Esq., Special Master, pursuant to order of Hon. John C. Knox, *District Judge*, made and entered herein on July 29, 1936.

Present—THE SPECIAL MASTER.

APPEARANCES:

For Complainants: O'BRIEN, DRISCOLL & RAFTERY, by Arthur F. Driscoll, Esq., Edward C. Raftery and Edward J. Clarke, Esq.

For Defendants, Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation: J. ROBERT RUBIN, Esq., by Samuel D. Cohen, Esq., Walter H. Pollak, Esq. and Earle L. Beatty, Esq., of Counsel.

And at hearings in California: LOEB, WALKER & LOEB, Esqs., by Milton H. Schwartz, Esq., and Walter S. Hilborn, Esq.

For Defendant, Culver Export Corporation: SAMUEL D. COHEN, Esq.

For Defendant, Loew's Incorporated: LEOPOLD FRIEDMAN, Esq.

28 The Special Master states that he has taken his oath as required by statute.

It is stipulated by and between counsel for the respective parties that the fees of the Special Master shall be in an amount to be fixed by the Court.

HEARING OF DECEMBER 2, 1936.

GEORGE E. BERRY, of 1540 Broadway, New York, N. Y., having been first duly sworn by the Special Commissioner, testified as follows:

29

Direct examination by Mr. Cohen:

Q. Mr. Berry, what is your occupation? A. Accountant.

Q. You are employed by whom? A. At the present time, you mean?

Q. Yes. A. Lo[illegible] Incorporated.

Q. How long have you been so employed? A. For seventeen years.

Q. Are you acquainted with the accounts of Culver Export Corporation? A. I am.

Q. Please state in a general way how the accounts of Culver Export Corporation are kept and the routine in

30 the office. A. When we receive statements from a foreign corporation, we take these statements and have them gone over and then taken to what we call the powers department, which is the department which punches up the income and the expenses and list it according to pictures from the various countries. This in turn is turned over to me and the credit is put through for the various pictures, cost and the income received of the various pictures.

Q. Culver Export Corporation is engaged, of course, in the business of exporting motion pictures? A. That is right.

Q. It has contracts with various corporations? A. That 31
is right.

Q. Approximately how many? A. I should say about forty.

Q. And these corporations distribute the motion pictures in countries other than the United States? A. That is right.

Q. Are there at the present time existing contracts between Culver and these various corporations? A. Yes.

Q. How many versions of the picture were made for exhibition in various countries? A. The versions were four; five including the English version; four versions with foreign languages.

Q. In approximately how many foreign countries was 32
the motion picture "Letty Lynton" exhibited? A. Approximately forty.

Cross examination by Mr. Raftery:

Q. Mr. Berry, these foreign versions, for example we will take the German version first, where was that made? A. The German version was made at the Culver City studio.

Q. It was made at or about the same time the picture was produced in California? A. Not necessarily.

Q. After the picture was produced? A. Yes.

Q. It was made in the Metro Studio in Culver City? A. 33
Yes.

Q. Now, regarding the print cost, where are the French prints made? A. The French prints are made in France. They are made over there.

Q. The French negative is shipped from here to France? A. Yes.

Q. Did you usually ship just the negative, or the negative and one print? A. That I can't tell you. I think they shipped a dupe negative.

Q. That dupe negative is shipped to Paris? A. Yes.

34 Q. And any prints that are made for France or the French version are made in Paris? A. That is right.

Q. The only knowledge that you have regarding the moneys expended for prints are the statements that come over from the other side? A. That is right.

Q. About the German? A. The same way.

Q. The same thing? Those prints are made in Berlin? A. That is right.

Q. The Italian version? A. And the Italian, the same way.

Q. The English print cost that is listed here, of $24,311.90, you shipped a negative to England? A. Yes.

35 Q. And your prints are made in England? A. That is right.

Q. So that this item of $24,000, was that all incurred in England? A. None of it was in England.

Q. Where was that incurred? A. In various other countries where we shipped the prints directly to the other countries. We shipped most of our prints here for the other territory, but the prints for England are not included in that cost.

Q. Do you recall how many prints are included in that $24,000 item? A. No, I couldn't tell you.

Q. Have you a record of it somewhere? A. We may have, how many prints we shipped to different territory.

36 Q. Will you look at your records in your office and give me the number of prints and the territory to which each of the prints were shipped? A. All right.

HEARING OF DECEMBER 11, 1936.

37

WILLIAM L. ENGELHARDT, of Rockville Center, Long Island, N. Y., called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. What is your occupation, Mr. Engelhardt? A. Accountant.

Q. Employed by whom? A. Loew's Inc.

Q. How long have you been so employed? A. Fifteen years.

Q. In your capacity as accountant for Loew's Inc. is it part of your duties to take care of the preparation 38
of income tax returns for the Federal government? A. I assist in the preparation of income tax returns.

Q. Federal income tax returns? A. Federal income tax returns. I handle the State tax myself, not the Federal income tax returns.

Q. The State tax you handle exclusively? A. Yes.

Q. And the Federal income tax you assist with? A. That is right.

Q. In your capacity of accountant for Loew's Inc. did you assist in preparing income tax statements for Culver Export Corporation? A. I did.

39

Mr. Raftery: To save time, if you are seeking to prove that this man prepared tax returns and the proportionate part of the tax that he has allocated to the "Letty Lynton" receipts from the foreign field are the amounts set forth in the accounting, we will accept the figure but we object to its propriety in this accounting. It has no place in it.

Mr. Cohen: In other words, you object merely—

Mr. Raftery: To the deduction.

40 Mr. Cohen: On the ground that it is not a proper deduction?

Mr. Raftery: On the ground that it is not a proper deduction.

Mr. Cohen: But you accept the figure as correct?

Mr. Raftery: Yes.

Mr. Cohen: That is all I wanted to prove by this witness.

ALFRED DE ORO, JR., of 600 West 157th Street, New York, N. Y., called as a witness on behalf of the de-
41 fendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. Mr. De Oro, are you employed by Culver Export Corporation? A. Yes, sir.

Q. In what capacity? A. Bookkeeper.

Q. Are you acquainted with the contracts which Culver Export Corporation has with foreign corporations for the distribution of its motion pictures abroad? A. I am.

Q. Have you made extracts of these contracts? A. That is what I work on, examination and synopsis of the actual contracts.

42 Q. As part of your work have you the various percentages which these foreign contracts call for in payment to the distributors abroad? A. Yes.

Q. Have you a list of these percentages here? A. No, I believe you have them in your papers.

Q. I mean the original list. A. I drew the list up myself.

Q. Have you got a copy of the list which you made up, showing the percentages paid the foreign corporations? A. That is the typewritten list that I believe you have in your hands now.

Q. Have you got a copy of it? A. No, I have not. If 43
you will show it to me I will verify it.

Q. Is that a copy of the list which you made up (handing paper to the witness)? A. Yes, that is right.

Q. Can you tell us, please, the percentage of gross receipts which was paid the foreign corporation for distribution in Argentina?

The Witness: The contracts are right here.

Mr. Cohen: Here they are, your Honor, hundreds of them. (Bundle produced.) Does your Honor want us to introduce them in evidence? We will if you want them. May I say this, your Honor? 44
We will give the other side an opportunity to check the rates and if they find any error in the rates given by Mr. De Oro in his testimony——

Mr. Raftery: We want to check the contract, and not the rate. We want to know the company and the terms.

The Special Master: I think he is entitled to do that.

Mr. Raftery: Do you want to offer them as one exhibit or mark them for identification?

The Special Master: I don't want to burden the record. I think you should mark them for identification. He has the right to look at the contracts. 45
I don't want to clutter up the record and I don't think he does; but he wants them available.

Mr. Cohen: Mr. Raftery, I will let you mark them any way you want, whether as an exhibit or for identification.

The Special Master: Mark them for identification.

(The contracts just referred to were deemed marked Defendants' Exhibit No. 1 for Identification, of this date.)

46 Q. How many contracts would you say there were in here, Mr. De Oro? A. I should say roughly 200. I took every original contract and put it in that bundle there.

Q. Mr. De Oro, I show you this package and ask you what this package contains (package exhibited to the witness). A. 200 original contracts.

Q. Contracts by whom and with whom? A. By Culver Export Corporation with the several branches in Europe, or rather in the foreign field. (Package opened by the witness.) These are the original contracts.

The Special Master: You have not got a list of the contracts, have you?

47 Mr. Cohen: No.

The Special Master: You are producing for purposes of identification the contracts with foreign distributors, and you will produce a list and let the list be marked for identification, with the assurance that you will produce any of the contracts for further examination.

Mr. Cohen: Certainly.

Mr. Raftery: Correct.

The Special Master: You want to have this witness testify that these are the percentages provided for by these contracts?

48 Mr. Cohen: That is right.

Mr. Raftery: I will stipulate that the witness will testify that he has examined these contracts and has copied these percentages from the contracts and that these are the percentages named in the contracts.

The Special Master: Introduce this as a compilation.

Mr. Cohen: I introduce in evidence a compilation made by Mr. De Oro of the various contracts between Culver Export Corporation and its foreign

distributors for distribution of the picture "Letty Lynton" and others, for the years 1932-1933, 1933-1934, 1934-1935 and 1935-1936. The figure which has after it the asterisk is the figure which represents the percentage paid the foreign distributor, or the percentage retained by the foreign distributor abroad from gross receipts.

Mr. Raftery: What is the figure without an asterisk?

Mr. Cohen: The figure without an asterisk has no relation to the picture "Letty Lynton". It is the rate which was paid in the—take the first country, Argentina; you will see the figure 25 Foreign Version. The foreign version of "Letty Lynton" was not released in Argentina; the regular version was released; therefore, the figure 25 under the regular version has the asterisk.

Q. Am I right, Mr. De Oro? A. Right.

By Mr. Raftery:

Q. In other words, in Belgium it was the foreign version and not the regular version? A. Yes, until 1935-1936.

(The compilation headed "Letty Lynton"—"Percentage Retained By Foreign Distributors", was marked Defendants' Exhibit No. 6, of this date.)

By Mr. Cohen:

Q. Mr. De Oro, I notice in the list you got up, Defendants' Exhibit 6, that 35 per cent. was retained by the British company for distribution of the picture "Letty Lynton" in Great Britain. Is that right? A. Yes, sir.

Q. Can you tell me, please, whether you know if the 35 per cent. retained by the British company required

52 the British company to pay for motion picture prints, duties, forwarding charges and expenses of the British office, loss on quota pictures and other such items?

Mr. Raftery: Now, Mr. Cohen, the contract speaks for itself.

Mr. Cohen: This is the only case.

Mr. Raftery: If you want to make a statement in the record that the contract with the British company provides for such and such, please do so.

Mr. Cohen: For the purpose of the record, these percentages which are set forth in the statement, in so far as they pertain to Great Britain, require
53 the British company, out of its percentage, to pay for motion picture prints, that is, positive prints, duties, and forwarding charges, administration expenses, the British company expenses, and loss on quota pictures. Do you want testimony as to the loss on quota pictures?

Mr. Raftery: We will both agree that you have a quota loss. The law provides that for every American picture distributed in Great Britain you have to have a certain amount of British footage. Some distribute a quantity of quality British footage and, therefore, have no loss. Some companies
54 buy cheap British footage and have a loss because they can't get any revenue for it, but buy it to comply with the law. That is the principle.

Mr. Cohen: Except that I don't know any British pictures on which any of them make any money.

Mr. Raftery: You are not familiar with the United Artists pictures.

Mr. Cohen: They are an exception. I also want a stipulation on the record, Mr. Raftery, that the British quota requires that one, I think, out of every five motion pictures distributed should be a British picture.

Mr. Raftery: Whatever the law is I will stipu- 55
late it. We will furnish Mr. Auchincloss with an extract of the law.

Mr. Cohen: All right. That is all for this witness at this time.

MAURICE BRUNET, of 892 Elm Avenue, Ridgefield, New Jersey, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

56

Q. Mr. Brunet, what is your occupation, please? A. I am in charge of the tax accounts of Columbia Pictures Corporation.

Q. Of Columbia Pictures Corporation? A. Yes.

Q. That is a company engaged in producing motion pictures? A. That is a company engaged in producing motion pictures.

Q. Does Columbia Pictures Corporation distribute in foreign territory? A. They do.

Q. How long have you been connected with Columbia Pictures Corporation? A. Four years.

Q. And prior to that what was your occupation? A. 57
I was connected with three other motion picture companies for a period of over sixteen years.

Q. What were those companies? A. Pathe Exchange, R-K-O and Educational Pictures.

Q. How long were you with Pathe, and the period? A. I was with Pathe over fifteen years, being back from 1917 to about the beginning of 1931—it was——

Mr. Raftery: We concede that the witness has been in the motion picture business for a great many years.

58 Q. After Pathe with what company were you connected? A. R-K-O.

Q. That is Radio-Keith-Orpheum? A. Yes.

Q. In what capacity? A. In the capacity of tax man.

Q. For how long a period? A. For a period about a year and a half, or rather, a year, I should say.

Q. Then with what company were you? A. Educational Pictures Corporation.

Q. In what capacity? A. In the capacity of general auditor.

Q. For how long a period? A. For about fourteen months.

59 Q. In these various capacities have you acquired knowledge of the percentages paid for foreign distribution of motion pictures? A. I have.

Q. For each of these companies you mentioned? A. For the three companies I mentioned; four companies, I should say.

Q. Have you had before you Defendants' Exhibit 6? A. I had a copy of it.

Q. I ask you to look at these percentages and tell us whether or not each of the percentages paid was reasonable and fair?

60 Mr. Cohen: If your Honor will recall, at the last session you wanted some testimony as to the reasonableness of the charges and the fairness of the set-up, and your Honor made the statement that your Honor thought that since the complainants are seeking to recover profits they will have to stand the expense which was incurred in producing these profits.

The Special Master: I don't think the testimony is very helpful. You said you have made these payments. How can this witness testify that those are reasonable payments, without discussing the situation in each of those countries?

Mr. Cohen: We shall have it discussed. 61

The Special Master: I am inclined to let any testimony in that you want to put in until I find out more about what the case is about. But take Chile; what did you give them? 30 per cent.; you actually paid them 30 per cent., you say. Can he testify whether under the circumstances existing in Chile that was a fair cost or not?

Mr. Cohen: From the experience of his own companies.

The Special Master: You go ahead and prove it the way you want, and we will see how relative it is.

Mr. Raftery: Then I reserve my right to strike out. 62

Q. Let us start with the first country on the list, Argentina. For the season 1932-1933 you will notice that the Argentina corporation retained 25 per cent. of the gross receipts. For the year 1933-1934 it retained 30 per cent., and then each of the subsequent years it retained 30 per cent. Can you tell us whether that was a fair and reasonable percentage which the Argentina corporation retained from the gross receipts for the distribution of the picture in Argentina? A. From my past experience with motion pictures, there were some of them dealing in the territory on an out and out sales basis or on a percentage agreement basis. This percentage is below the amount that those companies had to concede to franchise holders in that territory. One company that I have been connected with has opened exchanges out there since 1932. In that territory I can safely say that the percentage allowed to that company for operation has been in excess of the figures which was taken here. As a matter of record I will say 40 per cent. 63

Q. Let us take the next country. Take Australia. There

64 was a uniform percentage allowed the Australian company of 40 per cent. for each of the years that the picture "Letty Lynton" was distributed in Australia. Is that a fair and reasonable percentage? A. In Australia the percentage seemed to be equal to the contract we have been having in the past with companies or franchise holders that were in business in those days and no more in business, and some of them that were in business have been taken over by one of the companies I have been working for. It was the same percentage. There wasn't any difference whatsoever in that territory.

Q. Austria, we seem to have paid 40 per cent. of the
65 gross receipts to the foreign corporation. What would you say as to that figure? A. Let me make a statement about Austria. My experience in that territory is not of the same nature as yours. You seem to have dealt with people or companies that retained 40 per cent. as cost of operation. I have not been so fortunate because I had no direct contact with that territory; we had to sell outright to franchise holders. Now, I don't have to tell these gentlemen here that outright sales in foreign territories are at a minimum return you could expect from the exploitation of a picture. When you have to deal on an outright sales basis you are not getting a fair deal. You take that because you would rather take that than take nothing.
66 When you are dealing with a corporation of your own or with someone who gives you a percentage agreement, then I suppose 40 per cent. retained by that distributor would give you a better break than the results you get from outright sales. I am sure you will agree with me on that.

Mr. Raftery: I think so.

Mr. Cohen: Do you agree, Mr. Raftery?

Mr. Raftery: I agree that if you sell a picture outright in a territory you get a flat fee for it.

Mr. Cohen: It is not as good——

Mr. Raftery: It is not as good as if you operate your own exchanges. I agree with that in principle. 67

Q. The next country is Belgium. There we seem to have distributed the foreign version of "Letty Lynton" and in 1932-1933 the Belgium company retained 15 per cent., likewise 15 per cent. in 1933-1934, and 25 per cent. in each of the years 1934-1935 and 1935-1936. What would you say as to the percentages just mentioned, as to their reasonableness? A. The best break that I remember in that territory has been some higher, when we received 65 per cent. of the gross and 35 per cent. was retained by the franchise holder in Belgium. I may state that maybe that the 25 per cent. that your company has retained out there is a fair figure compared with the 35 per cent. that we had to stand as the cost of distribution, because in that territory—— 68

By Mr. Raftery:

Q. In other words, your company had to pay 35 per cent.? A. Yes, we had to deal—we were not getting 35 per cent., but the best we got was 35 per cent.

By Mr. Cohen: 69

Q. There were cases where you did not get 35 per cent.? A. 50-50; that is way back in 1932 and 1933. It is not existing since that time. Since that time that has been reduced to 35.

Q. Take the next, the British West Indies. We seem to have allowed 25 per cent. in 1933-1934, 45 per cent. in 1934-1935 and a percentage of 40 in 1935-1936. A. In that territory I will have to make the same statement that I made in connection with Austria. We have dealt on an outright sales basis in that territory.

70 Q. What was your return on this outright sales basis? A. We have not received the break you would receive for a percentage distribution.

Q. So that you say that the percentages paid for British West Indies distribution are fair and reasonable? A. It was fair and reasonable and better than an outright deal in that territory.

Q. In Brazil there seems to be a percentage of 30 for each of the years in which "Letty Lynton" was distributed in that country. Would you consider that fair and reasonable?

71 Mr. Raftery: Mr. Cohen, we feel that we can save time. Without admitting the competency or relevancy of his testimony or the materiality of it, we will concede that this witness will testify substantially the same to all of the territories mentioned on here as he has testified to the territories above.

The Special Master: If he does, it would justify a finding that the charges were entirely reasonable.

Mr. Raftery: I will cross examine him after making the concession.

The Special Master: You may go ahead and cross examine, and if Mr. Cohen is not satisfied he may continue his direct examination.

72 Mr. Raftery: So that you do not misunderstand my concession, I am merely conceding that the witness will testify substantially similar to the balance of the countries as he has testified to the countries above.

Mr. Cohen: I can't find any fault with you for that.

The Special Master: Unless he is shaken by your cross examination, that would justify a finding, provided the finding is material, that the charges here were entirely reasonable. Isn't that so?

Mr. Raftery: No. I am merely saying that he will so testify. 73

The Special Master: I understand that.

Mr. Raftery: Then we still could offer evidence, if we wanted to, that the charges were unreasonable.

The Special Master: Oh, certainly; but in the absence of any attack, that would justify the finding I describe.

Mr. Raftery: Oh, yes.

The Special Master: Do you want to cross-examine him?

Mr. Raftery: Unless the witness wants to make some statement that there is some country here that he does not know about. 74

The Witness: There are some them that I have no record of because I did not deal in those territories but they are minor territories, I should say. When it comes to Germany, right now the information that I could give you would be more or less from my memory, because we are not dealing in Germany. Most companies have pulled out of Germany. But you have other cases, like in Greece, for instance, where your dealings are limited that whatever I would say, even if it was a percentage similar to yours or smaller, has really not much value on the whole thing because it receives such a small proportion of the total business done. 75

Q. Greece is a 30 per cent. country; but you have no knowledge as to the conditions in Greece? A. No, I would not want to make a statement that I would have answered as to all the countries.

Q. Mr. Brunet, I wonder if you could let us have the benefit of your experience in the motion picture business and describe to us the conditions which prevailed in the motion picture industry in so far as they related to the

76 foreign field prior to the organization of the foreign distributing companies by the various motion picture companies. A. I would be glad to do so. Way back to the war days——

Q. Which war? A. I would say the Great War—the distribution of pictures in foreign territory was more or less limited. There were very few companies that were doing great business in foreign fields. One of the biggest chain of distributors in foreign fields was run by a French company by the name of Pathe Cinema and they had their offices practically all over the world, or they were all scattered. There were about ten offices, and when you
77 wanted to make a deal in the South American field you had to deal with two or three franchise holders, one in Brazil and one in Argentina and Chile. Now, the distribution was of course very small and brought poor return to the originating companies because of the fact that you had to deal through so very few in order to get your contract. I remember the days when we were selling our rights for the entire world for a flat amount.

Q. Approximately what was that amount? A. The average amount of the foreign business never exceeded 15 per cent. of your total gross, the world gross. In other words, in the foreign field you were getting about 15 per cent. of your total world business.

78 The situation lasted for several years, when the American companies found out they were not getting a fair return, and engineered some new deals. Some of the deals were made and were based on the percentage of the total cost of the negative, applied to a certain territory. In other words, if a picture cost the American company $100,000, they would, for instance, allocate ten per cent. to the British territory and would make a deal with the franchise holder to pay ten per cent. of any picture they would make during the year, and whatever the cost was, if it was $100,000 it was $10,000; if it was $200,000 it was $20,000.

Q. In other words, the British franchise holder would obligate himself to pay you $10,000, being ten per cent. of the cost of making the picture? A. That is right. 79

Q. Continue, Mr. Brunet. A. The next step of the motion picture company was to try to get a fair deal with the franchise holders and to sell them the products on a percentage basis, the franchise holder to retain a portion of the gross, and from your share they would retain whatever expense they had to sustain for the making of positive prints, the expenses of duties, et cetera, and then, considering the transaction has resulted in a profit and will give you a further split, would split 50-50 with the American companies.

That method also left more net income to the American companies, but really did not give them yet a fair return. It was as the result of all those contracts which were unsatisfactory to the American companies that the American companies decided that rather than have their business run for them at a distance of three or four thousand miles from the home office, to take care of the distribution of their products out there in the foreign territory. They found it more beneficial, for two reasons; first, that they were attending to selling their own products, and secondly, they could operate more efficiently than the franchise holders were doing because the franchise holders more or less were working for a commission while the American companies were working for a commission but also to try to come back to the American company with a fair and reasonable return on their initial investment. 80 81

That is the situation now. Many American companies have installed their offices; and if I may refer back to the percentage sheet showing the percentages allowed to those various foreign corporations, to my estimation they are fair and reasonable, and I would even say this in proof of it, that by looking over some figures of the company——

Q. What company? A. I don't know if I should men-

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82 tion any company here, because I think it is not a party here. In looking over the company I am presently employed by I would say that their average distribution cost in foreign territories, on the foreign gross income of over $6,891,000, was $2,359,000, which would seem to indicate that the cost of foreign operation was silghtly under 34 per cent. All the charges are absorbed by the American Company; none of those charges are absorbed by the foreign corporations. So it means that the 34 per cent. really represents an average cost to the American companies for the distribution of its product abroad.

That 34 per cent. covers every kind of contract that we
83 have made. As a matter of fact, as I said before, it represents an average sum of money retained from the gross to operate in foreign territory.

Q. Now, Mr. Brunet, what would you say of a gross income in the foreign territory of $435,266.64 and a retention out of that sum of $150,894.42 by the foreign corporations, taking into consideration also the fact that in the case of England the English company paid out of its retention the cost of prints, duties, censorship, administration expenses, loss on quota pictures, forwarding charges, et cetera? A. In order to make a right comparison between your statement and the statement I made before, I would have to put our figures on the same basis as the basis you
84 mentioned to me. In other words, we would have to add to our distribution cost the cost of positive prints, duties, forwarding charges, and so forth, that our company in England does not sustain now but that your company in England sustains.

I worked up some figures here and I found out that the British print cost would increase the distribution cost of our product in Great Britain by ten per cent. In other words, that our figures, stated as being 34 and a fraction per cent., would be raised by a considerable figure which may reach as an average basis 38 or 39 or 40 per cent.

That would place the figures on the same basis as your own. 85

If I can visualize your figures as you state them right now, it would seem to me that your percentage of distribution down there is below 35 per cent., isn't it?

Q. Considerably. (Paper handed to the witness.) A. So for the purpose of comparison it would make it less than 35 per cent.; 34 and a fraction.

Q. Out of which the British company, of course, pays its own print cost and so forth? A. So if we use the same method and add the cost of prints of the British company to the cost of its operation, which are now exclusive of the cost of prints, I would say as a matter of comparison 86 our company would operate in the foreign field on a basis of 48 or 49 per cent. against your 34 and a fraction per cent.

Q. In Great Britain isn't our percentage considerably less than 34 per cent.?

Mr. Raftery: Now we are arguing. The figures speak for themselves.

The Special Master: You have made your point.

Mr. Cohen: Are there any questions that your Honor would like to ask Mr. Brunet, covering his past experiences?

The Special Master: Not now. 87

Cross examination by Mr. Raftery:

Q. Mr. Brunet, so as to clear up a part of your explanation of the evolution of the business, what I understand is that the American companies or companies that you were associated with, first made outright sales in territories other than the United States; is that right? A. That is right.

Q. Those outright sales were generally made for a cash

88 consideration to third persons who had no association with your company, as a general rule? A. Not all the time.

Q. As a general rule? A. As a general rule.

Q. In the early days? A. In the early days.

Q. Then at a later date, instead of making an outright sale it made an arrangement with the franchise holder, as you call them, who acted as a distributing agent in the foreign territory; is that right? A. That is right.

Q. And this franchise holder, as a rule, was some third person, firm or corporation that was in association other than by contract with your American company? A. In some cases that is right.

89 Q. And a later date these companies decided to open their own branches in these foreign territories, through subsidiary corporations? A. They did, yes, in certain particulars.

Q. Let us take Columbia; that is your present affiliation, is it not? A. Yes.

Q. Columbia formerly distributed in England through the United Artists? A. That is right.

Q. The United Artists Corporation, Limited, I think the name is? A. Yes.

Q. It distributed Columbia Pictures Corporation products in the territory for several years, for a percentage of the gross receipts? A. Yes.

90 Q. Do you remember the percentage? A. Yes.

Q. What was it? A. Twenty-five.

Q. Twenty-five per cent.? A. Yes.

Q. That was for the British Isles and the islands adjacent thereto? A. Yes.

Q. Now, at some date in 1934 or 1933 Columbia decided to open its own branch in London? A. Yes.

Q. Now, in setting up your figures on distribution through these foreign subsidiaries you kept a record of the actual cost of distribution in each foreign territory, did you not? A. I did.

Q. In other words, even though its contract with the subsidiary says 35 per cent. to the subsidiary, you know exactly what it costs that subsidiary to distribute over any given year? A. Yes, I do. 91

Q. And the difference between what that subsidiary charges and what the actual cost is is the profit of that subsidiary? A. Correct.

Q. That subsidiary in turn transmits that profit to your home office? A. Eventually.

Q. So that we have two figures of distribution now in each foreign territory, first, the figure charged by the subsidiary; is that right? A. Yes.

Q. And then the actual cost of distribution in the territory? A. That is a matter of argument. 92

Q. It is a fact. So that when you have been talking about franchise holders in these territories at the present time as a general rule you are talking about subsidiaries of your Columbia company? A. In certain places. You know we do not cover all the territory.

Q. You don't distribute yourself in Canada, do you? A. No, we do not, or in South Africa where there is a great deal of business coming from.

Q. When you gave your testimony as to the reasonableness of your charges you did not want the Special Master to think that it actually cost that amount of money to distribute this particular picture in any of these particular territories? A. No, because I was just answering the questions which appeared on the top of these statements, which says "Percentage retained by foreign distributors". Mr. Raftery, maybe I could make a little statement in regard to a remark you passed about the old contracts that we had with United Artists in England, where you mentioned the percentages were 25. May I say, as you well know, that the 25 per cent. the United Artists received in England was only part of their profit from the exploitation of the Columbia pictures in England. 93

Mr. Raftery: That is right. That is all.

94 Re-direct examination by Mr. Cohen:

Q. Do I understand that in addition to the 25 per cent. that a further charge was made? A. There were indirect profits realized by United Artists, which I do not think it is worth while discussing just now, because Mr. Raftery knows very well what they are.

Mr. Raftery: That is all.

Mr. Cohen: That is all for this witness.

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95 JACQUES VAN STRATEN, of 284 Eastern Parkway, Brooklyn, New York, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. What is your occupation? A. Accountant and auditor.

Q. For whom? A. Loew's Inc.

Q. How long have you been so employed? A. Ten years about, maybe a little more.

Q. Do you know how many foreign versions were made of the motion picture "Letty Lynton"? A. Yes, I do.

Q. Will you state them? A. English, that is the original;
96 Spanish, French, Italian and German.

Q. There were four in addition to the English? A. Right.

Q. Have you got the costs on the Spanish version? A. I have.

Q. Have you got the records? A. I have.

Q. Will you produce them, please? (Papers produced by witness.) In what country was the Spanish version produced? A. Spain.

Q. And the other versions, where were they made? A. At the Coast in California, Culver City.

HEARING OF FEBRUARY 1, 1937.

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Mr. Driscoll: My suggestion is to start taking the testimony in Los Angeles on Monday, March first, four weeks from today. It will give us an opportunity to rearrange our affairs again as we did before, and prepare to go out there.

Mr. Cohen: Will that be agreeable to you, Mr. Special Master?

The Special Master: It is about as agreeable as any other date.

Mr. Driscoll: Are you going to offer any evidence today?

Mr. Cohen: I would like to have these bundles marked for identification, for the time being. They are the original reports from foreign corporations. There are 19 bundles of records, which are the original reports received from the foreign corporations, showing gross receipts, throughout the world, with the exception of the United States and Canada, of the motion picture "Letty Lynton" showing also the percentage retained by the foreign distributing corporations, from which records the defendants prepared Defendants' Exhibit 6.

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(The bundles of records just referred to were marked Defendants' Exhibit No. 3 for Identification, of this date.)

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It is stipulated that these records may be taken back to the offices of the Metro-Goldwyn, to be open there to the inspection of the plaintiffs' representatives.

(Hearing adjourned, subject to the call of the Special Master.)

[SAME TITLE.]

Proceedings had at Metro-Goldwyn-Mayer Studios, Culver City, California, March 1, 1937 to March 8, 1937, inclusive, commencing at 10:30 o'clock A. M., March 1, 1937, before Gordon Auchincloss, Esq., Special Master.

APPEARANCES OF COUNSEL:

J. ROBERT RUBIN, ESQ., by Samuel D. Cohen Esq., and Walter H. Pollak, of counsel.

LOEB, WALKER & LOEB, ESQS., by Milton H. Schwartz and Walter S. Hilborn, Esqs., for defendants.

O'BRIEN, DRISCOLL & RAFTERY, ESQS., by Arthur F. Driscoll, Esq., for complainants.

Special Master Auchincloss: Proceed, gentlemen.

Mr. Pollak: As I told you, Special Master Auchincloss, and Mr. Driscoll, before coming out here, what seemed to me the most effective way of making a succinct presentation of what we desire is to have an adjournment of two or three days, if that is agreeable to both of you. I find that Mr. Cohen, whom you all know, and Mr. Schwartz and Mr. Hilborn, whom you will know, have done a beautiful job of presentation, so beautiful that I think it should be made a little more beautiful and can be made a little more comprehensive if we could be permitted to have an adjournment of three days. We suggest that so that in the interval, Mr. Prager can look over the books, which I understand he wishes to do, and I imagine, from gazing at the

mere magnitude of those books, Mr. Prager can be 103
well employed, even with his experience, but everything will be made easy for him. The other thing I wanted to say, Mr. Anchincloss, is this: I think it is desirable to have a simple statement of just what, in our view, the evidence out here will be concerned with. It will, of course, be concerned with specific accounting, but the evidence that we are going to introduce, besides accounting evidence pure and simple, besides figures and computations, will also be evidence directed to making clear for the record the actual organization of the great enterprise that you see about you. That evidence will, 104
of course, have bearing upon the accounting, pure and simple. It will show the nature of the effort which the expense items represent. That evidence, I want to make clear at this point, will also have, in our view, a separate and substantive significance of the highest importance in relation to the major, underlying issue in this case, an issue that, as everybody knows, is singularly bereft of clear authority.

That issue is the issue of what, as a matter of law in the case of infringement—and so far as there is judicial determination that cannot be changed unless and until the case reaches the Supreme Court of the United States—the issue is, 105
assuming infringement, what in the case of the infringement of written work by a motion picture production is the measure of recovery? The question is as to the great composite which is the ultimate creation, and I use the word "creation" with deliberation—and what share of that great composite that the motion picture production represents is the share that the plaintiffs have contributed? What is the share that the defendants have contributed? That is a problem of law. It

106 is a problem of law that in this case can be presented upon facts which show the nature of the contribution of the defendants as well as of the plaintiffs. The general nature of the plaintiffs' contribution is clear enough. It is a play the plaintiffs have written. The nature of the defendants' contribution can only become plain after it is demonstrated partly visually through your inspection, partly in question and answer form for the record, what the general quality of motion picture production is, and we propose, if your Honor please, to prove that in both ways: By inspection at your convenience and, of course, in the presence of counsel on both sides, of the premises whenever you
107 wish, and whenever it is convenient to both sides, and also by testimony for the record that can be preserved for other courts.

I have said one word about the general nature of the defendants' contribution, which is what we are here to prove. Having said a word about the nature of the defendants' contribution, and because my only purpose in saying anything is to make clear to you just what we feel the issues at this stage are, and increasingly from now on are going to be, I want to say one word about the nature of the
108 plaintiffs' contribution, though it is obviously a matter that will best have exposition at the close of the hearing, of all the hearings, and upon the submission of briefs.

In this particular instance, what the plaintiffs have done is to take a theme that was in the public domain, to improve that theme, improve it to the extent of having, as the court has adjudged, a copyrightable interest in the improvement, but still, simply to improve. This is no case of Dickens' writing a novel, of Swinburne's writing a poem,

and of absolutely fresh creation of the plaintiffs' part. This is a case, avowedly, of the development by plaintiffs, acknowledgeably of the defendants by plaintiffs of a theme that had been a part of the literature of the English-speaking peoples for about three generations and ultimately what we will get down to, in our view, and I am saying this now not, of course, trying to demonstrate it, but simply to give a lead to your Honor's thought to show what it is we are setting out to do and what we believe the evidence and the ultimate argumentation will demonstrate, what I am trying to make clear to your Honor is this: Our ultimate and inclusive proposition in this, that of the composite whole, the creation which the motion picture play was and is, the contribution of the defendants is immense. The contribution of the plaintiffs is a fraction only of the written work which, itself, is a small fraction of the total product. That is all I want to take up your time with at this time. Would it be convenient to have an adjournment until Thursday, Mr. Driscoll?

Mr. Driscoll: I just want to answer——

Mr. Pollak: Oh, yes, of course.

Mr. Driscoll: —Mr. Pollak. There isn't any such issue before you here at all. It is just too bad that Walter Pollak didn't try the case originally in the Federal Court, or handle the appeal; if he had, all of these things might have been important. But they are certainly not important here. It is just simply a case, if we follow out his indicated course of action, of trying the issues of this action all over again, and that is not what we are here for at all.

It is a matter of general knowledge that there is nothing new under the sun. Nobody in the world that knows anything about it would say that Edward

Sheldon and Mrs. Barnes conceived of something that had never been thought of before. That isn't the copyright law. They wrote a play that was a new one, an original play. The theme, of course, had been done before. There isn't anything in the world that hasn't been done before. But be that as it may, even though it hadn't been done before, or had been done before, the question is not before us. There is an order here that was made by the Federal Court referring to you, Mr. Special Master, as Special Master to ascertain and report the amount of complainants' damages herein and the amount of gains and profits of the defendants, and each of them, and, in addition, the Special Master shall report separately the amounts of such gains and profits as the defendants obtained from all sources outside of the United States, and that the complainants on such accounting have a right to examination, and so forth. So there is only one issue here. There is only one thing for you to determine, and that is the amount of profits made by the defendants with this picture. You have no cause at all to look over the plant and say what they have contributed. You have no cause at all to say what they put into this picture. You are definitely ordered by the court to find out what the profits on this picture are, and nothing else at all. We are not trying the issues of this action all over again. They have been tried and determined, and that is the situation. That is the thing we are here for.

Mr. Pollak: How about the inspection of the place, where would you care to do that, and in what circumstances?

Mr. Driscoll: Well, if this is part of the general inspection, I have no objection to the Special Master inspecting the place. In fact, I would like to in-

spect it myself. I think it would be very pleasant, 115
but if it is part of this judicial hearing, then I am going to record my objection right here.

Special Master Auchincloss: It isn't going to be part of the judicial hearing. The only purpose of having the inspection of the place is to make the testimony more intelligible to counsel and to the Special Master.

Mr. Pollak: That is correct. I think the record should show, don't you, as a matter of orderly procedure, that you have inspected it?

Special Master Auchincloss: Yes, that is all right.

Mr. Driscoll: Then I want to record an objec- 116
tion on the ground that it has nothing whatsoever to do with determining the receipts and expenditures or profits of this picture.

Special Master Auchincloss: That is all right, but we are only doing it, as far as I am concerned, so as to be a little bit more intelligent when you start in presenting your case.

Mr. Driscoll: We will meet, then, at 10:30?

Special Master Auchincloss: 10:30 Wednesday.

(Whereupon, at 11:15 o'clock A. M., the hearing was continued and adjourned until 10:30 o'clock A. M., Wednesday, March 3, 1937.) 117

HEARING OF MARCH 3, 1937.

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(At the hour of 10:30 o'clock A. M., Wednesday, March 3, 1937, the hearing was resumed, all parties being present.)

Mr. Hilborn: Mr. Craig, will you take the stand, please?

WILLARD K. CRAIG, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Hilborn:

Q. State your full name, please. A. Willard K. Craig.

Q. Where do you reside, Mr. Craig? A. 48 South Oakhurst Drive, Beverly Hills.

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Q. And what is your official position with Metro-Goldwyn-Mayer Corporation? A. Auditor.

Q. And for how long a period of time have you been auditor? A. For Metro-Goldwyn-Mayer Corporation since 1924.

Q. Will you tell the Master your prior experience as an auditor? A. I was Chief Accountant for the United States Reclamation Service on the Salt River Project from 1914 to 1916. I was Assistant Examiner of Accounts for the United States Reclamation Service in 1918 and '19. For six months in the early part of 1920 I was Office

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Manager and head of the Accounting Division for the Salt River Valley Water Users Association at Phoenix, Arizona. For a year and a half, beginning in the middle of 1920, through 1921, I was auditor for the Universal Film Manufacturing Studios at Universal City. In January, 1922, I went to the Standard Film Laboratories who were opening their plant in Hollywood and opened their accounts, and was there for six months, approximately. In May, 1922, I went to Metro Pictures Corporation as auditor, and I have been in that position ever since coming over to Metro-Goldwyn-Mayer Corporation in 1924.

Q. Can you tell the Master how many persons are in your department and under your supervision? A. At the present time I have some 95. 121

Q. Now, Mr. Craig, the accounting which has been in evidence here, the amended accounting, is in two classifications. One is called Completed Negative Cost (referring to Defendants' Exhibits 18-D1 to 18-D4), and the other is called Studio Overhead (referring to Exhibits 18-D5, 18-E1 and 18-E2). In the accounting called Completed Negative Cost there is in each, or in the most of the department classifications, an item of Department Overhead. Will you explain to the Master the basis and the method upon which that computation is made? A. May I take one department and use it as an illustration? 122

Q. Yes.

Mr. Driscoll: Why not take this first one that we are questioning?

Mr. Hilborn: The Camera Department (referring to Defendants' Exhibit 18-D1)?

Mr. Driscoll: The Camera Department.

The Witness: That is what I was going to suggest. In that department we have the head of the department who is designated as Head of Photography, his office staff, and also the maintenance and repairs of cameras and other incidental expenses which cannot be directly allocated to production. Those accounts are collected in a departmental group of overhead accounts. We have felt that the most practical way to distribute that, instead of dumping it into a general overhead pot, is to distribute it on the basis of the direct cameraman's work on the picture, and in order to arrive at a working percentage on that, we have taken our experience in the previous fiscal year and, say, for the sake of illustration, that the departmental overhead is 10 per cent. of the direct salaries of 123

cameramen. In the succeeding year we use that percentage as a basis for absorbing our Camera Department overhead. The same practice we endeavor to follow wherever practical through the departmental accounts.

By Mr. Hilborn:

Q. Now, in the Camera Department, Mr. Craig, what was the base, the proportion of overhead that you used to determine the amount of department overhead in the Camera Department that was charged to this particular picture? A. You mean the percentage?

Q. Yes, the percentage. A. Well, I am sorry, I have just sent down for it.

Q. If I show you a weekly computation, Mr. Craig, will that help you? A. In that year we were using a 10 per cent. figure—no 25 per cent.; pardon me—25 per cent.

Q. In other words, you charged directly into the picture as overhead of the Camera Department, 25 per cent. of the wages of the men who actually worked on the picture in the Camera Department?

By Mr. Hilborn:

Q. What was the total charge for wages of cameramen on the picture Letty Lynton? A. $4,185.63.

Q. And the department overhead charges in the Camera Department? A. It was $1,045.17.

Q. Which is 25 per cent. of the cameramen's wages? A. That is right.

Q. By the way, tell us what the fiscal year was in which Letty Lynton was produced. A. It was made in the fiscal year ending August 24, 1932. That is the studio fiscal year which differs a few days from the fiscal year, because they allow us to close on the week ending nearest the last of August.

Q. Can you tell us now what the total cost of operating 127
the Camera Department was in that year? A. The total cost for operating the Camera Department in the fiscal year ending August 24, 1932, was $68,191.81.

Q. And how much of that was absorbed in the picture in the method which you have described? A. Absorbed in the picture in the method that I have described, $58,410.29.

Q. Leaving unabsorbed how much, Mr. Craig? A. Unabsorbed, $9,781.52.

Q. And that amount appears as a charge to general studio overhead on Schedule A-2 (Defendants' Exhibit 18-E2)? A. That is correct.

Q. That is a debit item of charge in the overhead of 128
the unabsorbed studio Camera Department overhead? A. Yes.

By Mr. Hilborn:

Q. Were these books kept in the usual course of your business in this method you have now described? A. Yes, they were.

Q. Now, the method which you have described for charging departmental overhead into the picture prevailed over many of the departments? A. That is correct.

Q. And the only difference from department to department is the percentage which was used? A. In most cases, 129
yes.

Q. Mr. Craig, you have used the phrase "absorbed and unabsorbed overhead." Will you explain to the Master what you mean by those phrases? A. Well, if at a given period the charges in the department exceed the amount that we have charged out to pictures, the balance will be unabsorbed overhead. If the credits or the amounts that we have charged to pictures exceed the amount of the departmental cost, the balance will be over-absorbed.

130 Q. And what disposition is made of unabsorbed overhead, Mr. Craig? A. At the end of the fiscal year it is applied as an additional charge to general studio overhead.

Q. And what disposition is made of over-absorbed overhead? A. It is applied as a credit to the general studio overhead.

Q. Mr. Craig, the same 25 per cent. was charged in each picture. I mean the same system was used for each picture that was produced by the studio during this year, charging 25 per cent. of the direct camera cost as department overhead? A. That was true, with the exception of the Cosmopolitan Pictures, which were made under a special
131 contract.

By Mr. Hilborn:

Q. Mr. Craig, the same system was used with the proportionate department overhead for editors and cutters, was it not? A. That is correct.

Q. I show you a journal entry for editors and cutters for the week ending February 24, 1932, and ask you if you can tell us what proportion of the direct cost in that department was added for department overhead? A. There was added 8 per cent.

Q. And in what method did you determine the factor
132 of 8 per cent. as added cost for the department overhead? A. It was determined on the basis of the experience of that department for the fiscal year that ended in August, 1931, the previous fiscal year's basis.

The Witness: That is right. In other words, in this particular period we were unabsorbed as a result of the use of our 8 per cent. The same method was used in the prior year, but I thought I had the figures here.

By Mr. Hilborn: 133

Q. To what extent was the overhead of this department unabsorbed in this fiscal year, Mr. Craig?

The Witness: $11,841.67.

By Mr. Hilborn:

Q. And does that amount appear as the debit in the account of general studio overhead, Schedule A-2 (Defendants' Exhibit 18-E2)? A. Yes, sir, it does.

Q. Now, the total aggregate charges for overhead of the editors and cutters for the picture Letty Lynton was 134 $221.57? A. $221.57.

Q. That is the aggregate of the weekly charges, according to the journal sheets, which were made contemporaneously from week to week? A. Yes, sir.

Q. The next item, Mr. Craig, is the salary of Joan Crawford. Can you tell us what Joan Crawford's salary was at this time? By the way, who was Joan Crawford, Mr. Craig?

The Witness: Miss Crawford is an artist under contract to Metro-Goldwyn-Mayer Corporation. She was the feminine lead of Letty Lynton.

By Mr. Hilborn: 135

Q. What was her contract salary during the period of Letty Lynton? A. (Examining file.) I am sorry for the delay, but there was a change of salary rate on the 30th of March. I was just checking to see if that fell within the period that she was on the picture. Her contract rate when the picture started was $3,000.00 per week.

Q. And can you tell from that to what extent Joan Crawford worked on this picture? A. Joan Crawford started on the picture on February 24, 1932.

Q. And worked how long, Mr. Craig? A. She was finished in regular production on March 28th. She started to make retakes on April 1st, and finished retakes on April 4th. She made another retake on April 12th, and that, I believe, was all.

Mr. Driscoll: What?

The Witness: The last retake was on April 12th, according to my record here.

Q. Now, in addition to these amounts, Mr. Craig, Miss Crawford received some compensation for the period prior to February 24th, which was charged into this picture, did she not? A. That is correct.

Q. And that is included in it? A. That is correct.

Q. What was that for, Mr. Craig? A. There was a 5-day period between the finish of her previous picture and the day she started in Letty Lynton, for which she was being paid salary, $500.00 a day. Do you want me to explain that?

Q. Yes. A. Under the studio policy, with stars who are designated, important people such as Joan Crawford and Robert Montgomery—well, may I start back a little further. The stars of Crawford's type are employed on a yearly contract basis with a 40-week guarantee, and during the time that they are not actually engaged in shooting a picture, part of this 40-week guarantee has to be paid as idle time on the records in the studio, so for that star, the accumulated salary between productions is charged to the succeeding production. That was the case with Miss Crawford.

Q. So that the figure of eighteen thousand and some dollars that was paid to Miss Crawford, in that figure there was some idle time?

The Witness: Well, I see, it is $2,000.00.

By Mr. Hilborn:

Q. $2,000.00 idle time? A. You take up the $2500.00, and she started here a day back, that makes it $2,000.00.

Q. That was the general practice in the studio with reference to charging the idle time of stars, wasn't it, Mr. Craig?

Mr. Driscoll: Objected to as immaterial.

The Witness: Yes, it was.

Special Master Auchincloss: I think it ought to stand as to what you did in this particular case.

Mr. Pollak: We have a right, I think, Mr. Master, to show the general practice of the studio. The problem here is one of allocation among different performers.

Special Master Auchincloss: We will let it go in for what it is worth.

By Mr. Hilborn:

Q. This charge was contemporaneously made, Mr. Craig? A. Yes, sir, it was.

Q. Now, with reference to Robert Montgomery, did you have a contract with him? A. We did.

Q. And at what salary? A. Montgomery was being paid $2500.00 a week.

Q. Was that pursuant to a written contract? A. Yes, sir.

Q. And can you tell how much, do you know how much of the $10,000.02, if any, was idle time? A. In Montgomery's case there was $2500.00 idle time.

Q. And the balance was paid to him for actual work on this picture? A. That is correct.

Q. Will you tell the Master what a retake is, Mr. Craig? A. As the picture is being shot according to schedule, they come to the close of their schedule and they have

142 taken all the scenes called for in the script, or all that they have desired or essential, and they will close the regular production. Now, after they have cut the picture, perhaps even after they go so far as to preview the picture, they will find that they need certain changes in their photographed film in order to get the result that they find essential. And if those changes are important enough they will call for retakes and make as many retakes as necessary to get the picture in the best shape possible.

Q. Then at the end of this account, compensation paid to stock talent, you have an item stock talent overhead (Defendants' Exhibit 18-D2)? A. That is correct.

143 Q. And was that stock talent overhead fixed upon the same basis as in the Camera Department, except for the percentage? A. No, sir, it was not.

Q. How was it figured? A. It was merely an arbitrary figure determined by the management that has been in practice for a number of years.

Q. So that this item of $896.05 represents 25 per cent. of the stock talent in this picture, exclusive of Crawford and Montgomery? A. That is correct.

Special Master Auchincloss: That is for this stock talent overhead?

Mr. Hilborn: Twenty-five per cent. of the compensation paid to the stock talent, exclusive of Crawford and Montgomery, exclusive of stars who, in this picture, were Crawford and Montgomery.

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Q. Do you know what the base of that 25 per cent. charge was, Mr. Craig? A. Well, I can't tell you what the basis was, because it has never absorbed the idle time of the stock company, but the management wanted to add no more than 25 per cent. They kept that uniform charge.

Q. Now, Mr. Craig, that amount appears on Schedule A-2 of the account (Defendants' Exhibit 18-E2) as a de-

duction in computing the general studio overhead, does it not? A. That is correct. 145

Q. It is included in the aggregate amount of $128,855.26? A. That is right.

Q. Now, Mr. Craig, what was the method of charging department overhead in the Scenario Department, what percentage was used in that department? A. Twelve per cent.

Q. Twelve per cent. of what, Mr. Craig? A. Twelve per cent. of the writers' salaries working on that picture.

Q. And the Scenario Department overhead was over-absorbed to the extent of $30,592.41 in the fiscal year 31-32? A. That is correct. 146

Q. And that amount appears as a credit item on Schedule A-2 of the account (Defendants' Exhibit 18-E2), general studio overhead? A. That is correct.

Q. And to that extent reduces the amount of the general studio overhead? A. Yes, sir.

Q. Mr. Craig, what do the metal cabinets in this room consist of? What is contained in them? A. Well, we have endeavored to put into this room all of our records for the fiscal year of 1932 containing vouchers, that is, vouchers payable for accounts payable, they contain the transportation requisitions, journal entries——

Q. They contain all your bookkeeping records for the fiscal year 1931-32? A. Yes, sir, they do, our clock cards 147
and our payroll cards, payrolls——

Q. Ledgers? A. Ledgers, and everything else.

Q. Where are they normally kept, Mr. Craig? A. Well, we have a filing room adjacent to our Accounting Department where they are kept.

Q. They were moved into this room especially for this hearing, were they not? A. Yes, sir.

Q. So they would be available? A. Yes, sir.

Q. For any questions that might be raised in connection with the accounting? A. That is correct.

Q. And they have been made available to the plaintiffs? A. Yes, sir.

Q. They consist of approximately 30 feet of filing cabinets, and approximately 125 separate cabinets? A. About 50 feet of filing cabinets, to be exact.

Mr. Pollak: And about four or five cabinets in height.

Mr. Hilborn: That is right—besides miscellaneous books outside the cabinets.

A. Yes, sir.

Mr. Hilborn: I think this is as good a place as any to stop.

Special Master Auchincloss: Is it satisfactory to adjourn for an hour?

Mr. Driscoll: Yes, it is satisfactory to me.

(Whereupon, at 12:45 o'clock P. M., a recess was taken until 2:00 o'clock P. M.)

(At 2:00 o'clock P. M., Wednesday, March 3, 1937, the hearing was resumed, all parties being present.)

Mr. Hilborn: Mr. Craig, have you record here of the number of men who are working in the studio at this time, the number of people for the fiscal year 1931-32?

Mr. Pollak: I may interpolate that that question embraces women as well as men.

The Witness: I have no distinction between male and female employees. Mr. Hilborn, may I ask you to tell me how you want that? Do you want that for the average employees for the year, or do you want to take specific weeks?

Mr. Schwartz: The average for the year for each 151
department.

The Witness: All right. I can give you the various departments here, the average number of employees.

Mr. Schwartz: When you speak of average, you mean——

The Witness: These will not be in departments. They will be by classification of labor. Several of these classifications of labor may come under the Construction Department, for instance, carpenters and painters, and others, but I will give it to you as I have it on my payroll.

Mr. Schwartz: When we are talking about aver- 152
age, we mean, of course, that there are more people employed during a big production schedule than there are a small production schedule.

The Witness: The total number of people on the weekly payroll divided by 52; 52 payrolls and divided by 52 for an average: Carpenters, 212; mechanical, 129; painters, 48; storeroom clerks, 11; staff shop, 15; grips, 19.

Mr. Schwartz: Grips are what, men that haul scenery?

The Witness: Grips are men that handle the scenery on the sets. Laborers, 131; maintenance and firemen, that includes janitors and so forth, 153
107; laboratory, 166; restaurant, 56; machine men, 5; precision machine men, 37; still department, 15; projectionists, 21; wardrobe, 62; Art Department, 25; cutters, 53; timekeepers, 7; script, 56; sound, 96; property and drapery, 57; executive, 38; business office, 6; plant and engineering, 10; casting office, 8; production office, 8; foreign department, 56; accounting department, 38; purchasing department, 3; publicity department, 26; reading department, 17; scenario department, supervision and

154 office, 12; writers on contract, 18; writers, non-contract, 41; Newcomb's Department, 4; directors, 17; assistant directors, 9; unit managers, 4; first and second cameramen, 23; assistant cameramen, 22; still cameramen, 7; company, technical, 3; miscellaneous production assistants, 3; music department, office and supervision, 12; musicians various productions, 28; stock talent contract, 49, picture talent, 23.

Mr. Schwartz: What is the difference between stock talent and picture talent?

The Witness: Stock talent is the classification we give to people who are employed on long-term
155 contracts. Picture talent are people who are employed for one picture only.

Mr. Schwartz: They don't include the featured players or stars?

The Witness: Featured players and stars would come under the stock talent group.

Mr. Schwartz: I see.

The Witness: I think I gave you last the picture talent. Call bureau, 23; picture talent, other producers, 2. That refers to artists we may borrow from outside studios. I will have to make another explanation here: The people that we call to the
156 call bureau, which is a similar organization to the Central Casting Office, we pay a commission on, and I have given you the picture talent called through the call bureau and the picture talent no commission, averaging 9. Stock talent, not on contract, 14. We had the Eskimo company, that was a picture that was made up in Alaska. We had a special group on that of 6. Advertising and miscellaneous, 7, making a total average employees on the payroll of 1851.

Cross examination by Mr. Driscoll: 157

Q. Mr. Craig, at this time, during the fiscal year, what was the capacity of your studio in pictures? A. As to the number of pictures?

Q. The number of pictures that you could make. A. That is a very difficult question to answer. I don't know whether I am qualified to say what the capacity would be or not. I might say in comparison to other years that we made about the same number of pictures that we did in previous years.

Q. Yes. That is the best answer you can give to it? A. I wouldn't want to say that our capacity was eight pictures of one type, continuously shooting, because every 158
picture has different requirements. Some pictures take longer to shoot than others, and vice versa. I don't know who would be qualified to state the shooting capacity of the studio.

Q. All right. What was the Cosmopolitan Pictures that you were talking about? A. Well, that is a corporation called the Cosmopolitan Productions, Inc., with whom we have a contract to produce pictures, and there was an agreement for the sharing of the profits when the pictures were finished——

Q. Pardon me. Go ahead. Had you finished? If you hadn't, Mr. Craig, go ahead. A. I was just going to say 159
that Metro-Goldwyn-Mayer Corporation financed the pictures entirely and there were certain provisions in the contract where we were compelled to charge a stated amount of overhead.

Q. How many Cosmopolitan Pictures were made during that fiscal year? A. I am not prepared to answer that. I couldn't answer that right offhand, Mr. Driscoll, but I will be glad to give you that information.

Q. Will you get it for me later? A. Yes, I will.

Q. Can you approximate the number now? A. I would say five or six.

160 Q. Were those pictures full-length pictures, feature pictures? A. Yes, in all cases.

Q. And those pictures didn't enter into these items of overhead that you have explained here, did they? A. They didn't share in those departmental overhead accounts. We had an agreement that we were to charge a fixed general overhead charge.

Q. Against Cosmopolitan? A. Yes, sir, on a camera-day basis.

Q. Let's turn to the item of Compensation Paid to Stock Talent. We have Miss Crawford's salary? A. Yes, sir.

Q. We have a charge for Miss Crawford's salary on the
161 amended accounting of $18,916.68 (Defendants' Exhibit 18-DI)? A. That is correct.

Q. That, I think you said, included an item of something over $2,000.00 for unused time of Miss Crawford? A. $2,000.00 exactly, I believe.

Q. Well, I didn't figure it out exactly. I took your item. A. I made an error in the first testimony. I said it was $2500.00, which was later corrected by a journal entry. It should be $2,000.00.

Q. All right. Let's take $2,000.00. That represents salary for Miss Crawford prior to the time when she began rendering services in the photographing of Letty Lynton? A. Yes, sir. It is prior to the time that she started photog-
162 raphy in Letty Lynton.

Q. It is time between pictures, is that correct? A. Yes, sir.

Q. And you also say there is an item of $2500.00, similar unused time of Montgomery's that is charged in this item of $10,000.02? A. Yes, sir.

Q. Where did the 2 cents come from, Mr. Craig? A. Well, on our stock people we charge them out on a daily basis. It frequently happens when they work on the odd day, we have to bring it down to even cents to make their weekly salaries. It works out in odd amounts.

Q. I understand you to say that in Nils Asther's case, there is no idle time? A. There is none in the salary shown here. The added charg on Nils Asther will show under your—— 163

Q. Stock talent overhead? A. That is right.

Q. In other words, on the next page, page 2 of this amended accounting (Defendants' Exhibit 18-D2), there appears an item of stock talent overhead of $896.05. That includes an item of approximately $600.00 salary that was paid to Asther because of unused time? A. Yes, sir.

Q. And the other portion of that $896.05 was some similar salary paid to other talent for unused time, is that correct? A. Yes, sir, on Lewis Stone and Karen Morley. 164

Q. So that the entire item of $896.05 represents unused time? A. That is correct.

Q. Now, let's come to the next compensation paid for story. A. Yes, sir.

Q. According to your testimony, Meehan began work during the week ending December 9, 1931, and did his last work on this picture during the week ending February 10, 1932; is that correct? A. Yes, sir, that is correct.

Q. When was the writing of this picture finished, if you know, Mr. Craig? A. The last charges that I have for writing were in the week of February 10, 1932.

The Witness: I have here the weekly writers' report from February 4, 1932, to February 10, 1932, inclusive, and John Meehan is reported as having worked five days on Letty Lynton. 165

By Mr. Driscoll:

Q. Who makes up that report? A. It was made up by the head of the Scenario Department, approved by Mrs. Corbaley who was then one of the chiefs of the department.

166 By Mr. Driscoll:

Q. So that he was paid for 52 weeks in the year, wasn't he? A. Yes.

Q. And either his salary had to be assigned to some particular picture or charged to overhead, unassigned salaries, that is correct, isn't it, Mr. Craig? A. Yes, sir.

Mr. Hilborn: We can stipulate that all of these items in departmental overhead would not be charged directly to Letty Lynton, and that is why they are overhead. It goes through each item in overhead. It doesn't directly bear upon Letty Lynton. It is
167 part of the operation of our business, all of which contributes to every picture. What we are willing to concede is that we cannot show, and do not claim that any item which is included in overhead directly could enter directly into the cost of Letty Lynton, or any other picture; that goes throughout all the overhead items.

Q. There are times when the Publicity Department is more active than at other times, are there not? A. Well, yes, but the Publicity Department's flow of activity is quite steady. They are busy all of the time because publicity involves the current stock company, seeing that no adverse
168 publicity goes out on any of the stars, or any of the featured players, even when pictures are not in production they have to follow that, because any adverse publicity that gets out on those people means that you lose that much box office when they hit the picture. So that if we let something bad get out on Crawford, whether it was intentional or unintentional, that is going to hurt her box office value, and they are the watch-dog of the——

Q. Reputations? A.——of the publicity from the lot.

Q. The keepers of the reputations. Now, when you have directors who are not actually employed, of course, there

you know that they are not actually employed because if 169
they are, they are assigned to a definite job; that is true, isn't it? A. Yes.

Q. And you carry them as unassigned salaries? A. That is correct.

Q. In your general overhead? A. Yes.

Q. The same is true of your writers? A. No. Pardon me. I will correct you on that statement that you carry them in general overhead. A director is treated the same as a star. If we put a director on salary today and we don't give him an assignment for three weeks, the salary that we pay him up to the date of that assignment is an accumulation against his picture that he is assigned to 170
direct.

Q. So if you carried him for six months his salary would go into the next picture he made? A. That is correct. That is what we are paying for the direction of that picture.

Q. And the same is true of the stock talent? A. The stars only. That is, they are the only ones we treat in that way.

Q. Among those items is one item, for instance, of unassigned salaries to song writers and composers of $81,725.82? A. That is correct.

Q. Now, those were not writers or composers that were engaged in making Letty Lynton? A. No, sir. 171

Q. They were other writers and composers that the company had hired and hadn't used and hadn't assigned their salaries to any particular production, and therefore put them in under the overhead of the Music Department; isn't that correct. A. There are other writers, or perhaps I shouldn't say there were other writers; the writers whose salaries were charged direct to Letty Lynton, that time is not charged in this unassigned salary group. What I am trying to get at is that some of the salaries—there are some of the writers who were on Letty Lynton who may

172 have had unassigned salary in this amount. (Indicating.)

Q. Yes. A. In this amount here. (Indicating.)

Q. But when they were working on Letty Lynton they were charged direct to Letty Lynton? A. That is correct.

Q. And when they were not working on any production, they were charged under this item of unassigned salaries? A. That is true.

Q. At that particular— A. However, if we had had to go out and hire those writers for specific pictures we would have paid them a much higher rate of pay at the time they were working on the picture.

Q. Well, maybe, and maybe you wouldn't. It is a fact, 173 isn't it, that they had a lot of unemployed writers and composers out here about that time?

By Mr. Driscoll:

Q. Now, Mr. Craig, in order that we may make this statement of Mr. Hilborn's perfectly clear, whenever a song writer or a composer was working on a particular picture, his salary was charged to that picture? A. That is correct.

Q. And if he was working on anything at all, he was assigned to some particular production, wasn't he? A. Not necessarily. We often assign a writer—a song writer who has no assignment. We will ask him to write a song in 174 the hope that we can use it in some future production. In other words, a song writer is creating something. He just can't go out and, by so many hours' labor, build some material thing. It is a creative proposition.

Q. But you didn't have any such songs in Letty Lynton, did you, Mr. Craig? A. I can't tell you just what songs were in.

(Whereupon, at 5:10 o'clock P. M., the hearing was continued until 10:00 o'clock A. M., Thursday, March 4, 1937.)

HEARING ON MARCH 4, 1937.

175

WILLARD K. CRAIG, having been previously duly sworn, resumed the stand and further testified as follows:

Cross examination (resumed):

Q. Have you a copy of the amended accounting there, Mr. Craig? A. Yes, sir, I have.

Q. Let's turn to the next page, page 5 (Defendants' Exhibit 18-D5). A. Yes.

Q. Under the general heading of General Studio Overhead. A. Yes, sir.

Q. Do I understand that all those items on that page are New York items? A. The first item of $2,246,000.00 176
is not.

Q. Well, that is detailed in the next schedule we will take up, but the rest of those, if they are all New York items, I won't bother you with them at all. I don't think you have offered any proof as to those anyway.

Mr. Hilborn: They are all New York items.

By Mr. Driscoll:

Q. We will just pass that, Mr. Craig, and turn to the detail of this item of $2,246,793.28, which appears on Schedules A-1 and -2 (Defendants' Exhibits 18-E1 and 18-E2). 177
A. Yes, sir.

Q. Now, you have the first item on that sheet (Defendants' Exhibit 18-E1) as salaries, Executive Department, $1,047,599.43. A. That is corect.

Q. What salaries go in to make up that figure? A. The salaries of management, producers and their assistants, and secretaries.

Q. It includes Mr. Mayer's salary? A. Yes, sir.

Q. That is $130,000.00 charged in there? A. Do you want that broken down by individual salaries?

178 Q. I want it broken down to some extent, because I want to find out. A: Well, may I prepare for you a breakdown of that departmental salary group?

Q. Yes, I will be glad if you would make a note of that. If you will do that, we will pass that item for the present.

Mr. Hilborn: I think we can tell you what each individual got, Mr. Driscoll, at the present time.

The Witness: For the specific individuals we have their cards. Let me show you. May I take a payroll of the Executive Department for a week and read you the names?

179 By Mr. Driscoll:

Q. Yes. A. Would you like to have it about the period of Letty Lynton, and then at a subsequent date?

Q. Yes. A. I am going to take the week of March 16, 1932. I think that is during the period of production of Letty Lynton. I can give you other weeks if you prefer.

Q. That is a very good week. A. Do you want their salaries and their rate, would that be information you want, or just the names?

Q. I am anxious to know what salaries went into making up that item of $1,047,599.43. A. Louis B. Mayer, 180 $2500.00, General Manager.

Q. So that for the year in that item of $1,047,000.00, $130,000.00 of it was for Mr. Mayer's salary? A. Yes, sir. There was a rate cut in July, 1932, and Mr. Mayer took a cut, so that won't be an exact figure. We all took cuts in 1932, July 23rd. Have you got the cards on that? (Addressing Mr. Cochran.)

Mr. Cochran: We have Mr. Mannix' card. That might help you.

The Witness: Ida R. Koverman, secretary to Mr. Mayer, $100.00. Grace Clark, stenographer in

Mayer's office, $35.00. Janet Spooner, stenographer in Mayer's office, $35.00. Irving Thalberg, $1,000.00. Vivian Newcomb, secretary to Irving Thalberg, $90.00. Frank Lawrence, assistant to Irving Thalberg, $350.00. E. J. Mannix, executive, $700.00. J. S. Partridge, secretary to Mannix, $65.00. Louis Dorn, contact man, $50.00. Do you want to know what that means? Dorn attends theatres and makes reports of theatre reactions for Mannix. Paul Bern, supervisor, which is the same as a producer, $1500.00. Irene Harrison, secretary to Paul Bern, $65.00. Felix Feist, assistant to Paul Bern, $125.00. Harry Rapf, executive, $3,000.00. Winifred——

Mr. Hilborn: Who is Harry Rapp?

Mr. Pollak: You might tell what he was an executive of.

The Witness: Harry Rapf was Vice-President of the organization, and also acts in a producing capacity. That is the reason we rated him as an executive rather than as a producer, solely. These are titles that I am reading from the payroll. They may not cover their entire function, but they give you a general idea of their function.

Winifred Able, secretary to Rapf, $41.00. Frank Davis, assistant to Rapp, $300.00. Ruth Carnell, secretary to Davis, $41.00. Mary Hagenborth, reception clerk, $35.00. Jack Cummings, assistant to Rapf, $350.00. N. T. Peterson, secretary to Cummings, $30.00. Lawrence Winegarten, assistant to Harry Rapf, $850.00. Frances Woodward, secretary to Winegarten, $41.00. E. B. Derr, supervisor, $1250.00. Nan Fanger, secretary——

By Mr. Driscoll:

Q. How much was Derr? A. Derr, $1250.00. Nan Fanger, secretary to Derr, $35.00. B. H. Hyman, super-

184 visor, $2,000. Louis Bruckner, secretary to Hyman, $60.00. James McKay, assistant to Hyman, $175.00. Hunt Stromberg, producer, $2500.00. Irene Glynn, secretary to Stromberg, $55.00. Sam Zambalist, assistant to Stromberg, $185.00. Tamara Palmer, assistant to Stromberg, $50.00. Margaret Widenor, stenographer in Stromberg's office, $35.00. V. P. Fineman, supervisor, $1500.00. Hazel Stray, secretary to Fineman, $50.00. Ben Piazza, marked here as "special," he was really acting in the capacity of a talent scout, $300.00. John Emerson, supervisor, $1,000.00. Albert Lewin, supervisor, $1250.00. Myrtle Brady, $50.00. Harold Wilson, assistant to Lewin, $70.00. Payroll for that week
185 was $21,870.41.

Mr. Cochran: Will you read that again?

The Witness: $21,870.41. There was one item in there of $2.41 that was paid to one of the stenographers for overtime. Other than that, I believe they were all paid the straight, weekly rates.

By Mr. Driscoll:

Q. Well, Mr. Craig, out of that $1,047,000.00 item then, approximately $13[illegible],000.00 represents Mr. Louis Mayer's salary for the year? A. That is correct.

186 Q. Subject to any adjustment on account of the cut taken about July, or thereabouts? A. That is right.

Q. And Mr. Thalberg, $52,000.00 represented his salary for the year? A. Subject to the same general cut.

Q. Yes. A. Because that was a uniform cut I think almost without exception throughout the organization.

Q. Yes. Mr. Thalberg's $52,000.00 was in addition to a New York office charge? A. So I understand.

Q. Now, Mr. Mayer, what is his title? A. Vice-President, and at that time carried the title of General Manager.

Q. Vice-President and General Manager? A. He is in charge of this studio.

Q. So that his general supervision, I suppose, filtered down through the various strata to the Letty Lynton picture, the making of the Letty Lynton picture? A. Yes, it did. 187

Q. And Mr. Thalberg, what was his title at that time? A. Mr. Thalberg was an Executive Producer and a Vice-President of the corporation.

Q. And Mr. Thalberg had separate productions that he had charge of, did he not? A. He did, but he was also, you might call him the—he had the final say-so on all productions on the lot.

Q. I see. Now, do you know what part of his salary represented his position as Vice-President, and what part of his salary represented the work done by him in supervising the various productions on the lot; is there any distinction? A. I would not attempt to make any distinction myself. 188

Q. So that as supervisor of all productions on the lot, his influence also filtered down through the various strata to Letty Lynton? A. Yes.

Q. Now, Mr. Mannix' salary accounted for approximately $36,000.00 of that $1,047,000.00. That is correct, is it? A. That is correct.

Q. And what is Mr. Mannix' position? A. Mr. Mannix was business executive. Shortly after this time he was appointed General Manager by Mr. Mayer, and he functioned as Mr. Mayer's right-hand executive. 189

Q. Shortly after this started, but at the time of the making of "Letty Lynton", what was Mr. Mannix' position? A. Well, he was, I might say, Assistant General Manager. He was merely titled as an executive, and he was the man in charge of the business end of the studio; when Mr. Mayer was out of town he was the man that was virtually—

Q. He was Mayer's pinch-hitter? A. I haven't attempted to define any of these titles, but his functions were that of General Manager under Mr. Mayer. That is the best way I can state it.

190 Q. That is, pinch-hitting for Mayer? A. Well, the job was too big for any one man to handle. He has to have assistants.

Q. And in that capacity as substitute for Mayer, or assistant for Mayer, or pinch-hitter for Mayer, or whatever it might be, his influence, I suppose, covered in a general way the production of "Letty Lynton"? A. That is true.

Q. And then we have Mr. Hunt Stromberg, who was the producer directly in charge of the production of Letty Lynton, isn't that correct? A. Yes, sir.

Q. And Mr. Stromberg, according to your figures, re-
191 ceived $2500.00 a week. That would be $75,000.00 for the year?

Mr. Hilborn: How much? $2500.00 a week is $130,000.00.

The Witness: I said approximately.

Mr. Driscoll: In order to give Mr. Hilborn the benefit of the doubt, let's make that $130,000.00 for the year. We will just forget the reduction for adjustments and so forth. Is that satisfactory, Mr. Hilborn?

Mr. Hilborn: I was just making the computation on $2500.00 a week.

192 By Mr. Driscoll:

Q. So those four gentlemen, Mr. Mayer, Mr. Thalberg, Mr. Mannix and Mr. Stromberg accounted for approximately $348,000.00 out of this $1,047,000.00? A. I haven't kept track of the figures, and I can't verify your total, but the individual items were correct as stated.

Q. Well, I think they work out that way. Now, then, in addition to those four, we have in this list the various producers that you have mentioned here a few minutes ago, including, for instance, Mr. Rapf, Mr. Derr, Mr. Fineman,

John Emerson, Mr. Lewin. We have those gentlemen whose salaries are also included in that $1,047,000.00? A. That is correct. 193

Q. Now, Mr. Rapf had nothing whatever to do with "Letty Lynton", did he? A. He was not directly in a supervisory capacity, but all of the supervisors act as counsel, general counsel, for each other's pictures.

Q. Yes. A. Well, that is a fact. They meet every day and discuss—discuss individual problems, but make collective suggestions.

Mr. Driscoll: Yes.

The Witness: In other words, a group of men of the calibre of these eight or ten men that you have mentioned here can bring a lot of ideas to a picture that one man can't do. 194

By Mr. Driscoll:

Q. Now, then, Mr. Craig, let's take Mr. Rapf. He had assigned to him a certain number of productions during that fiscal year, didn't he? A. Yes, sir.

Q. And he was the producer in charge of those productions, he supervised them? A. That is correct.

Q. And under him he had directors? A. That is correct.

Q. And he had cameramen? A. That is right. 195

Q. And so forth. Now, Mr. Rapf did not have assigned to him the making of Letty Lynton, did he? A. He did.

Q. Mr. Rapf received $3,000.00 a week, or $150,000.00, or, on Mr. Hilborn's suggestion, we will make it $156,000.00 a year, is that right, approximately, with adjustments made in July? A. That is correct.

Q. Yes. And that $156,000.00 is part of this $1,047,000.00 that appears on Schedule A (18-E1) in the first item? A. That is right.

Q. And in addition to Mr. Rapf's $150,000.00 salary for the year, he had a secretary at $41.00 a week, he had an

196 assistant, Mr. Davis, at $300.00 a week, or $15,000.00 for the year, and Mr. Davis had a secretary at $41.00 a week. Mr. Rapf had an assistant named Cummings at $350.00 a week. He had an assistant named Winegarten at $850.00 a week, and Mr. Winegarten had a secretary at $41.00 a week. All of those were in Mr. Rapf's department, weren't they, so to speak? A. That is correct.

Q. Having to do with the productions of which Mr. Rapf had charge? A. That is correct.

Q. Now, in addition to that, we have Mr. Bern, who received $1500.00 a week, or $75,000.00 for the year, or we will make it $78,000.00, if Mr. Hilborn wants us to, for the year. Mr. Bern had no direct charge of Letty Lynton, 197 did he? A. No, sir. He wasn't directly assigned to Letty Lynton.

Q. Mr. Bern might confer with Mr. Stromberg, as you say, or with Mr. Rapf, or with Mr. Fineman, or any of the others, is that correct? A. That is right.

Q. Now, Mr. Bern, in addition to his salary of $75,000.00, or $78,000.00, a year, he had his secretary at $65.00 a week, he had an assistant at $125.00 a week, and all of those salaries are in this item of $1,047,000.00 charged up on this Schedule A, is that correct? A. That is correct.

Q. Now, then, the same thing is true of Mr. Fineman, who had $1500.00 a week, and a secretary, and an assistant, 198 and so forth. All of those salaries are charged up in the same way as part of this $1,047,000.00, is that right? A. That is correct.

Q. And the same thing is true of Mr. John Emerson and Mr. Lewin? A. That is right.

Q. So that when we sift the thing right down, out of the $1,047,599.43, the only part directly chargeable to Letty Lynton are portions of the salary of Mr. Mayer, Mr. Thalberg, Mr. Mannix and Mr. Stromberg, and their departments, Mr. Mayer's secretary, and Mr. Mannix's secretary, and Mr. Stromberg's secretary, and so forth, isn't that correct? A. No, I wouldn't admit that.

Q. No, because you contend that they all get together and give each other ideas? A. I certainly do. 199

Q. Yes, all right. A. Any one of those men is more valuable because he has the association of the other men, rather than standing alone.

Q. Then we will come to the next item, expenses, Executive Department, $16,482.79. What enters into that charge?

Mr. Hilborn: Mr. Craig, you have in front of you a statement showing each item, each particular item, which went into the total of $16,482.79 in the fiscal year 1931-32?

The Witness: Yes, sir, I have. 200

By Mr. Driscoll:

Q. Before leaving this other item, Mr. Craig, there is one other question I would like to ask you. Mr. Stromberg, for instance, one of the four gentlemen that we mentioned together who was the supervisor of the production of Letty Lynton, he also produced a number of other pictures during that fiscal year, didn't he? A. Yes, he did.

Q. Letty Lynton was one of how many pictures that he produced during the fiscal year? A. I am not able to tell you offhand. It would be a matter of research for me to go back. 201

Q. Probably four or five, or six or more? A. Stromberg is one of the active producers. I imagine about four or five pictures.

Q. Yes. And Mr. Mayer's services of $130,000.00, his services applied to all of the productions on the lot, 41 productions, and the shorts? A. Yes.

Q. And the same thing is true of Mr. Thalberg? A. That is true.

Q. And the same thing is true of Mr. Mannix? A. Yes, sir.

202 Q. Now, Mr. Thalberg, in addition to having general supervision over all productions on the lot, also had his own productions, did he? A. Yes, he did.

Q. That is, he was directly a producer the same as Stromberg and these other fellows in addition to having general supervision? A. Yes, he had his own pictures.

Q. As a matter of fact——

Mr. Cohen: Whose name did you mention?

The Witness: Thalberg.

By Mr. Driscoll:

203 Q. Let's come down then to this executive expenses of $16,482.79. A. As I stated, I have in front of me the complete detail of those charging making up the item of $16,482.79, representing the expense of the Executive Department, including such items as automobile transportation when an executive uses one of our transportation cars, it includes various additional stenographic help that we have from the Script Department, relief girls, office supplies, and innumerable small miscellaneous items.

Q. All right. You needn't go into detail on those unless you want to.

Mr. Pollak: Give us a few as an illustration.

204 The Witness: Do you want me to amplify that?

Mr. Driscoll: Mr. Pollak wants you to give a few as illustrations.

The Witness: Well, I see more transportation and script charges here that predominate, office supplies, store supplies, and various other small items.

Mr. Cohen: All right.

Q. Let's come down to Production Department, salaries, $72,346.20. I would like very much to have you tell me what that means, what it is? A. Production Department

is a department that functions from the time the script is 205
completed and ready for shooting through the production of the picture. They have under their supervision in a general way, or directly under their supervision, the assistant directors and unit managers. The first operation after a script is completed and ready to shoot is for the Production Department to break it down and schedule the shooting so that they can carry out their production schedule in the most efficient and economical way.

Q. Are your supervisors part of your Production Department? A. The supervisors, as we list them in the Executive Department?

Q. Yes. A. No, sir. 206

Q. They are not part of the Production Department? A. The Production Department handles only the physical production features of the picture. In other words, they have no jurisdiction to tell a director what he shall shoot. When he says he is going to shoot a certain scene in sequence, the Production Department must have the operating functions all correlated and brought together so that they can shoot at the given time. They prepare the estimates on pictures, and break down, lay out the detailed schedule of shooting, as I have already mentioned.

Q. Now, in this $72,346.20, is there any item of unassigned salaries? A. The item that would be considered unassigned time there might be such vacations as the in- 207
dividuals of that department were entitled to.

Q. This production department also worked for the 21 shorts that were made during the fiscal year? A. They contributed to a very slight degree.

Q. The shorts pay no part of $72,346.20, do they? A. They do, in that they were charged a certain amount of general overhead.

Q. When you say "general overhead", you take and lump everything together and make a charge against them for overhead? A. Right.

208 Q. What was the charge for overhead made to the shorts? A. I think the shorts was $3500.00 per short, I think, in that year.

Q. All of those shorts were one-reelers, or were there some of them two-reelers? Or, put it this way: On the 21 shorts, how many reels were there? A. You are misquoting the situation a trifle, because I believe my testimony yesterday was to the effect that we worked on 21 shorts, not that we completed 21 shorts during the year. I couldn't, without further investigation, say just how many were completed. I know that some of those shorts that were worked on were worked on in the previous fiscal year, and at that time they were charged on a basis of $700.00 a day, but
209 that charge went into the previous fiscal year.

Q. When you say $700.00 a day, is that overhead, or does that include the whole cost? A. $700.00 per production day. Usually a short will shoot in one to two days. We charged them $700.00, or $1400.00.

Q. A flat rate? A. Yes. I am remarking about some of the shorts that were worked on. I am referring to a schedule that I have in mind that I have prepared which shows that of those 21 shorts worked on, they were not all completed. Some of them had overhead charges that went back into the previous fiscal year, and in this fiscal year there were two charged $3500.00 apiece for overhead.

210 By Mr. Driscoll:

Q. Two shorts? A. Yes.

Q. When you speak of this $700.00 a day production charge made to shorts— A. Pardon me. I think you misunderstood me. The $700.00 a day was the fiscal year prior to the one in which we are concerned.

Q. Oh, I see. A. There is no credit on the present fiscal year at $700.00 a day on shorts, but you asked me, as I recall it, yesterday how many shorts we worked on during the fiscal year.

Q. That is right. A. I referred to my schedule which showed the increase in cost, and there were 21 that had had charges accruing against them during the fiscal year in question. Only two had been charged overhead at the rate of $3500.00 a day, so that our general overhead received a credit of $7,000.00 during this fiscal year for operation on shorts. 211

Q. For those two shorts? A. That is right.

Q. And there was no overhead charges against the other shorts? A. No, not in the fiscal year in question.

Q. Now, the salaries, maintenance, $123,602.31, what does that include? A. Was that $123,602.31?

Mr. Prager: That is right. 212

The Witness: That includes salaries of dressing room attendants, firemen, janitors, messengers, telephone operators, telegraph operators, and so forth, office boys, that is, boys in the reception office that show visitors around and run mail, and one thing and another, on the lot. If you want that broken down by the various classifications, I can give it to you.

Mr. Driscoll: No.

The Witness: It also includes our police department.

By Mr. Driscoll: 213

Q. Your nurses and doctors, are they charged direct to production? A. They are where we employ them and assign them to a production. I have in this account No. 817, nurses not assigned to production.

Q. That comes in under this item of $123,000.00? A. Yes. It is $2,745.00.

Q. And you assign nurses and doctors to the type of thing that we saw the other day out here at——

214 Mr. Cohen: Chatsworth.

The Witness: Yes, on locations. It is required in many cases, and it is practical in all cases, to have them there.

By Mr. Driscoll:

Q. Did you have any nurses and doctors used in Letty Lynton? A. I wouldn't be able to say offhand.

Q. If you did, they were paid for it? A. I would say this, if they were used on location and hired as such, they would be charged directly to the picture.

Q. Yes. A. However, we maintain on the lot a first-aid
215 station and a nurse is always in attendance and she is available for call on any production that needs her services here on the lot.

Q. Part of this item of $123,602.31 is salaries of nurses and doctors who are unassigned? A. That is correct.

Q. Listed here as salaries, maintenance. A. That is correct.

Q. Then we come down to the item of rental of studio and facilities, $334,464.61. From whom is it rented, and to whom is the money paid? A. The title there is explanatory more than to be construed as actual rental. All of the assets of the corporation are carried on the home
216 office books in New York. We do not figure any direct depreciation on the plant or equipment at the studio. This is a weekly figure that is set up and credited to the home office in lieu of depreciation. It is either absorbs or underabsorbs the depreciation that the New York office sets up, which I do not handle personally, and have no knowledge of the exact figure.

Q. All right, that fully explains it, I think. It is a figure set up in lieu of depreciation.

Mr. Hilborn: Mr. Driscoll, I think in the interest of clarity, so that we may have it together, there is

on this account on page 5 an item of unabsorbed studio depreciation of $179,704.16. That item, plus the item which we are now talking about, $334,000.00, the aggregate of those two items should equal the depreciation which is charged in New York at the end of the year for buildings and equipment. 217

Mr. Driscoll: All right.

Q. Now, then, we come to salaries of directors unassigned, $27,715.49. Those are picture directors who are not working on any production, is that correct? A. Those are picture directors who, prior to the termination of their services, had unassigned time which could not be allocated to any definite production. As I explained to you yesterday, the normal procedure on a director is that when he goes on payroll, his time is accumulated, and if unassigned, is charged to his next succeeding production. We frequently have a man who finishes a picture and has idle time before his contract is terminated and, if not renewed, that idle time has to go into general overhead. 218

Q. Now, let me understand this, then: When a director takes up a production, all of his elapsed time from the finishing of the prior production is charged to the new production? A. That is correct.

Q. And would not constitute any part of this item here of $27,715.49, is that right? A. That is right, yes. 219

Q. This $27,715.49 is the end of the contract where the time is too short to assign a man to some job, or something that way? A. Yes, sir.

Mr. Hilborn: Where he is not assigned to a picture.

Mr. Schwartz: Where he is not reassigned and no new contract is made with him.

The Witness: I have one item here that illustrates what I mean. There was a director by the

220 name of Robinson whose contract was terminated by mutual consent, or otherwise, and there was a salary accumulation of $4,345.00 which was charged into this account. Another termination was $5,395.84.

By Mr. Driscoll:

Q. Let me ask you this question, Mr. Craig: Take, for instance, Clarence Brown. He was the director of Letty Lynton, was he not? A. Yes, sir.

Q. And Letty Lynton is here charged with his salary of $75,000.00. Did that include idle time? A. No, sir. In the case of Clarence Brown, his contract called for a flat
221 payment of $75,000.00 per picture. If you wish—would you let me have Brown's contract?

Q. Well, if you say that is so, I won't require it. A. That is correct. It was a flat charge of $75,000.00 for Brown's services.

Q. Regardless of the length of time that was required? A. That is correct.

Q. And therefore there was no payment on account of idle time? A. No consideration of idle time in that payment.

Q. The next item is rejected continuity charges and songs, $63,996.57. Will you tell us what that is, Mr.
222 Craig? A. Do you want the detail on that, Mr. Driscoll?

Q. Well, if you can tell me that it is songs and music, and so forth, that you have rejected, that was not used, it was paid for and not used, and that it had nothing to do with Letty Lynton, why, we will pass along to the next one. A. Well, that is a correct statement. It was not chargeable direct to Letty Lynton, and it has been rejected.

Q. None of it was bought for Letty Lynton? A. No, sir.

Q. All right. Now, then, accumulation——

Mr. Hilborn: In order that we may have the record complete, it is the exact amount which these rejected continuities and songs had cost the studio? 223
The Witness: That is correct.

By Mr. Driscoll:

Q. The next item is accumulation on rejected pictures, $151,686.80. Letty Lynton didn't happen to be one of those pictures, did it, Mr. Craig? A. No, sir. I am sorry that it wasn't.

Q. This $151,686.80 is money that was expended upon pictures that were never released, is that correct? A. That is correct. I have the list here some place, if you care to have it. 224

Q. I am not interested beyond that. A. Well, that is the case.

Q. Yes.

Mr. Hilborn: And charged off in this fiscal year?
The Witness: Yes, sir.

By Mr. Driscoll:

Q. And no part of it was spent on Letty Lynton? A. That is correct.

(At the hour of 2:00 o'clock p. m., Thursday, March 4, 1937, the hearing was resumed, all parties being present.) 225

WILLARD K. CRAIG,

By Mr. Driscoll:

Q. Mr. Craig, will you kindly turn to page 2 of the Schedule A of amended accounting? (Defendants' Exhibit 18-E2.) A. Yes, sir.

226 Q. The item of total overhead, $2,246,793.28. There is reflected in that account $298,025.47 from unassigned salaries of the domestic stock company; that is correct, isn't it? A. That is correct.

Q. And those unassigned salaries are in much the same category as unassigned salaries that we have talked about heretofore in this hearing? A. I don't believe you are quite correct in that, because the unassigned salaries of domestic stock company amounted to $813,240.63.

Q. Yes. A. We have reduced that by the percentage that is already charged in the various pictures on the basis of 25 per cent added to the direct salaries of the
227 picture, which item amounted to $128,855.26. We have further reduced the unassigned salaries of the stock company by the profit that we made in renting our stock players to other studios which is purely a profit item over and above the cost of that artist for the loan-out. That credit amounted to $95,170.98. So that in the balance of $298,025.47 there has been a credit rendered the account for the profits that we have made on loan-outs.

Q. But that credit is against the item of $813,240.63. That is no credit against any part of the $298,025.47? A. No, that is true, but what I wanted to impress on you was the fact that the $298,000.00 does not represent all of the unassigned salaries of the stock company.

228 Q. No. A. There is a far greater amount than that.

Q. Yes, but coming back to my question, let me put it this way: Whatever stock talent was used in the making of Letty Lynton was charged direct to Letty Lynton, was it not? A. That is correct.

Q. Yes. And this is entirely made up of unassigned salaries, unused artists? A. That is correct.

Q. The expense of carrying them? A. That is right.

Q. Now, these other debit items that appear on that page in that column with the $298,025.47, except the last one, are the items that we have already talked about in

connection with the various other accounts that we have covered here in our examination, is that right? A. Yes, sir. 229

Special Master Auchincloss: I don't quite understand this compilation here. Was that less unassigned salaries, the $304,429.80?

The Witness: May I explain it to you, please? The gross unassigned salaries of our stock company, including our stars, amounted to $813,240.63. In accordance with the practice that has been followed by the studio, the stars' salaries are accumulated and charged against succeeding pictures; whereas the 230
featured players' salaries, *other than stars*, at the end of the year we clean our slate off and write off the unabsorbed balance to overhead, and we carry over the stars' salaries over into the next fiscal year, because we charge those salaries directly against the succeeding picture. So that at the end of the fiscal year 1932, we had $291,188.92 representing stars' salaries that we were carrying over to charge in the succeeding pictures.

Special Master Auchincloss: I understand.

Q. Now, out of this overhead item of $2,246,793.28 (18-E1, 18-E2), was there any part of that allocated to profit and 231
loss?

Mr. Hilborn: I don't understand the question.

Mr. Driscoll: Well, it is a simple question. I think Mr. Craig will probably understand it.

The Witness: I think I had better answer that in this way: I do not know, because I do not handle the consolidated books of the home office.

232 By Mr. Driscoll:

Q. I see. A. I merely, in my closing fiscal year report for the year, transfer this amount as an unabsorbed item to the home office.

Q. For them to— A. Along with my negative costs of the year.

Q. Do you know that it is now the custom that studio costs not apportioned to specific films are charged in part to profit and loss, and the balance amortized as a separate film production, commencing with the next succeeding fiscal year?

233 Mr. Pollak: The question is whether he knows that it is or not?

The Witness: I will have to answer "No" to that question.

By Mr. Driscoll:

Q. You don't know that it is now done? A. No, sir. I have no information how the accounting is handled in New York.

Q. All right. There is just one other question at this time, Mr. Craig. You said there were 21 shorts, I think. Did you make any newsreels here? A. No, sir.

234 Q. So that the entire product was the 41 feature films, which included five Cosmopolitan, and 21 shorts for that fiscal year?

Mr. Hilborn: I think, Mr. Driscoll, that question assumes something that has not been testified to, 41 features.

The Witness: Our entire production costs for the fiscal year 1932 were made up of charges against feature productions in process during the year, and further included suspense charges against pro-

ductions that we anticipated that we would produce 235
in the near future. In other words, before a picture has been definitely assigned to active production, we frequently have occasion to accrue charges against that other than story charges, and for that purpose we consider them suspense charges. In addition to that, we had worked on foreign versions and on the shorts, as has already been mentioned, and we had some costs accruing against productions that had been completed and transferred in prior fiscal years.

By Mr. Driscoll:

Q. I think that answers the question. I don't know 236
whether I asked you the number of reels in these shorts. A. There are one and two reels, I believe.

Q. Is there any method of telling me, have you any means of knowing, how many were two-reel pictures and how many were one-reel pictures? A. I would have to get that information from other records that I haven't available at the moment. If you would like to have us get that for you as a matter of information——

Q. I think it ought to be in the record.

Mr. Schwartz: Does that mean more than two that you say the overhead of which was charged in 237
this fiscal year? I don't know that Mr. Driscoll wants a record of all of them.

The Witness: As I understood the question, you wanted me to tell you how many one-reel shorts we worked on, and how many two-reel shorts we worked on in the fiscal year.

By Mr. Driscoll:

Q. That is right. I think that is all just now.

Re-direct examination by Mr. Hilborn:

Q. Now, Mr. Craig, in order that we may make it perfectly clear what there is in this room, you have here a record of every dollar spent in studio production in the fiscal year 1931-32 for the general overhead and for Letty Lynton? A. That is correct.

Q. That means that you have a detailed statement of each item of expenditure? A. Yes, sir.

By Mr. Hilborn:

Q. Mr. Craig, in the operation of the studio, is it or is it not possible to keep the stars and directors working 52 weeks a year?

Mr. Driscoll: Of course, it is immaterial to our issue. We are not in partnership here, as the courts have said in a number of instances; objected to as immaterial and irrelevant to the issues being tried.

Mr. Hilborn: On specific pictures.

The Witness: Am I at liberty to talk?

Mr. Driscoll: I made an objection on the ground that it is irrelevant and incompetent. A number of decisions have held that we are not concerned with the general business in any way. We are not in partnership with them. We are entitled to the accounting of the profits of this picture, and we are not governed by their general business.

Special Master Auchincloss: What is your theory of the admissibility of it?

Mr. Hilborn: It is really to bring out clearly the reason for the pickup of the idle time on succeeding pictures.

Special Master Auchincloss: Well, I am in doubt as to whether it is good or not, but we will let it go in and see what he says.

The Witness: In the production of motion pictures we are faced with the proposition of preparing a story in continuity form, ready for production. It is a creative matter, not a matter of physical production, and hence cannot be turned out on a factory basis. The result is that there are often considerable delays between the time an artist or a director finishes a picture and the time that the succeeding picture is prepared and ready to shoot. There has never been a satisfactory way worked out, and it is impossible to work out a method where that can be controlled, because creative genius cannot be controlled in the sense that you can make a man think of something that is suitable within a given time. 241 242

Re-cross examination by Mr. Driscoll:

Q. You have heard of stars going direct from one picture to another, haven't you? A. I know it has happened in certain instances, yes.

Q. It is not impossible, is it, Mr. Craig? A. It is not impossible, but it is by far a very small percentage of the cases. I think in my experience in the studio in the last 12 years that there have not been more than five or six artists who have worked their 40-week period in any one year. I think, to be exact, there are two instances of that. 243

Q. And it is a fact also that under the method you use, if there is a stretch of three months between two pictures, you carry that star's salary over to the next picture? A. That is correct.

Q. And, Mr. Craig, this is true, is it not: You said, if I remember correctly, that props bought for a picture were charged to that picture? A. Yes, sir.

Q. You also said that props that were not bought for the picture, but taken out of stock, were not charged specifically to the picture; that is true? A. Yes, sir. There

is, no charge made for the use of props from our own stock.

Q. Yes, and props that are bought for a picture and charged to that picture are then put into stock without any credit? A. That is true.

Q. And that was done with the props that were bought and paid for by Letty Lynton; they went into stock to offset those that Letty Lynton might have used from stock, isn't that right? A. That is true. On Letty Lynton we purchased props for sets of $873.01, and hand props of $155.91, and that would not dress anywhere near the number of sets we have on the schedule, some 23 sets.

Q. But those went into stock at the end of the making of the picture? A. Yes, sir.

Mr. Driscoll: All right, that is all.

By Mr. Hilborn:

Q. Mr. Craig, Letty Lynton had the advantage of all the props that had been purchased prior to its production, and that applied to all the equipment, and the preparation of all the equipment, and the general studio efficiency which existed when Letty Lynton went into production?

The Witness: Yes.

Special Master Auchincloss: Are you finished with Mr. Craig for the time being?

Mr. Hilborn: Yes, sir.

(Witness excused.)

Special Master Auchincloss: Mr. Craig can be recalled at any time.

Mr. Pollak: I thought, to save time while he is coming, we might have a stipulation that the Master has, in part, examined the plant here at Culver City of the Defendant Metro-Goldwyn-Mayer. Do you want it detailed as to what the examination was?

Mr. Driscoll: Why, I don't believe that is any part of this record.

Mr. Pollak: Well, I believe it is. That is a question of law, but will you stipulate the fact—— 247

Mr. Driscoll: Subject to my objection that it constitutes no part whatever of this record, I will admit the fact that the Master and all of us have had a very pleasant tour all over the entire plant, but I object to that constituting part of this record.

Mr. Pollak: I think the fact that the inspection was made is a proper part of the record and is usual. For instance, when there is a view of the premises, I think some note of the fact is made in the record.

Special Master Auchincloss: Well, it will go in over the objection for what it is worth. 248

CHARLES CHIC, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name, Mr. Chic? A. Charles Chic.

Q. And what is your present position? A. Production Manager of the studio.

Q. Will you speak a little louder? A. Production Manager for the studio. 249

Q. Thank you. And what was your position in 1932? A. I was the Assistant Production Manager.

Q. And, Mr. Chic, will you tell us in your own way what the function is of the Production Manager and of his department, especially of the department? A. All right. You want to know the personnel?

Q. Well, no. First tell us in a general way, in your own way, what the department is and does. A. We have, first of all, the Production Manager, the Assistant Production Manager, about eight to ten unit managers, and a

250 number of Assistant Directors equivalent to the number of companies or units, either, that we have shooting. That ranges anywhere from 12 on up to 18 or 20, depending on the number of units in which a company is split up. Then there are script clerks for all the shooting companies. That is the direct personnel.

Q. Let me interrupt you for a moment to make this clear to a fellow that is as ignorant as I am, and to the Master, who has no technical acquaintance, I guess, with the movie business. A Production Manager is not, himself, a producer; am I right about that? A. That is right.

Q. If I may put one or two questions that will help make it clear to me, for each production there is a producer who
251 is the responsible head, subject to the General Manager and the Executive Vice-President? A. That is right.

Q. That is a producer who is the specific, responsible head of that production, is that right? A. That is right, yes, sir.

Q. And your department, the Production Manager's department, is distinct from the several organizations of the several producers, is that right? A. That is right.

Q. All right. Now, go ahead and tell us what your department does. You have told us pretty well who they were. A. Yes.

Q. Of course, you have an office force besides these officials? A. Yes. There is a large office force and a number
252 of sub-departments directly connected with it. If you want to know about that later, I will give it to you.

Q. You might tell me now, in round numbers, about how large your force was in 1932, if you know. A. I should say about 40.

Q. I see. Now, go ahead. I won't interrupt you again, I hope. A. That's all right.

Q. Tell me what, in substance, the function of the department is. A. The function of the Production Department is to coordinate and collect and have ready all of the specific things that it takes to make a picture, in addition

to budgeting and controlling the spending of the money during the making of the picture. For instance, at the start of a picture a script is broken down and estimated by the Assistant Directors and script clerks and unit managers. This is done after we have had meetings with the heads of the various departments who will be concerned in the making of the picture. The Art Department will make sketches and models based on the requirements of the script, present them to the Director and Producer with the cost, and when it is agreed that that is how much money should be spent in that department, for instance, then we have a closed budget for that Art Department. The same thing takes place in every department of the studio that has to do with the making of a picture. We next have a budget meeting in which the heads of all these departments are present, and any question which may come up at that time relative to what procedure should be taken throughout the picture, on the method of handling anything, is decided, and among this group of people there is the Director, and frequently the Producer. When a budget has been completed and the amount of money that we plan to spend on the picture is approved by the Producer and the executive above him, we then go immediately to work among the other departments under our departments, such as the location department, for instance, getting locations lined up, the casting department lining up the principal people, organized by a chart which we make especially to show what time we will need various people. All the preliminary work is done sometimes as far ahead as a week to the actual starting of the picture, and with a very large picture we might be preparing for as long ahead as three months or more.

253 254 255

After the actual start of a picture, then the Production Department has to function from then on to see that everything runs smoothly and is ready on time. Frequently you have to readjust schedules which have been first made out in order to accommodate the other shooting companies.

256 Q. Let me ask you this, Mr. Chic, to see if I have it right: The Producer will come to your department, will he not, and say, as an illustration, "I have to have eight Eskimo sleds." Will it be your function to see that he gets them? A. Well, it doesn't work out exactly like that. It is our function to figure out how many sleds are needed. We suggest the amount from experience as to what we would need in a case like that. It is only in cases of large expenditures, or an expenditure over and above what has been approved in the original budget, where we have to appeal to a Producer. We control that in our office.

257 Q. Am I right in this—maybe I am not—is it true that it is the Producer's function to determine what it is he wants in the production? A. Usually it works like this: We will have a general meeting with the Producer and Director.

Q. Yes. A. And, as I said, with the head of the Art Department, and at that time the Producer will lay out the manner in which he sees the thing done generally. For instance, he will say whether the sets should be made very elaborate, or whether, for the type of picture it is, he thinks we should confine ourselves and spend our money more in one spot than in another. A general feeling about the picture is about all that he expresses, and from then on we organize it and present it to him.

258 Q. Is this correct: You are sort of a general staff that makes available the resources of the studio to whatever production is being done? A. Yes, that is very well put.

Q. And that applies even on the budgeting side to the extent that you have mentioned? A. Yes.

Q. Will you explain just what a unit manager is, Mr. Chic? A. A unit manager's position in this studio is similar to a stage manager's position, I imagine, in the theatrical profession, except that it is a little more complex here. I, as the head of the department, hold him directly responsible for any delays which may occur in the making

of the picture, or any unnecessary expense. For instance, 259
here at the studio where we are so involved with a number of stars working in several pictures at the same time, he helps coordinate and arrange things so that we don't come into conflict.

Q. Do you have one unit manager for each picture? A. For our important pictures we have one unit manager. For the less important ones, one unit man can handle two or three.

Q. I see. Now, is this correct, that of central importance, from the standpoint of economy in production, it is necessary to have the various materials and also the various human agents that go into the picture ready as nearly as 260
possible at the same time? A. Yes. That is the function of the unit manager and Assistant Director, to so plan their work that there are no delays. We frequently, here in California, have to go to more expense in having alternate sets ready. For instance, during the rainy season we have prepared sometimes in three different ways with a call. We have to be prepared in case we are working on location and it is bad weather so that we have an alternative set to shoot inside. We also have to be prepared that we have an alternative set to shoot inside in case the wind is too strong on a location and we can't record sound. With almost any emergency we would still be able to work, and that involves quite a bit of careful preparation with 261
people, so that they will be available for any exigency.

Q. You even have charge of transportation, have you not? A. We have charge of the railroad and airplane transportation, but not the transportation to and from the locations.

Q. Who conducts that? A. That is done by the head of the transportation department.

Q. I see. A. Although the unit managers are supposed to control the unnecessary use of rolling stock.

Q. There is one detail that struck me as rather interest-

262 ing. Am I right in understanding this, Mr. Chic, that if you have a number of scenes in which the stars appear, you may shoot those scenes continuously without regard to the sequence of the picture itself? A. Well, that is, of course, the most economical way to do it, but here I think that we are more inclined to spend the money, if we find that we get a better picture by permitting a Director to work in continuity, so that the quality of the story progresses along in a smooth way. If the Director is compelled to shoot a scene that takes place in the first part of the story, and then a few days after take the climax of the story, it is often puzzling and often not so good to jump that way when you have left out all the mood and feeling which
263 builds up to that; and more now, I think, than ever we are trying, we spend a little more money and let them work in continuity where we can, although we lay it out the other way and present to a Producer the cost both ways. In cases where an actor is not available within those periods we are forced sometimes to make those jumps.

Q. You budget on both bases, is that right? A. Yes. We frequently make it out on both bases wherever it is seriously involved. If there are people who are not immediately demanded in another picture, then the question is not so serious, and we permit them to work in continuity. There are probably more things I could tell you, but I am
264 just not sure as to what you want.

Q. Well, I think it is very interesting. I think you can tell us anything which you think about that would help to explain this to persons who are not acquainted with the business. A. I have always been a little proud of our studio for this one thing: A lot of studios, for instance, if we have a location which takes place in Africa, it is so much easier to put up a lot of palm trees and brush, and a cage and put an animal behind it, and call it Africa, but I think M-G-M has a very enviable reputation—possibly that may not show up so well in our final costs—but we usually

try to send out to a location where the locale of the story 265
is supposed to be. For instance, we spent a long time in Alaska. We sent over to China for the stuff on the Good Earth. We sent to Morocco. We have been to the South Seas about ten times, and they are talking now about sending a company to India for Kim. That has been the policy of the studio, which I have been a little proud of.

Q. Mr. Chic, when you send such a unit away from Hollywood, your department has to provide its equipment, is that right? A. Yes. That, of course, is all budgeted just the same as a picture would be and, naturally, has to be done far in advance of the making of the picture. There are times when we send the actual people who are going to play 266
in the whole picture, as we did in Alaska, and the pictures that we sent to Africa on, but occasionally it will be that we will just shoot portions of it with maybe not as important a Director, or where it isn't necessary to send the entire crew. The cost of it is all approved, of course, before we do it.

Q. Just as a matter of mechanical explanation for the record, you have told us what a unit manager is. Will you tell us what an Assistant Director is? A. An Assistant Director's duty is to be as close to the Director as possible all the time during the shooting, and previous to shooting, to have lined up for him all of the people that are required for the scene, to see that they are in their correct ward- 267
robe, properly made up and on the set ready in time to work. It is also his function to direct background action and to remind or suggest to the Director anything which, in his opinion, the Director may have overlooked, like an extra touch for cutting, or that sort of thing.

Q. And the script clerk, what is he? A. The script clerk's duty is to keep a written record on the set during the shooting of the action as it was shot, showing any changes that were made in the script and act as a prompter in dialogue, and to keep the various reports that we require

268 as to the time consumed in shooting any particular scene, or anything that might be needed for reference so that we can go back and retake that same scene, if we have to.

Q. Mr. Chic, I was watching a shooting the other day. Is the script clerk the young man with an enormous tome spread out before him who seems to be jotting down notes all the time? A. Yes.

Q. And I suppose he makes a record so that if the leading actress seems to get a particularly effective entrance by coming in three and a half feet to the left of the peach tree, he just notes that in case they want to shoot a scene over again? A. Yes. I think a script clerk is probably
269 more important here than in most studios, because I think here we make more retakes than in other studios. It costs us more than a lot of studios who, without mentioning names, are quite willing to let their pictures go out without perfecting them as we do here. We take sometimes as much as a week or more on retakes on a picture just to try and perfect it and make it as good as it can be made. That requires a lot of detail to be kept track of, so that when we go back and pick up these little scenes they can tie in with what has been done previously.

Q. Some of these retakes are made after some preview, are they not? A. Yes, they are, although we do make retakes sometimes previous to a preview if, in the opinion
270 of the Producer, it is not as good as we can get it.

Q. I think, Mr. Chic, you have given us a very good account, unless you have something else you would like to add— A. I can't think of anything more. Probably we could talk for a long time, but I don't know exactly what kind of information you want.

Q. Mr. Driscoll, my friend over on the other side, may have some questions to put to you,

The Witness: Have you?

Cross examination by Mr. Driscoll: 271

Q. Mr. Chic, when did shooting start on Letty Lynton? A. Well, I didn't come prepared to tell you that. I know that we made the picture in 1932.

Mr. Driscoll: Well, are you willing to concede, Mr. Pollak, that Mr. Stromberg has testified in this case that shooting started on February 24, 1932, and finished on March 28, 1932?

Mr. Pollak: There is no dispute about it.

Mr. Driscoll: And the story, Letty Lynton, was purchased on December 4, 1931. That is the date of the contract, Exhibit D in the trial. The picture was released on April 28, 1932. 272

I have no further questions, Mr. Chic.

Re-direct examination by Mr. Pollak:

Q. Am I right in thinking that the substance of what you gave as the description of the functions of the Production Manager's department applied in 1932? A. Yes, you are. Knowing what period you were talking about, I didn't tell you all the various departments which since have been incorporated under my department. I now have control of four departments that I mentioned to you. 273

Mr. Pollak: I think you gave both a modest and an accurate account.

(Witness excused.)

FRED GABOURIE, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Fred Gabourie.

Q. What is your function? A. I am the Superintendent of Construction.

Q. Of the Construction Department of Metro-Goldwyn-Mayer? A. Yes, sir.

Q. Did you hold the same post in 1932? A. Yes, sir.

Special Master Auchincloss: What department is that?

Mr. Pollak: Superintendent of Construction, Mr. Master.

Q. And, Mr. Gabourie, we will go into the details later, but as a preliminary to the explanation, yours is a very large department just in sheer number to begin with, is it not? A. Yes, sir.

Q. The numbers, I suppose, change from time to time, depending upon the amount of construction there is? A. On the amount of production, yes, sir.

Q. What is the largest number of men that you may have in the Construction Department at a given time? A. Well, I have had as high as 4,000.

Q. In the Construction Department? A. Well, in all the departments I have that come under me. That is, we have separate departments.

Q. I will come to that in just a moment. Roughly, what number would be an average number, say, in 1932? A. Oh, I would say between 1800 and 2200, maybe 1600 or 2200. We have peaks.

Q. Depending on the amount of production that you have? A. Yes, sir.

Q. Now, will you describe, in general terms, the divisions of your department, Mr. Gabourie? A. Well, we have what we call the carpenter department.

Q. You might tell us as to each department in a general way what it does, or if you would prefer to indicate it in some other way, it is entirely up to you. Well, let's see, the carpenter would come first. He builds the sets. The painter paints them. The grips department puts them in and takes them down. The labor department cleans up after them and hauls stuff around the lot. There are truck drivers, tractor drivers. We have what they call a prop shop, men who make special effects. We have a nursery, nursery men who put up trees, build trees, handle foliage. Then there is the plumbing department, plaster shop, modelers and casters, and they all tie in together in building a set. On some sets we don't have any plaster. In other sets we have a terrific lot of plaster. The departments are all kept together for the reason that we have to have them when we do have plastering or painting. So the carpenters and painters have to work all the time, naturally. 277 278

Q. And how many shifts do your men work? A. Four shifts.

Q. Four shifts? A. Six-hour shifts.

Q. In other words, the Construction Department is at work all day? A. Twenty-four hours.

Q. And every day? A. Every day but Sunday, but that comes in spells occasionally. We stop at 12:00 o'clock Saturday night, and start at 12:00 o'clock Sunday night.

Q. But for six days in the week you function 52 weeks in the year? A. Yes, sir. 279

Q. Now, I take it these various subdivisions have their own sub-department heads, have they not? A. Well, they call them Assistant Superintendents, that is, they all work directly under me through my office, but we have a separate man for each one of those divisions.

Q. Are there Foremen under each of these Assistant Superintendents? A. Yes, sir.

Q. In charge of specific jobs? A. Yes, sir.

Q. And is this right, in addition to the departments you

280 have mentioned, just to get the thing complete, there is a miniature department? A. Well, it is called prop shop and miniatures. We have a Foreman for the miniatures and a Foreman for the prop shop.

Q. What do the miniatures mean? A. Miniatures are buildings that are built under size, probably quarter scale, on a miniature stage. They photograph it first and then tie it into a set afterwards. Buildings are cut, are built 1/6th the size of a regular building, or whatever scale is necessary.

Q. You mean your miniatures are as large as that? A. Oh, yes, quarter size.

281 Q. Then you build them ultimately— A. We can build them any size that is necessary for the particular shot.

Q. But when you finally take your shot, if you want to represent an eight-foot wall, what you have is an eight-foot wall, isn't that so? A. Well, we can have them quarter size. It doesn't have to be a half, an eighth or two-thirds.

Q. I understand, but don't you commonly finally shoot from actual sizes? A. On the majority, 90 per cent of our stock is done full size.

Q. Well, maybe I misunderstood you. It is customary somewhere in the course of construction, is it not, to build a miniature of what you are going to have?

282 Mr. Driscoll: Aren't those called models?

The Witness: Models. We build a model of everything we have.

By Mr. Pollak:

Q. Oh, I'm sorry. A model is different? A. A model is much different.

Q. Explain what the miniature department does. A. Well, the miniature department will reproduce a mountain, we will say for argument's sake, in Africa, small size, one-

eighth, one-sixteenth, whatever size we wish to shoot at it. 283
We build it up in detail and then photograph it.

Q. I see. A. It can be anything. We make a railroad wreck out of a miniature.

Q. You adjust the sizes by photographic devices, or what-not? A. As far as we wish to get away from it. If we want to stay away a mile, we can make the miniature that much smaller.

Q. I see. Tell us about your gardening department. A. Well, on our gardening department that is kind of hard to tell. We spent last year $52,000.00 for material alone in it, that is, for trees, brush, flowers, cut flowers, plants, everything you can possibly think of that grows, we use. 284

Q. With nursery men, of course, in charge? A. Yes.

Q. And is this true, as a general statement, that in each one of these departments you have highly skilled mechanics trained in their particular occupation of plastering, say, or carpentering? A. Yes.

Q. And some scientific technicians, and many of them? A. We have many of them.

Q. Many of them. What about glass? Have you charge of that glass blowing? A. Yes.

Q. Then the arsenal department. That sounds a little striking to me. Will you tell us something about that? A. Well, we have three men that work in that, who are really good powder men, professional men. They keep up 285
the machine guns, and rifles and revolvers and all types of guns. That is kept under lock and key. We have to have a state license to have them, so we have to have licensed men to handle them. It requires two to three men all the time. Then, of course, we don't know how many men we use every day. We just finished with a set using 31 men working on powder and guns the day before yesterday.

Mr. Schwartz: That was out at Chatsworth?

The Witness: Out on location.

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86 By Mr. Poilak:

Q. Well, whatever is physically required to be erected indoors or outdoors for any set on the studio or on location, then, I take it, is the function of your young army of men to create? A. That is right, yes, sir.

Q. Your department, I think, has the distinction of having an accounting force of its own, isn't that so? A. Well, yes, sir. We have to keep track of the figures. We get cooperation through the accounting office up front, and we carry our own figures.

Q. That is, you have time cards, I suppose? A. Yes, sir.

87 Q. And make out payrolls? A. No, we don't make out any payrolls, only the time cards, that is all.

Q. I see. By the way, do you supply the truckage for the studio? A. Just for the immediate studio, nothing for outside. I have charge of the trucks that haul everything around the lot, but my trucks do not go outside.

Q. I see. Now, to get the physical equipment straight, you have, of course, a carpenter shop? A. Yes.

Q. And a prop shop? A. They are both combined, but called separate departments.

Q. That is, you actually make the props, if they are to be made? A. Yes, sir.

Q. You have a building for the paint department? A.

88 Yes, sir.

Q. And for the plaster shop? A. Yes, sir.

Q. And for the plumbing department? A. Yes, sir.

Q. That is a separate building for these three that I have mentioned? A. Yes, sir.

Q. And a separate building for gardening and landscaping? A. Yes, sir.

Q. Do you employ landscape architects? A. No.

Q. You do your own landscaping? A. We do our own landscaping.

Q. With the assistance, I suppose, of the Art Depart-

ment? A. The Art Department draws the plan. They give 289
us some idea of what they want, and our men carry it through.

Q. Just as a matter of explanation, the Art Department here includes architecture and landscape architecture? A. That is correct.

Q. How many buildings do you use for storage? A. Well, we have three complete buildings for scenery storage plus, I would say, 10 acres on another lot, some 1,000 feet of storage on this lot that we have, it is uncovered.

Q. You have tractors and trucks? A. Yes.

Q. And boom trucks? A. Boom trucks.

Q. Which are what? A. Well, they are a truck that 290
carries a 22-foot stick on it that has power and has a winch on it. We can pick things up, up to five tons. It is just like a regular boom, but it is stationary.

Q. Well, but this stick, you mean what we colloquially call a crane or something? A. That is right.

Q. You have a mill, I believe? A. Yes, sir.

Q. What sort of a mill? A. Well, we re-saw lots of our own material. We use stickers, planers, rip-saws, and so on. That is in one mill. Then, of course, in our shop we have band-saws, jig-saws, a complete set of machinery.

Q. It sounds pretty complete to me. You have a lumber yard? A. Yes, sir.

Q. And in what sort of units do you buy your lumber? 291
A. Well, I can't really tell you how much they buy at a time. I understand last year they had something like, I don't know, 15,000,000 or 20,000,000 feet of lumber in here.

Q. Besides putting up the sets, do you take them down? A. Yes, sir.

Q. That is, you strike the sets, as the phrase goes? A. Yes.

Q. And do you store such of the "stricken scenery," such of the sets as you keep? A. Yes, sir.

Q. And the props are under your control? A. No. Props are under Mr. Willis. That is what we call set dressing.

292 Q. I mean even the physical storage of them is not with you? A. No, it is another department.

Q. Well, I suppose when some entirely new kind of set is needed, you have to go ahead and construct it from plans given by the Art Department? A. From plans given by the Art Department, yes, sir.

Q. Is this a substantially correct statement—if it isn't, you make it correct—that in the work of construction in some process or other, you use practically every known craft? A. Yes, I believe we do.

Q. Now, are the things that you have told us about, were they, in substance, true in 1932, as well as true today?

293 A. Yes, sir.

Q. The general process was the same? A. Yes, sir.

Q. And the general organization was the same? A. Yes, sir.

Q. And your function in production was the same then as it is now? A. Yes, sir.

Mr. Pollak: Any cross examination, Mr. Driscoll?

Mr. Driscoll: No.

(Witness excused.)

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291 HEARING ON MARCH 5, 1937.

NATHALIE BUCKNALL, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Mrs. Bucknall, what is your position with Metro-Goldwyn-Mayer? A. I am the head of the Research Department.

Q. And did you hold the same position in 1932? A. Yes.

Q. In order to get some of these things on the record I am going to ask you a little about your personal biography, Mrs. Bucknall; you are a Russian by birth, is that right? A. Yes. 295

Q. And I believe you fought in the Battalion of Death in the Russian Civil War? A. Yes.

Q. And, with many other Russians of your class, you emigrated after the Bolsheviki came into power, is that right? A. Yes, I followed my husband to America.

Q. And you speak how many languages? Don't be too modest about the thing. A. I speak fluently four, Russian, English, German and French, and naturally out of the four I understand and read approximately 12.

Q. And it is sufficient for our purposes that included in those 12, besides the four you have mentioned, are Spanish and Italian? A. Yes. 296

Q. With the command of the Slavik languages and English, French and German, and the two principal romance languages other than French, you can make yourself acquainted, I suppose, with pretty much all the literature on a given subject that is published in the wide world, isn't that true? A. Definitely so.

Q. Now, would you tell us, in a general way, explaining it to persons like me who don't know anything about the movie business and are attracted by it, what the function of the Research Department in the Metro-Goldwyn-Mayer organization is? A. To supply information on every picture made by M-G-M to every department on the lot, who require first-hand information. 297

Q. And it is your function, literally, to be a local encyclopedia for a given production, is that not correct? A. Yes.

Q. And by you, I mean the function of yourself and your department? A. Yes, my department included, naturally.

Q. How many assistants, approximately, did you have in 1932, Mrs. Bucknall? A. Seven, I think.

298. Q. Now, what resources and facilities have you for the procuring and supplying of information? A. I have a large library, magazines which I get from all over the world which are clipped and placed in the files, various documents collected from all over the world and, naturally, the resources of the various libraries in the town, all over the United States, and of course from it we can get material from abroad on given notice.

Q. How many books have you in your own library, roughly? A. Roughly, 7,000.

Q. That is exclusive of clippings and magazines? A. Entirely.

299 Q. Entirely. Now, I suppose a particularly important feature of your work is the insuring of the accuracy of details of place and circumstance and costume, isn't that correct? A. Exactly so.

Q. And Mr. Schwartz reminds me that customs may be even more difficult than costumes? A. Yes.

Q. I am using all these terms very inclusively. Architecture, of course, would be a feature calling for constant checking, is that correct? A. Yes, definitely.

Q. The precision of scientific demonstrations of every kind would require checking, would it not? A. Yes.

Q. For example, the operation of a train or a boat, is that correct? A. Yes, definitely.

300 Q. Now, I suppose you would have to find out what the ordinary mode of life of a given class of a particular community would be, roughly, when they dine, for instance? A. Very much so.

Q. How they dine? A. Yes.

Q. What kind of food and drink would be served at a dinner? A. Yes.

Q. And to take one illustration among thousands, I suppose you would want to know how a person of a given rank is addressed? A. Yes.

Q. Whether you call him Mr. Secretary, or Secretary, or plain Mister, or what not, is that right? A. Yes.

Q. And you would want to know essentially the same things which may be much harder to find out if the locale was, say, Guatemala, or Czechoslovakia? A. Yes. 301

Q. This whole system was in operation in 1932? A. Yes, and previous to that, since 1927, when I came to the studio.

Q. You created the department, is that not right, Mrs. Bucknall? A. I enlarged the department which was definitely in the embryonic state.

Q. I see. Is this a correct statement, that essentially the Research Department is a distinctive feature of this particular studio, Mrs. Bucknall? Perhaps I will withdraw the question. Have the other studios similar Research Departments? A. Yes, but not operating on the same line. 302

Q. Not operating on the same line? A. No.

Q. Mrs. Bucknall, you have a system of recording, have you not, what inquiries were addressed to your department, and what researches your department made, in connection with each picture? A. Yes, sir.

Q. And that system has been in effect, if I am right, since 1929? A. Yes.

Q. Now, have you actually available the records showing the researches among which your department was engaged in connection with the picture Letty Lynton? A. Yes.

Q. Would you take the list of those researches and read them off to the Master? A. Mr. Tolubof, for Letty Lynton, books on Portugal, suggest Portugese names, suggest Portugese surnames, books on Corsica, suggest name for Turkish gentleman. I have to explain here that at first it wasn't decided which locale was to be used for Letty Lynton. I will take something else at random. 303

Mr. Driscoll: What was the date of that last one, Mrs. Bucknall?

The Witness: January 21, 1932. January 26th, same year, Mr. Tolubof——

By Mr. Pollak:

Q. Miss Tuchok was one of the writers? A. Miss Tuchok was one of the writers. Check all South American files for pictures of Montevideo and Buenos Aires. Check National Geographic for same, Stoddard's Lectures for same. Check Burton Holmes Lectures for same. January 26th, a general list of requests for production Letty Lynton. Montevideo street scenes, taxicab, Montevideo license plate for same, chauffeur's uniform for same, exterior-interior tango barn, cigarette girls, waiters, types for same, soldiers Montevideo, horse cab Montevideo.

Q. May I interrupt for just a moment. When it says, for example, chauffeur Montevideo, does it mean what kind of a costume a taxicab chauffeur would wear? A. Exactly.

Q. And a license plate is what that would look like? A. For a taxicab, or for any car.

Q. Excuse me. Go ahead. A. Interior, hotel lobby Montevideo, bedroom scene, elevator in lobby, policeman, Montevideo, which steamships call from Cape Town to Uruguay. Is it a through line to New York? What lines ply between Uruguay or Buenos Aires and New York; better class liners, modern German liners, interiors of same, deck scenes of same, staterooms, same, dining rooms, uniforms of crew, officers, sample of ship's newspaper, radiogram received on board, stewards, all uniforms, determine which line to use. Those are all requests on January 26th. February 3rd, Mr. Harnell, one of the draftsmen, pictures of Mexican decoration, books on Mexican design, file, Mexican architecture, file, arts design. By "file" it means all material available in architecture in our files. February 9th, Mr. Gibbons——

Q. Mr. Gibbons is the head of the Art Department? A. Yes, sir, and Mr. Tolubof is the Art Director of production; pictures of houses at Lake Saranac, New York, for types of architecture. Pictures of Adirondack Mountain lodges. Mr. Gibbons, the same date, and Mr. Tolubof, ad-

ditional for all pictures of Yosemite Lodge, and all pic- 307
tures of Mt. Baker Lodge—Production Letty Lynton, re-
quest on February 9th, liquor slip as used on board ship
to be signed. Radiogram as used on board ship. Christ-
mas Eve celebration on ship. New York skyline. Pictures
South American line docks. New York also. U. S. Cus-
toms, New York. U. S. Customs Officer's uniform. Check
whether for 736 Park Avenue, telephone exchange of Mur-
ray Hill would be okay. New York subway interiors.
Turnstile from hotel in subway. How long from Monte-
video to New York by boat? How long from Montevideo to
Havana, and then the detailed replies to same. Interior
of District Attorney's office, New York. Picture, Lake
Saranac, New York. Pictures mountain lodges generally. 308
Pictures of Mt. Baker-Yosemite Lodges. In this case, the
request of Mr. Gibbons and Mr. Tolubof above previously
recorded has been entered for the same material that had
to be sent, and additional material had to be sent to the
Property Department and the draftsmen who wanted the
same information and data as sent to Mr. Gibbons and
Mr. Tolubof.

Mr. Vasian on February 12th—Mr. Vasian was a drafts-
man in those days—pictures, U. S. Customs on docks in
New York. New York docks showing passport and in-
come tax inspection desks. Mr. Thompson—I think he
was a draftsman—all the files on Mexican pottery, Mexi- 309
can architecture and art pottery books on Mexico. Febru-
ary 13th, Mr. Brown, the Director, and Mr. Tolubof, Art
Director, two hour conference on story. That means I
had to be present and give information on any question
that they might ask in connection with this particular
picture. Mr. Brown, "How to pronounce Montevideo." Feb-
ruary 13th, same day, Mr. Brown, pictures Uruguay and
Argentina. Types, pictures of soldiers and officers, same
two countries. What type architure would tango barn be?
Would windows have grilles? Do they have Eucalyptus

trees there? Would they have a Bel Air or Santa Barbara stretch of beach at Montevideo? Are hotels on waterfront of Montevideo? Do ships dock in town of Montevideo? What type tenders? How do boats dock at Buenos Aires? Are there any horse-drawn carriages in Montevideo? What are surburbs of Montevideo? Types of South American Indians wearing ponchos; also gauchos. What types dinner clothes would gentlemen wear there? Do women use fans a lot? What type of hair do they wear? What type of fans in hotel bedrooms? What type fans in hallways and lobbies? What type furniture? What type floors? Do they use carpets? When do Winter fogs start? How long was steamer from Buenos Aires to Montevideo? Do they use heavy draperies in houses? What is value of Uruguayan peso? Mr. Havens, same date, February 13th—

By Mr. Pollak:

Q. Who is Mr. Havens? A. He was a draftsman, I think, in those days. Deck scenes on Steamship Bremen. File, transportation, steamships, Atlantic. Enclosed views of doors leading to stateroom and lounges from decks, Steamship Bremen. In this case a ship was used which does not go to South America to give suggestions of the type of architecture they may want to use for deck scenes, cabins, and so forth. February 15th, Mr. McAfee, he is an Art Director. In those days he was a draftsman. Pictures, interiors Ritz Hotel, New York. The prop man on the same production wanted a Braille book for the blind. They had an idea that they might want to use that in a picture. Mr. McAfee, again, same day, pictures of interiors Ritz Carlton Hotel in Boston. File of U. S. architectural hotels and file New York architecture, hotels. February 19th, Mr. Fred Hersh, International Newsreel photograph of boat races, Poughkeepsie. February 20th, Mr. Dorian. He was Assistant Director for picture. Uni-

form of captain of Bremen, or similar ship. Uniform of 313
first, second and third officer, chief engineer, purser, radio operator, chief steward, dining room steward, room steward, deck steward, bartender, waiters in bar, waiters in dining room, first mate, second mate, tango barn, Montevideo types tango barn, bus boys.

By Mr. Pollak:

Q. Now, Mrs. Bucknall, that is almost all, and we are very much obliged. I want to ask this: It has been suggested in this case that the amount of research, while of course it varies from picture to picture, would necessarily be greater in connection with a period picture than 314
with a picture largely laid, for instance, in South America but modern. Is that true, that the period pictures necessarily call for more research? A. Definitely.

Q. They call for more research than, say, a modern picture in a foreign location? A. Not always. Sometimes a modern picture laid in a foreign locale requires quite as much work as a historical production, because so very little is written on the customs, modern customs, of foreign peoples and their costumes in foreign locales, whilst on the historical pictures and period pictures we always can find confirmation and information which is printed.

Q. And, Mrs. Bucknall, is it the fact that Letty Lynton 315
required at least the average amount of research? A. I would say more than the average for a modern picture.

Q. And, roughly, I suppose, as nearly as one can determine, is it fair to say that it required at least the average research, taking all types of pictures, feature pictures that you produce? A. Would you mind repeating the question?

Q. Yes. I didn't put it very well. In fact, I will try to make it simpler. Comparing Letty Lynton with your other feature pictures— A. (Interrupting.) Yes.

Q. (Continuing.) —whether modern or period, would

316 Letty Lynton average out with the lot in respect to the amount of research required? Would it be as much as the average, or a little more, or a little less? A. It would be more than the average.

Q. More than the average? A. Yes.

Q. Mrs. Bucknall, you are familiar with the clipping libraries that the great newspapers have, are you not, I mean generally? A. Yes. We use them quite a great deal in our work.

Q. Would you say, Mrs. Bucknall, that your own clipping library compared favorably with the clipping libraries of the great metropolitan newspapers? A. Yes, definitely 317 I had a value placed on same approximately four or five years ago by a member of one of the New York newspapers who was familiar with the cost of such clippings, of the value of such clippings, and he informed me that mine was then worth at least $500,000.00. Of course, it has grown since then in value very much.

Q. Unless there is something particular you want to add, Mrs. Bucknall, I think that is all. A. May I just say that the blue marks there (indicating) were against a complete request, I mean as asked by one person, but under those blue markers, under the question by the single person, there are, in some cases, as many as 15 to 20 listed. We usually mark them as under one person's 318 request, as naturally we should do.

Q. Mrs. Bucknall, Mr. Schwartz correctly reminds me that I haven't got on the record an answer to a question. You have given us the answer by just hearing it. When these requests were made you complied with them, did you not? A. Naturally.

Mr. Pollak: Mr. Cohen, have you got the figures as to the number of these requests?

Mr. Cohen: I counted 75 main requests with many subdivisions under many of the main requests. Some

of the requests have as many as 10 and 12 subdivi- 319
sions.

The Witness: Yes.

Cross examination by Mr. Driscoll:

Q. You are familiar with the picture Letty Lynton, of course? A. As much as I can remember it now. We have an awful lot of pictures.

Q. Yes. Do you recall that the action opened in this tango barn in Montevideo, that the scene shifted then to the street, the automobile that conveyed the stars, or conveyed Miss Crawford and Asther, from the tango barn to the hotel, a few scenes in the hotel, and then it goes to 320
the boat in the harbor? A. I remember it vaguely, yes.

Q. And from that time on there is no more action in Montevideo. A. Yes.

Q. Everything after that in the picture are scenes on the boat, in New York and in the Adirondacks. A. As I remember it, yes.

Q. That is true, isn't it? A. Yes.

Q. So that the only part of that picture that was in a foreign country was the first few shots; is that true, or isn't it? A. Only according to what ~~you~~ saw in the picture.

Q. Yes. A. But not according to what we had to pre- 321
pare in it.

Q. No. I am just judging the picture from what I saw, what was exhibited to the public, of course. I had no opportunity to see what was prepared. I am talking about the finished picture, and that is the picture that is involved in this law suit. In the finished picture only the first few shots were in Montevideo, and after that the entire picture was either on the steamship, in New York City or at this lodge in the Adirondacks. A. I must repeat again——

Q. Well, isn't that true? A. That is what you see, but——

Q. Isn't that true, Mrs. Bucknall? Am I right, or am I wrong? A. You are right when you see the picture, yes.

Re-direct examination by Mr. Pollak:

Q. Mrs. Bucknall, I will just ask you one question. I take it you are generally familiar with the arts, and it is unnecessary to ask, aren't you? A. With what?

Q. With the arts. A. Yes; naturally.

Q. With painting, writing and the other arts? A. Yes.

Q. I take it that you would give as your judgment, would you not, that in any art the fundamental process is the selection of what to include and what to exclude; that is true, isn't it? A. Yes.

Q. Is it true in connection with a picture that a vast amount of research goes into scenes that are considered at one time and then rejected partly after research is made?

Mr. Driscoll: We will concede that that is true.

The Witness: Yes, definitely.

Mr. Driscoll: It has to be true.

By Mr. Pollak:

Q. The scenes may be rejected partly because research shows that for some reason or another a particular incident or locale is not available, is that right? A. Oh, yes, or sometimes they may be photographed and eliminated from the picture after the picture is cut.

Mr. Pollak: That is all, Mrs. Bucknall. Thank you very much.

(Witness excused.)

CEDRIC GIBBONS, having been first duly sworn, took the stand and testified as follows: 325

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Cedric Gibbons.

Q. Mr. Gibbons, what is your position with the Defendant Metro-Goldwyn-Mayer? A. Supervising Arts Director.

Mr. Driscoll: What was that?

(The answer was read by the Reporter.)

By Mr. Pollak:

Q. Did you hold the same position in 1932? A. Yes. 326

Q. Go right ahead. A. Since 1918.

Q. Since 1918? A. No, on this lot since 1918, but from the beginning of the amalgamation of M-G-M, when they started.

Q. I see. What was your training in the arts, Mr. Gibbons? A. General training in architecture and painting.

Q. Now, what are the functions of the Art Department? A. To provide a background for all the scenes that are shot in the picture, whether it is an exterior or an interior.

Q. By a background, you mean the design of the scenes? A. Yes.

Q. That is entirely in your charge? A. Yes.

Q. How large, roughly, was the department in 1932? 327
A. The immediate department, you mean, the drafting room and the Art Department generally, or the departments that the Art Department controls?

Q. Well, the immediate department. A. Oh, I would say about 40 draftsmen, about 10 unit Art Directors, two assistants.

Q. A unit Art Director is an Art Director assigned to a specific production; is that correct? A. Yes.

Q. Now, what were the departments subject to the control of the Art Department in 1932? A. The miniature

328 department, the process department, the Newcombe department, construction department, plaster department, prop department, set dressing department, and so forth.

Q. Well, do you mind explaining the "so forth"? A. Well, when I say miniature department I mean there are many things that have to be done in miniature that sometimes require work from another department which is not really under the control of, but during that time it is under the control of the Art Department, because the Art Department is asking them to do something the way the Art Department wants it done.

Q. The miniature department, in a general way, has been
329 explained to us. It is the department that takes pictures from miniatures, is that right? A. Yes. They do a scene in miniature which would be too expensive to do in full size.

Q. Now, taking the departments that were subordinate to the Art Department in 1932 as you have outlined them, how large would the Art Department be on that basis? A. You mean in number of people?

Q. Yes, in round figures. A. I would say around 800 or 900.

Q. Can you give us, in general terms, a statement of the types of artists that are included in the Art Department? A. Well, painting, sculpture, wood-carving, architecture,
330 photography, if that is called an art, I don't know. That is all.

Q. The dressing of sets is under the control of the Art Department, is it? A. Yes.

Q. By the dressing, I understand you to mean the garnishing of the sets after there has been physical construction of them, is that right? A. Yes. That may mean anything. That may mean planting trees, or moving rocks around, or something like that.

Q. By the way, in your statement of the arts you mentioned architecture in general terms. That would include landscape architecture? A. Yes.

Q. And you have men experienced in landscape architecture specifically? A. Yes. 331

Q. And architecture would also include, I suppose, interior decoration? A. Oh, yes.

Q. And you have experts in that field? A. Yes.

Q. And, in a general way, all these answers, I take it, apply to 1932 as well as to now? A. Yes.

Q. Now, do you also design the costumes in your department? A. No.

Q. You do not? A. No.

Q. That would be in which department, wardrobe? A. Wardrobe Department.

Q. Do you happen to know how many sets were actually used in the picture Letty Lynton? A. No, I don't know, but I imagine they averaged, a picture of that sort is somewheres around 45. 332

Q. Well, my information is that it was 32. A. That is probably it.

Q. Subject to correction, may we state it that way? A. Well, there is a difference in figuring those things. You can figure a set as each individual room, but where you have a hotel, maybe there is a bedroom and a bathroom and a corridor and sitting room, and several things like that. They can be listed as separate sets, or grouped if we put them together as one set. I will say, for instance, Lynton's house in the Adirondacks was the interior of that, and 333 then there was the exterior. That was called one set.

Q. I see. A. We put them together.

Mr. Driscoll: And the room upstairs in the same house.

The Witness: Yes. That was not together. The hallway and the exterior downstairs where the sleigh came up, or the carriage or motor car, I have forgotten.

Mr. Driscoll: The sleigh, and the scene at the fireplace, and the scene upstairs.

334 The Witness: So the one upstairs would be one set, and the two sets downstairs would be called one set.

By Mr. Pollak:

Q. Of course, your department was continuously and actively engaged in the production of Letty Lynton, was it not? A. Yes.

Mr. Pollak: That is all for me, Mr. Gibbons. Have you any questions?

Mr. Driscoll: No questions, Mr. Gibbons.

335 (Witness excused.)

NAT W. FINSTON, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your name? A. Nat W. Finston.

Q. Mr. Finston, what is your position with Metro-Goldwyn-Mayer? A. Director of the Department of Music.

Q. Did you hold that position in 1932? A. Not in this
336 studio. I did, but not in this studio.

Q. But not with M-G-M? A. No.

Q. Were you familiar with the organization of the Music Department of M-G-M in 1932? A. Yes.

Q. Mr. Finston, tell us what the functions of the Music Department in a motion picture studio are, in your own way? A. We select music, we write it, we orchestrate, we compose, we paraphrase, we clear.

Q. What does clear mean? A. Securing permission or legal rights based on certain compensation, to be permitted to use certain compositions that would be restricted other-

wise. We have orchestras, conductors, song writers, lyric 337
writers, all actively engaged on the music of every production we do.

Q. Roughly, how large is the organization now, the Music Department? A. When the orchestras come in we might have over 100 people in a week. Without the orchestras you will have a residence or stock music department of about 60 to 70 people constantly.

Q. And what types of musicians would be included in your regular resident department? A. Song writers, lyric writers, conductors, scorers, orchestrators, adapters, all musical service outside of the actual orchestral performances. 338

Q. The orchestral performances would be under your jurisdiction when you are having them? A. Yes, sir.

Q. And, of course, the studio makes use of orchestral performances when necessary? A. Constantly.

Q. What kind of performing musicians are included in the Music Department when the orchestras function, for instance? A. All symphonic, operatic, standard works are performed during those sessions.

Q. Well, it is certainly true, is it not, that the studio includes in its staff practically every type of musician or musical performer, is that not so? A. It has to be.

Q. It has to be. The whole field of musical art is included in the studio's operation? A. It has to be. 339

Q. And this was true essentially in 1932? A. Definitely.

Q. You have song writers of your own? A. Yes.

Q. Regularly employed? A. Yes.

Q. How about dance directors? A. Yes, we have about six of them now.

Q. And were there dance directors, if you know, in 1932? A. Oh, yes.

Q. Here at M-G-M? A. Yes.

Q. Do you conduct any form of music research? A. Constantly.

340 Q. Would you explain that in general terms? A. Well, in going over a script or looking at a picture for the first time it is necessary to get your geography, your histrionics, everything in connection with music.

Q. That somewhat arrests me. How do you have to get your geography in connection with music? A. Study the period, the year, you study the place, the locale in your picture. It makes a difference then whether your picture musically is in Ireland or Jerusalem or New York City.

Q. In other words, the incidental music would have to be consistent with the time and place? A. Yes, sir.

Q. Take an extreme case. You couldn't throw in a song
341 that had been written 10 years after the date of the picture? A. No.

Q. Or a song that just didn't happen to be sung in South America, let us say? A. Yes.

Q. Have you a building of your own for your department? A. Yes.

Q. By the way, you have the selection, I suppose, of the subordinates under you, don't you? A. Yes.

Q. And the general administrative work of a pretty large department, although it is an artistic department? A. Yes.

Q. I think the general picture is clear enough, and I have nothing more, unless you want to add some further explanation of your department. A. No.

342 Q. I just want to get this clear. Essentially, from your knowledge, what you have said of the present Music Department of the defendant M-G-M was true in 1932, wasn't it? A. Oh, yes. No picture can be musicalized without a department, without a set-up, they just can't be.

Q. Without an inclusive, specialized organization created for musicalizing in connection with motion pictures, is that right? A. Yes.

Mr. Pollak: Any cross examination, Mr. Driscoll?

Mr. Driscoll: Not a bit.

(Witness excused.)

LAWRENCE KEETHE, having been first duly sworn, took the stand and testified as follows: 343

Direct examination by Mr. Polkak:

Q. Will you state your name? A. Lawrence Keethe.

Q. Mr. Keethe, what is your present occupation? A. In charge of the Wardrobe Department.

Q. Of Metro-Goldwyn-Mayer? A. Yes, sir.

Q. Were you connected with that department in 1932? A. Yes, sir.

Q. Were you then the head of it? A. I was the assistant.

Q. I see. And who was then the head? A. Mr. Joe Rapf, R-a-p-f. 344

Q. Who, I understand, has been ill of late? A. Yes.

Q. At all events you are thoroughly familiar with it, of course, in 1932? A. Yes, sir.

Q. Will you tell us in your own way, Mr. Keethe, what the functions of the Wardrobe Department are? A. Well, we get a script. Then we break it down. By breaking it down we read through it and see how many changes of wardrobe are required for the artists. After we make the break-down, as we call it, we turn it over to our designers. Then, in turn, the designer also reads the script and then makes his sketches from the break-down.

Q. The designer would be a member of your department? A. Yes, sir. 345

Q. I see. The designer in this particular picture, I believe, Letty Lynton, was a Mr. Adrian, is that right? A. Yes, sir.

Q. And he is a very distinguished designer, isn't he? A. Very much.

Q. Go ahead. I am sorry to have interrupted you. A. So then he makes the sketches and gets in touch with the artists, who was Miss Crawford in this case, then also gets in touch with the producer and the director. They all get together to decide on the certain type of gown. Then he

346 puts it into work, and we make what they call a muslin pattern first.

Q. A what? A. A muslin pattern.

Q. I beg your pardon. A. Then he tries it on the artiste, and if he doesn't like that pattern, he makes another one, in other words, to get the type of gown which would fit her the most suitably. Then the gown, after the pattern is okayed, is put into work. Then we cut into the material.

Q. In other words, your department designs all the costumes? A. Yes, sir.

Q. A great many costumes you actually have in stock, have you not? A. We do, yes.

347 Q. Are they under the supervision of your department? A. Yes, sir.

Q. And I suppose a problem at once is whether a given costume is available for a picture? A. That is right.

Q. I suppose, self-evidently, that a costume for a leading character always has to be made to fit that person? A. That is right.

Q. How large is your department, how large was it in 1932, roughly? A. Well, I would say around 300.

Q. That includes designers? A. Designers, seamstresses and wardrobe help, and issue clerks, and so forth.

Q. Of course, the mechanical execution of the designs, once they have been drawn by the designers, would go to

348 a mass of assistants? A. That is right.

Q. Who would be the principal officials of the Wardrobe Department, what would you call them? A. Well——

Q. You were the assistant under the head. What others were there? A. The assistants that would work with Adrian in connection with the construction of the gowns, you mean?

Q. Well, taking the organization of your department, how many subdivisions were there, or were there any, I don't know. I mean, are there sub-department heads? A. Well, we just have the assistant to me, you know.

Q. I see. A. That would be all. 349

Q. How many designers would you have? A. Well, at that time we had, I believe, two designers, Adrian and I believe Dolly Tree was with us then.

Q. With assistants of their own? A. With assistants of their own, yes.

Q. Roughly, how large is your stock of wardrobe? A. You mean in valuation, or garments that we have there?

Q. Well, say the garments that you have there. A. That would run up into the thousands of garments.

Q. And it would have run up that high in 1932, also? A. Oh, yes.

Q. By the way, you have been telling us about the gowns 350
that you design for female characters, and I suppose they naturally hold the championship. If it is a question of the costumes of the men, you have to look after that too? A. Oh, yes.

Q. Including the costumes that obviously have to be specially designed of historical character or characters remote in place and costumes not here used, and so forth? A. Yes, sir.

Q. That whole field? A. Yes, sir.

Q. Have you anything that you feel you would like to add, or let me ask, is the repair of costumes in your charge? A. I don't quite get you.

Q. The repair of costumes. A. Oh, yes, anything pertain- 351
ing to gowns, costumes, or anything.

Q. That is, if any costumes are used? A. Yes, sir.

Q. And naturally, if more or less worn out, they have to be repaired for a second use, if there is such a use? A. That is right, yes, sir.

Q. Including a second usg that may come in some quite different production, is that right? A. Yes, sir.

Q. You salvage what costumes you can salvage? A. That is right.

Q. That is all in your department? A. Yes, sir.

352 Q. Does the Art Department instruct you as to what costumes they want? A. No. The only time that we come in contact with the Art Department is in the case of a set that might be, we will say, painted dark, and we will kind of get together and we will put a light gown in there in order to balance it up. That is the only time we get in touch with the Art Department.

Q. It is the producer who lets you know what he wants, is that it? A. Well, between the producer and the star and the director.

Q. I see. A. We get the three of them together and let them decide upon what they think would be the most suitable for the part.

353 Q. That is in general? A. In general.

Q. Then the actual designing is in the hands of the designer? A. Yes, sir.

Q. After the character of the costume has been determined by the various authorities, whatever they are? A. Yes, sir.

Mr. Pollak: I think that is all, unless you have something, Mr. Driscoll.

Mr. Driscoll: No.

(Witness excused.)

354

DANIEL GRAY, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. What is your name? A. Daniel Gray.

Q. What is your position with Metro-Goldwyn-Mayer? A. Editorial Chief.

Q. And by editorial, you mean editorial in the cutting, in the film cutting department, is that right? A. Yes, sir.

Q. You have nothing to do with the writing? A. No. 355

Q. Or revision of pictures? A. No.

Q. Just to clear that up, it is not what we outside of the industry think of as editorial work? A. No.

Q. I suppose as an incident to revising the film, you may have to have revision of the text too, is that not so? A. That is right.

Q. Now, will you explain what the function of the editorial and cutting department—do you call it both? A. Yes.

Q. Will you tell us what that is? This is technical and important, and you can make this fairly full, Mr. Gray, if you will, please. A. Well, it is the same as every other 356
department. A script of a picture is submitted that goes into production. That script we read. We go through it and see if there is anything suitable that we might have in stock to save in the cost of production, such as a railroad train, or ferry-boat whistle, to save time in the shooting production. We read that script and we work in conjunction with the director. We keep a picture cut right up to date, daily. What I mean by daily is, the director shoots a picture yesterday. We get those dailies today and we run them, screen them, break them down and select with the director what we think is the best take of a day. For example, a director might make five scenes in one take. We make a selection. That selection is the choice 357
take which the director thinks, and what the particular cutter I might assign to that picture thinks, would be suitable for the story. Lots of times they make mistakes in the dialogue and we take a corrected take. From there it goes into a continuity room where we make a daily continuity of each individual scene, of the very lines of dialogue that is spoken on the set. We need that for editorial purposes when we get into the cutting of a picture. Of course, after we have a picture assembled and the director finishes, it might run into approximately 15,000

358 feet of the first cut. Then we figure a picture is too long to go out to the public in that footage. So then we work with the director and the producer on that particular picture and we make all the eliminations possible to keep the story intact in the least footage we possibly can get to the public. These continuity sheets help us a great deal in that work.

Q. Tell us what a continuity sheet is. A. Well, a continuity sheet is just a typewritten sheet that we keep on every individual scene that is made on the set. The script might call for certain lines. When they get onto the stage the director might think, well, if we add a few lines, or eliminate a few lines, it doesn't correspond with the par-
359 ticular script. I mean they make slight changes while they work during the progress of a picture. But we have an actual individual scene continuity which we cut the picture from, including the script.

Q. In other words, a director may change the actual expression on the set, is that right? A. That is correct.

Q. Slightly? A. Yes, very slightly.

Q. That is, the original may be, "Ethel, there you are," and it becomes, "Ethel, you are there"? A. That is correct.

Q. Using that as an illustration. A. Just minor changes, but we have to keep them together. Every individual word
360 that is spoken is on a daily continuity sheet, so when we make eliminations we probably will go back and eliminate one sentence from one scene to blend with one sentence of another scene, and probably cut out a portion of it in the final editing of the picture.

Q. And this you do each night as you get the dailies of that day's production? A. That is correct.

Q. That is right? A. That is right.

Q. Pardon me. Go ahead. A. In shooting a scene, the director will probably open up on a long shot of a set.

Q. Tell us what a long shot is. A. Well, a long shot of a set, I will take, for example, this courtroom.

Q. Yes. A. The shooting of a courtroom sequence. You 361
shoot a long shot of all of us characters just as we are sitting here. Then he will move in and shoot a semi-closeup in group formation of the same particular shot, in other words, only doing the same action all the way through in a semi-closeup shot. Then he will move in and do the same thing in the individual shot, which we call a closeup. When we get that for construction to put onto the screen, we probably will establish our location with a long shot of a court room. Then, for example, if I am on the witness stand and you are the attorney, you ask me a question. We might go to a semi-closeup of you asking me a certain question in the court. Then they will cut to a closeup of 362
me responding to you. So we keep moving into the continuity.

Q. And cutting means literally cutting some of the film out, is that right? A. That is right. In other words, if they go through a continuity sheet——

Q. Well, let me interrupt. What does cutting mean, exactly? A. What does cutting mean?

Mr. Schwartz: And editing.

By Mr. Pollak:

Q. It is the arrangement, in sequence of the material, is that right? A. And construction of the story to the screen 363
for the public.

Q. And, of course, the actual elimination of a great deal that comes in sort of diffuse version, is that right? A. That is correct.

Q. Mr. Schwartz understands this much better than I do. A. You didn't let me finish.

Q. Go ahead. A. I was just going to go back over it. Now, for example, they shoot a long shot of a courtroom. It might run around 200 feet.

Q. Yes. A. All right. Then we move in to shoot the semi-closeup of the same action in 200 feet.

364 Q. Yes. A. Then we move in and shoot an individual closeup of the same action in 200 feet. In other words, we have 600 feet, but when we put it together for the screen it will probably wind up to be 150 feet in sequence of a courtroom. In other words, we eliminate approximately 450 feet.

Q. This you do in conjunction with the director each night? A. Yes, sir.

Q. And the producer too? A. Plenty.

Q. What do you do, assign a cutter to each production? A. Assign a cutter and an assistant cutter to each production.

365 Q. And you are generally familiar with the whole process of cutting in all the productions? A. Yes, sir.

Q. How large was your organization in 1932? A. My whole department, including cutters and office staff?

Q. Yes. A. Forty-five, approximately.

Q. Well, given the fact that the particular art here involved is motion pictures and not writing, the word "editor" is exactly correct, isn't it? You really do edit the material? A. That is correct.

Q. The film? A. Yes.

Q. You revise it and determine its final form? A. Yes.

Q. Of course, in conjunction with the producer and the director? A. Yes, sir.

366 Q. But you take pictures that other persons have made and determine which are to be produced really of the particular shots? A. Yes, sir.

Q. I suppose the devices and machines you have are almost legion, aren't they? A. Yes, sir, they are.

Q. Have you a film library? A. Yes, sir.

Q. Can you give us some idea of the dimensions of the film library, the number of films you had in 1932? A. Well, I would say around, a rough guess of around 6,000,000 feet.

Q. These are the things you carry in stock, is that right? A. Yes, sir.

Q. There is, for instance, a stock picture of a thunder storm in the woods? A. We keep that, yes, sir. 367

Q. 6,000,000 feet you had, you think, in 1932? A. Yes.

Q. How many librarians do you have for this film library, or did you have in 1932, as nearly as you can recall it? A. Six.

Q. Well, let me ask you one thing more about this cutting and editing business. You have previews of your pictures, don't you? A. Yes, sir.

Q. And if, on the preview, some features of the film seem undesirable, you may start the process of editing over again? A. Yes, sir, many times.

Q. Many times. You must send somebody to every preview? A. I send two people to every preview. 368

Q. You send two people to every preview? A. Yes, sir, a cutter and an assistant cutter and myself. I always attend every preview we have.

Q. You attend every preview? A. Yes, sir.

Q. In other words, the process of at least possible revision and editing goes on even after production has been finished up to the preview? A. Oh, yes, quite a bit.

Q. Because production may then have to be resumed after the preview? A. Yes.

Q. If changes are required? A. Yes, sir.

Q. You have told us how many employees you had in the whole department in '32, didn't you, in round numbers? 369
A. Round numbers, roughly speaking, around 45.

Mr. Pollak: Have you any questions, Mr. Driscoll?

Mr. Driscoll: No.

(Witness excused.)

MARCELLA NAPP, having been first duly sworn, took the
370 stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your name? A. Marcella Napp.

Q. Miss Napp, what is your position with the department? A. Assistant Casting Director.

Q. The Chief Casting Director is Mr. Datig? A. Yes.

Q. What was your position in 1932? A. Assistant Casting Director.

Q. And would you tell us, in a general way, what the functions of the Casting Department are? A. Yes. Our duties are to select talent for the various pictures that are
371 produced. We read a script which is submitted, for breaking down of characters needed in the picture, and then, of course, we attempt to cast them for the proper characters.

Q. You wouldn't cast the stars, would you, or would you? A. No. The stars are usually cast before we get the script.

Q. But you are told that there is needed, say, a good Irish character actor? A. We cast everything. We cast all the featured players right down through to the extras needed in the picture.

Q. From featured players through to the extras, but excluding stars? A. Excluding stars.

Q. And would you mind explaining, for the sake of the
372 record, what the difference between a star player and a featured player is? A. A star player is usually the player that carries the picture, the top name in the picture. For example, Wallace Berry is a star in a picture. Usually the picture is written around that character and he plays the main character in it. All the other players are just—what shall I say——

Mr. Driscoll: Supporting cast?

The Witness: Supporting cast and subordinate to the star. The star, of course, is the one that gets the top billing and everything else in the cast.

By Mr. Pollak: 373

Q. Well, the top billing means just exactly that? A. Yes, sir.

Q. His name appears before the name of the picture in the billing, is that so? A. Yes, usually.

Q. Well, for instance, you see Joan Crawford and Robert Montgomery in "Letty Lynton," using that as an illustration? A. That is right.

Q. Then the featured players would be named after the name of the picture? A. That is right.

Q. And the featured players may be players of great importance? A. Yes, and usually playing very important 374
parts in the picture.

Q. That is what I mean. A. Yes.

Q. Including the great character parts and other supporting parts? A. Yes, indeed.

Q. Now, when the picture has been broken down, as you put it, for casting, what do you do about it? Where do you get your actors from? A. Well, we usually line up all the actors and actresses that we know would suit or fit that part that are either in Hollywood or in New York, or sometimes they are brought from England, and we submit their names. When they are definitely okayed for the parts—by testing usually, or just being well known enough, you see, for the producer and director to agree upon that actor for that 375
character—they are brought either to Hollywood from New York or Europe, or directly from Hollywood. They might already be here.

Q. The producer and director have the final say as to what featured players they want? A. Yes.

Q. Tell us about this testing business. What does that mean? A. Characters usually are tested for a production. We will take a well known actor, an actor that has been in pictures.

Q. Yes. A. And is fairly well known. He is brought out to test for either makeup or certain wardrobe costuming

376 that he has never done before just to determine his ability to play a certain type of characterization. The testing of an unknown, of course, is very, very involved, and we usually start with bringing them to the studio, having the test director give him some lines and dialogue which they study and rehearse several days prior to the making of the test. They are taken to the makeup department and make-up is gone over. Perhaps they are tested just with silent makeup tests to determine which is the best makeup to use for them, you see. Then, of course, they learn the dialogue after several days' rehearsal perhaps with one or two other players who are given their time, and the test is made after, of course, wardrobe and everything is suitable. The test is
377 made, and then we all look at it to determine whether or not that player is someone we can use. If not, they are discarded.

Q. What does the test consist of, how is it done? A. How is it done?

Q. Yes. A. Well, do you mean the actual shooting of the test?

Q. Well, what I mean is this: Is the result determined by what the picture shows, or by what you think of the man, or a little of both? A. Well, usually by the personality that comes through on the screen.

Q. I suppose there also must be consideration of this:
378 This fellow has tested pretty well, this girl has tested pretty well, but there is a chance of a much greater development? A. Yes. There is some spark of something that we call screen personality. Many, many tests are made to bring that out. Often those aren't enough to determine the worth of a player like that.

Q. That is, it is a subtle, and, I suppose, intuitive process of personality judgment that is involved in your work? A. Yes, indeed.

Q. Probably it is very hard to explain to anybody how you do it, but you have kind of a flare for it, if you are not too modest, is that right? A. That is so.

Q. You must also, besides getting actors from Hollywood or New York or London or Vienna, or whatnot, you have a reservoir of actors of your own here under contract? A. Yes, our stock company, which is very great. 379

Q. Roughly, what was the size of your stock company in 1932? A. Well, if I can remember, I think it was about, I think we had about 79 or 80 contract players. That didn't include the stock players that are on a week-to-week basis, boys and girls non-contract that we carry.

Q. How many of them did you have in 1932? A. I should imagine in 1932——

Q. In round numbers. A. —very roughly, about 50.

Q. And then in addition to them, you might hire people from anywhere? A. Oh, yes, indeed. 380

Q. Would you hire persons from abroad that hadn't been tested at all? A. Well, usually after a test has been made abroad and it wasn't exactly what it should have been and yet, as I say, there was a certain personality that came through on the screen. Or, they might have made a foreign film, and then we bring them over here sometimes just for a series of tests and, of course, all their expenses are paid to Hollywood, and all their living expenses while here. Oftentimes they speak a little English and we have to get teachers for them, put them through a series of extensive training before they even make the test.

Q. Do you conduct a school of motion picture acting? A. No, but we have various departments along those lines. For example, we have the dramatic coaches. We have diction teachers and instructors. We have school teachers. We have chaperons that just teach them nothing but English when they come over here. 381

Q. That is a function I had never thought of in connection with a chaperon. A. Well, they are with them, either speaking French or Viennese, or whatever the girl might be, the teachers are right with them all along.

Q. I see. A. To teach them English.

Q. Tell us a few names of foreign actresses that you have

382 taught English to? A. Luise Rainer. We have now with us a woman named Korjus, Deila Lind, who is now with us. I can't think of them all offhand. There are several.

Q. Your company has been giving long M-G-M cheers right now for the fact that Miss Rainer won the award as the best film actress of last year? A. So I understand.

Q. From the Academy, is that right?

Mr. Driscoll: Wasn't it the best performance, instead of the best film actress?

The Witness: The best performance.

By Mr. Pollak:

383 Q. And M-G-M is giving still more enthusiastic cheers? A. Of course.

Q. Miss Napp, if, for instance, a mob is required, how do you get after that? You don't make special tests of those people? A. No. Those are called extras. They are hired through the Central Casting Corporation, the Bureau. We pay toward its upkeep, you see.

Q. That is maintained jointly by the various producers? A. Yes, but of course we pay for it, naturally.

Q. You tell Central Casting that you want 17 Roman centurions, say, and they get you fellows for that? A. Yes.

Q. Do you explain to the Casting Bureau what sort of costumes they have to wear? A. No. The costumes are
384 furnished by the studio, unless it is modern dress, otherwise the costumes are furnished by us.

Q. And I suppose you have to explain that you need fellows that look like Roman centurions? A. Yes, indeed. We explain the type needed, and they send them over. Many times we have interviews for certain types of people like that. In fact, nine times out of ten we interview them for period or costume pictures.

Q. And all that you are telling me was essentially true in 1932? A. Yes. It has existed for as long as I can remember.

Q. Do you have a separate Casting Director for each production? A. No. 385

Q. Whatever the title may be. A. No. I think there are 14 people in the office at the present moment. We all do the same type of work, you see, we can all do everything necessary in the office, but there are some assistants that just take care of these extras, as we say, the calling of extras, getting certain types of interviews, and everything straightened out. There are two assistants that take care of bits, bit part players.

Q. Do you conduct a kind of continuous research of who the effective actors on the screen are, as, for instance, by watching screen performances? A. Oh, yes, indeed. We see several pictures a week. We see at least six and eight pictures a week. You see, the entire casting office is required to go to these different showings that we have at various places, the Filmart Theatre, for example. We pay so much a week for the casting office to be permitted to go to see various pictures. Of course, then there are all the different places, all the way down to the little theatres that are completely covered at all times by different members of the casting office. Pictures are brought out here for us to see at the studio for a certain type of work that an actor has done that we are not familiar with. They bring pictures out that might have been made at another studio and we run it to see what type he has played in that particular picture. 386 387

Q. Now, if you find a promising actor that has some slight defect, or an actress, if she is a little too thin or too stout, do you physically recondition them at all? A. Oh, yes, indeed. A great deal of that work has been done. We have physical instructors. We have masseurs and masseuse. We have dental work done. We have facelifting.

Q. Do you have dentists of your own, or a dentist? A. We have a dentist here on the lot, and caps are made for teeth that aren't perfect. Whole sets of teeth are made lots of times.

388 Mr. Schwartz: And noses straightened?

The Witness: Of course, hair is fixed and made different colors. That is all in the makeup department. Wigs are made, and different things like that.

By Mr. Pollak:

Q. Most of these mechanical acts are done through other departments at your suggestion? A. Yes. Of course, it all comes through with orders from our department, naturally, all charged to our department.

Q. I see. How large did you say the department was in 1932, or haven't you told us? A. I believe there were
389 about 10.

Q. That is, specifically in your department? A. Ten.

Q. The work being done, in many instances, through other departments? Take these chaperons, for instance. Would they be under your department? A. Yes, they would be.

Q. I see. Well, in the 10, does that include all— A. No, that includes just the members of our department, the testing department. Of course, there are school teachers that come under our supervision, and chaperons, and singing teachers.

Q. The school teachers are brought in for the young child actors? A. Yes.

390 Q. That must be given instructions? A. We must have a school teacher here at all times, and a welfare worker for anyone under 18 years of age working in a picture, on a set.

Q. By the way, do you select dancers too? A. No, that is done through the Music Department.

Q. What provision do you make for illness? A. We send doctors out to any members of the cast either before or during a production. For example, an actor or actress is supposed to start a picture on Monday, and Saturday afternoon we find that they are ill with the flu or something.

We immediately send our doctor out to determine whether or not they will be available on the day we need them. Often doctors have gone out on the sets to stay with an actor, or nurses have been required to stay with actors and actresses while they have been working on sets. 391.

Q. Supplied by you? A. Yes, by us.

Q. Well, now, counting all the persons, not merely the 10 chiefs and the immediate subordinates that you have been talking about, counting all the persons under your department, how many were there in 1932? A. Well, I would say between 15 and 20.

Q. You mean that includes the chaperons and teachers? A. Yes.

Q. I am informed—and I may be just all wrong—that in 1932 the doctors were hired by your department. It doesn't make much difference. A. Well, I may have forgotten. I think they were at that time. Yes, the Music Department did not handle them at that time. 392

Q. And whoever handled them, the process of selection, I suppose, was essentially much the same as with actors, pure and simple? A. Yes, indeed.

Q. Although their physical constitutions, that of the dancers, might be particularly important? A. Yes, indeed. Naturally, when they come out on an interview, we will say, they are a little bit more particular about the selection, probably. They might have more interviews on the dancers that come out than with just regular actors and actresses for certain types of dance work that are required. 393

Q. How many persons have to be present to make a test? A. Outside of the actors, you mean? There is the test director, the cameraman. I don't know how many electricians are required. Then if music is required in the test there is an orchestra, and I imagine that is about all on the set.

Q. A single test may be quite an expensive process? A. Oh, yes, they are. They are very expensive.

394 Q. Have you any figure of what a single test costs? A. No, I haven't exactly, upwards, I would say, of $500.00, and that is just for a short test.

Q. For a single test of an actor? A. Yes.

Mr. Pollak: Mr. Driscoll, have you any questions?

Mr. Driscoll: No.

By Mr. Pollak:

Q. Have you anything you want to add to the description of your department's work, Miss Napp? A. I can't think of anything, unless there are some questions you
395 would like to ask me.

Mr. Pollak: No, I believe that is all. Thank you.

(Witness excused.)

EDITH LOUISE FARRELL, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your name? A. Edith Louise Farrell.

Q. Is it Miss or Mrs.? A. Miss.

396 Q. Miss Farrell, what is your post with Metro-Goldwyn-Mayer? A. Head of the Stenographic Department, which consists of a clearing house for stenographers and secretaries on the lot, a file containing all the stories we own, produced and unproduced.

Q. I didn't quite hear that. A. File consisting of stories owned, both produced and unproduced, mimeograph work, fan mail.

Q. How large was your department in 1932, roughly? A. It varies when we are not busy, but I should say around 45. It goes up to 125.

Q. Miss Farrell, can you tell us about this file of stories 397
that you have? A. Well, it is a file that came to the studio when the three studios amalgamated in 1924.

Q. I see. It is simply a record, sort of a library of the stories you have? A. Yes.

Q. Now, the stenographic work, I suppose, while very voluminous, is not so very different from stenographic work in any other large establishment, or is it? A. It is quite considerably different, yes. A great deal more is required of these girls, both in background and hours and tact, discretion, it is quite different from working for a business concern.

Q. And you supply stenographers for all the different 398
departments? A. Yes.

Q. Are the secretaries of the different executives and writers under your jurisdiction, or are they separate? A. No, they go on another payroll.

Q. They go on another payroll? A. Yes.

Q. What is movie-ola work? That is a phrase that means nothing to me. A. I forgot that. We used to have script girls on the set who wrote down the dialogue, everything as it was shot, for all the various takes, correcting mistakes that were made, an actor not remembering his lines. Now with the dailies, everything that is shot every day is sent to this room and the members of that department write down the action of the scene and the dialogue. 399

Q. That is done every day right after it is shot? A. Yes.

Q. Was that substantially true in 1932? A. Yes.

Q. What is this fan mail business? A. Well, certain mail comes in to the department, to stars, I should say, which must be taken care of. If it is money, it must be opened and some answer given, and the money returned, or stamps returned, questions answered and packages received and sent back. Sometimes it is in the star's contract that the studio pays for certain things. Sometimes the star pays for certain things. It costs a great deal of money.

400 Q. In a general way, I suppose the purpose of it is to keep on good terms with the admirers of the stars, or the purpose is to keep in good humor the clientele of the different stars, is that right? A. Yes, a matter of advertising and publicity.

Q. Do you get many requests for pictures, for instance, of the stars? A. Well, that is essentially what this mail consists of.

Q. What do you do about that? A. Answer it according to how the star's mail is to be taken care of. If the studio has made an arrangement whereby we take care of the fan mail, it is taken care of by the studio. Otherwise it
401 is taken care of in the department for the star, in charge of the star.

Mr. Pollak: I think that is all, unless you have something.

Mr. Driscoll: Not a question.

(Witness excused.)

FLOYD L. HENDRICKSON, having been first duly sworn, took the stand and testified as follows:

402 Direct examination by Mr. Pollak:

Q. What is your name? A. Floyd L. Hendrickson.

Q. What was your position in 1932, Mr. Hendrickson? A. In 1932 I was assistant to M. E. Greenwood.

Q. What was Mr. Greenwood's position? A. Mr. Greenwood was Business Manager in charge of the Contract Department.

Q. Head of the Contract Department? A. That is correct.

Q. And what are the functions of the Contract Department? A. The Contract Department is where we accumu-

late all the information on contracts. We retain all con- 403
tracts in our files. The information on the contracts originates in the various departments, from the department heads, or executives, who have the authority to make deals. That may come to us merely in figures and terms. If a contract is in any way involved, we refer it to our attorneys down town who prepare the contracts. If it is an ordinary contract, we prepare the contract right in our own office.

Q. And your attorneys down town are Loeb, Walker & Loeb? A. Yes.

Q. Now, these contracts include, of course, contracts with the stars, is that right? A. They include contracts 404
with the stars, featured players. We have handled all the building contracts, all story purchase contracts that originate here. They are either referred to our down town office, or are cleared through our department. After the contract is prepared we send out the information to the various departments who are interested in the particular information. We keep a constant check on the contracts, the termination dates, option due dates, and any pertinent data in the contract itself.

Q. What is the option due date? Am I right about this, that the general practice is, with a star at least, to hire him on a contract which gives an option of renewal at an advanced rate to the employer? A. That is correct. 405

Q. The contract may have a run of several years, assuming these options are taken up? A. The usual run is seven years.

Q. The California law, Mr. Schwartz tells me, limits the term of a personal service contract to seven years? A. Yes.

Q. You also have to do with the contracts of directors and producers? A. All contracts of any nature go through that department.

Q. And the ordinary contracts of the so-called actors on contract, is that right? A. Yes, that is correct.

406 Q. About how many contracts would pass through your department, would you say, in the year 1932, at a minimum? A. Personal service contracts—you mean actors, artists, directors?

Q. Yes. A. It is hard to determine. I would say at least two or three hundred contracts, some of which would be short-term contracts, and some long-term.

Q. That is, the personal service contracts alone, would average about one a business day? A. Yes, I would say so.

Mr. Pollak: I think that is enough.

Mr. Driscoll: No questions.

(Witness excused.)

407

LOUIS F. KOLB, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Kolb, what is your position with Metro-Goldwyn-Mayer? A. Mechanical Superintendent.

Q. Mechanical Superintendent. Are you under the Construction Department? A. No, I am not.

408 Q. Or are you a separate department? A. Separate department.

Q. Mr. Gabourie, if I pronounce his name correctly, has testified that you head right out to the General Manager? A. Yes. That is, the Studio Manager and the Production Manager.

Q. What are the main divisions of the Mechanical Department? A. Well, we have four departments. We classify them in this way, stage lighting, maintenance and construction, we have a machine shop which consists of three different departments, that is, the tin shop, machine shop and the foundry.

409 Q. You have an automotive department, or is that not under you? A. Yes, we have an automotive department. I had forgotten that.

Q. And did you have it in 1932? A. Yes.

Q. You were the head in '32 also? A. That is correct.

Q. Now, the whole problem of stage lighting is under your department? A. That is not the actual lighting of the set. We place the equipment, operate the equipment at the direction of the cameraman.

Q. But I mean you supply and repair the mechanical equipment? A. That is correct, yes.

Q. The cameraman tells you how he wants it done? A. Yes.

410 Q. And he acts under the director, producer or production manager? A. Yes.

Q. How large a force, roughly, did you have in 1932? A. Well, it varied some for the amount of production, but I would say the average would be around 250.

Q. Including what types of technical men, Mr. Kolb? A. Well, on the stage lighting we always have a head electrician, and he is really the cameraman's assistant. He also has an assistant, and from then on the men are just the men, the electricians and lamp operators. Now, this is on the stage. In the shop we have first-class mechanics and a foreman in each department.

411 Q. Just to get the record straight, what kind of mechanics are these? These things are all familiar to you, but we want the record to show. A. Well, we have electricians, machinists, blacksmiths, moulders, tinsmiths, automotive mechanics, and, of course, each one of these different departments really specializes. For instance, in the electrical department there are probably six different types of electrical work.

Q. That is just what I wanted to get at. Would you mind telling us? A. A construction man is usually no good on the set and, at the same time, a construction man

412 would not be a good maintenance man. So we have to keep covered with men in all departments.

Q. How many hours a day does your organization function? A. We have many men here working 24 hours a day.

Q. In how many shifts? A. Six-hour shifts.

Q. That is four six-hour shifts? A. Four six-hour shifts.

Q. Do you work Sundays too? A. Yes, often.

Q. But not regular? A. Not regular, but we are working pretty nearly every Sunday.

Q. And you regularly work the other six days of the week? A. Yes.

Q. In six-hour shifts? A. That is right.

Q. And you have to supply and keep maintained the
413 power in the studio, is that right? A. Yes, sir.

Q. What do the maintenance fellows do? A. Well, there is all this electrical equipment, that has to be intained and repaired. There is a good deal of maintenance in the studio grounds itself. There is a lot of machinery here that has to be maintained. In other words, it takes at least 12 to 15 men a day just maintaining the equipment.

Q. Some of the machinery is extraordinarily specialized machinery, I suppose? A. No, I wouldn't say that, outside of the lighting equipment.

Q. You don't maintain the sound equipment? A. No.

Q. Oh, I see. A. No, I have nothing to do with that.

414 Q. That is a different department? A. Yes.

Q. But you have the general physical maintenance? A. That is right.

Q. Of the organization? A. Yes.

Q. How many foremen have you? A. I have six.

Q. Six foremen. A. There is one in the electrical, on the stage, one in construction and maintenance, power supply, one in the machine shop in the daytime, one in the machine shop at night.

Q. That is substantially it? A. And one in the automotive, and one at night, that is right.

Q. And that was substantially the same in '32? A. Just about the same, yes. We haven't changed a great deal. 415

Q. Well, now, who has charge of the generating plants? A. Jack Winchester.

Q. The portable? A. Yes.

Q. Is he a subordinate of yours? A. Yes.

Q. What is his title? A. His title is my assistant.

Q. I see. That sounds like a good one. Tell us something about the pumping equipment. What have you got to do with that? A. Well, we maintain the pumping equipment. We have a large pumping outfit here that supplies high-pressure water to our sprinkler system, and when it is not being used for that, it is being used to produce water effects. It supplies water to our dump tanks for such scenes as a boat in a rough sea where the waves are dashing over the boat. It is also used for fire scenes, and in addition to that we have a lot of portable equipment for high-pressure work, such things as airplanes on a ram where the thing has to be raised in the air and movement is required. We also have pumps for rain effects. 416

Q. Tell us, for instance, about a picture where you participate in the taking of an airplane picture? A. Did you see Night Flight?

Q. No, I am sorry. A. Mr. Brown made that. We had an airplane on a ram and the ram was raised up and down by hydraulic pressure. The movement back and forth was also raised and lowered by hydraulic pressure, and in back of that was a screen through which the picture was projected which gave the illusion of the plane flying in the air, and the movement, of course, was provided by these jacks. 417

Q. Now, there were actors in the plane? A. Oh, yes.

Q. And they were photographed with this background, in motion? A. Yes.

Q. In other words, in addition to maintaining this large plant, your department contributes directly to actual production where it is specialized, is that right? A. Yes.

418 Q. And these things it also did in '32? A. Yes.

Q. What does the foundry do? A. The foundry makes castings, bronze, aluminum. These castings are machined into parts that are used in the construction of sets, special effects. The foundry is a miniature of a large foundry where the clay is used as a mould and the patterns are made out of wood and placed in this clay, and the mould is separated and later on filled with hot metal from which we get our castings.

Q. For various productions, among other things? A. All for productions.

Q. All for productions. The determination of what to
419 cast, for instance, I suppose, comes from, say, the Art Department, or the producer, or director, or somebody? A. Yes. The Art Department supplies prints, a design of everything that is to be built. We build all of our stuff directly from plans.

Q. Now, in your various activities you must employ about every kind of technical skill there is, don't you? A. Well, it is pretty well covered, yes.

Q. I mean that literally. A. We can do almost everything.

Q. Including civil engineers, for instance? A. That comes under the Engineering Department. I haven't anybody that can do that.

420 Q. But both mechanical and electrical? A. That is right, mechanical and electrical.

Mr. Pollak: Have you anything, Mr. Driscoll?

Mr. Driscoll: Not a thing.

By Mr. Pollak:

Q. Was it your department that made the famous rhinoceros? A. Yes. That is, we tried to build one. We spent a good deal of money on that with not much success. We finally found out later that we could buy a tame

rhinoceros in Germany and he did the work of our mechanical rhinoceros. 421

Q. Someone told me that you had a wonderful mechanical rhinoceros. A. We did pretty well, but not well enough.

Q. But you do create these artificial devices that are sometimes necessary for use? A. Not only that, we created a very large alligator that was used in Tarzan that was all mechanical.

Q. And he seemed really to simulate a genuine alligator? A. I don't think anybody could detect the difference.

Q. I see. Well, there is probably some reason why an alligator is easier to create than a rhinoceros, but we won't go into that. A. This fellow just didn't have any life in him, that was the reason. 422

Q. By the way, your tin shop, I suppose, among other things, produces roofs for sets? A. Oh, yes. In addition to that we build miniatures of submarines, battleships, they are all very costly. A miniature submarine will run around $500.00 or $600.00. It is all handwork. It is almost a jeweler's job.

Q. Then with various photographic devices you magnify pictures from them? A. Yes.

Q. Pictures are magnified from the miniatures? A. That is right.

Mr. Pollak: I think that is all. 423

Cross examination by Mr. Driscoll:

Q. Neither the rhinoceros nor the alligator was used in Letty Lynton, was it? A. No.

Mr. Pollak: If he knows.

Mr. Driscoll: He says no.

(Witness excused.)

WILLIAM WALKER SPENCER, having been first duly sworn,
424 took the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Spencer, what is your present position? A. At the present time I am Assistant Purchasing Agent.

Q. And what was your position in 1932? A. In 1932 I was not with M-G-M. I was Assistant Purchasing Agent from '23 until '31, when I left their employ and came back again in 1933.

Q. Well, are you familiar with the department as it was conducted in 1932? A. I believe so.

Q. And will you describe in general what the Purchasing
425 Department does? A. The function of the Purchasing Department of the studio is practically the same as the Purchasing Department of any large organization. We buy everything that is necessary towards the manufacture and maintaining of all pictures. We have in our general stores 10,000 commodities which we carry at all times. Our function is to replenish and keep those store stocks up, plus the fact that we must buy all materials necessary for the manufacture of pictures at the authorized, qualified requisitions of the technical department heads. We differ just a little bit from the ordinary Purchasing Department of an organization in so far as we have to buy everything that is made,
426 and a lot of things that aren't. We have to have many things made special.

Q. Well, will you give us some illustration of that? A. Well, you talked last about the mechanical rhinoceros, and so forth and so on. We have to find the skin, for instance, that would look like a crocodile. We have to find a skin for an elephant, and hair to go on an elephant to look photographically exactly the same thing. We can't buy as other Purchasing Departments do on bid, because in the picture business it is a matter of waiting until the Art Department decides just how they are going to shoot, and

we generally buy anything today that they wanted yesterday, so we buy mostly for service. We have to pay a little more money than the average concern might for the same kind of commodity, but that is the matter of having service for the production so it won't be held up. 427

Special Master Auchincloss: Mr. Pollak, this gentleman made a very clear statement of exactly what his department is, and in the interest of time and brevity if you can conduct this examination in that way it will be very helpful.

Mr. Pollak: Yes.

Q. Would you know, roughly, what the purchases amounted to in dollars, we will say, in '31 when you left for a short time? 428

Mr. Driscoll: Haven't those been gone into by the Accounting Department? We have all the figures.

Mr. Pollak: Very well.

Q. You have given us a very good, succinct statement already. Is there anything you would like to add, Mr. Spencer? A. Nothing that I know of. I will be glad to answer any questions that you would like me to answer.

Q. You have to keep, among innumerable other things, the wardrobe replenished? A. Correct. 429

Q. And get some new kind of wardrobe that just never was sold anywhere, or hadn't been sold for 500 years? A. Correct, for every picture.

Mr. Pollak: Is there anything for you, Mr. Driscoll?

Mr. Driscoll: Not a thing.

(Witness excused.)

WAYLAND P. HENDRY, having been first duly sworn, took
430 the stand and testified as follows:

Direct examination by Mr. Pollak:

Q. State your full name? A. Wayland P. Hendry.

Q. And what is your present position? A. Chief of Police, Metro-Goldwyn-Mayer Studio.

Q. Did you hold that same position in 1932? A. I did.

Q. And tell us, rather swiftly, what the duties of your department were in 1932? A. The maintenance of safety and prevention of sabotage or any malicious destroying of properties.

Q. Did you have charge of traffic? A. I did.

431

Special Master Auchincloss: Chief, see if you can copy that last witness.

The Witness: I will be very happy to. I handle the care of the payrolls when they are taken out on location, to the pay office here on the sets; where we have a rather large group, rather than to send them up to the Accounting Department, we pay them on the sets. My men are guards going to the banks four and five times a day with the cashiers where they pick up the money, or go there to make deposits in cash. My men accompany them on all those trips.

432

By Mr. Pollak:

Q. You also have fire protection? A. Fire protection. I did not have in 1932. However, I have it at the moment.

Q. Who had charge of it in '32? A. That came under Mr. Robinson.

Q. Well, to save time, you probably know all about it, will you tell us about it? A. We maintain our own fire department to handle the fire until such time, I believe, as we may need help and call on the Culver City or the Los Angeles equipment.

Q. You are the Chief of the Culver City Police Department? A. No. I was at one time, but I am not now. 433

Q. Were you in '32? A. No. I was there in '29. I came back here in '29.

Q. But you maintain, anyway, a complete police and fire department? A. I do.

Q. And your men are sworn in as peace officers? A. That is right.

Q. Do you have charge of the watchmen at night? A. I do.

Q. Now, some of the possessions of at least Metro-Goldwyn-Mayer in the wardrobe and costume department, for illustration, are really museum pieces, are they not? A. That is right. They are of great intrinsic value, at least. 434

Q. Then there is the value of the libraries? A. That is right.

Q. Of a specialized character, not easily replaceable? A. Correct.

Q. This department is maintained, of course, for the protection and service of all the departments of Metro-Goldwyn-Mayer? A. That is right.

Q. Tell us what the size of the police force was in 1932? A. In 1932 I think it was around 28 men. I am not sure. That could be verified from the Accounting Department.

Q. Did you have some officers included in those 28? A. A captain and one lieutenant at that time. 435

Q. Does that include the fire department, or is it separate? A. Well, that didn't include it in 1932, Mr. Pollak.

Q. I mean 1932. A. I had nothing to do with it then.

Q. Those figures that you gave us— A. —are my police department without the watchmen. The watchmen are on an extra, what you call an extra board. They are called in only for service when they are needed, like watching on sets and taking care of very valuable properties where it would cost more money to undress the set and return it to the prop room than it would for the watchman to be

436 assigned there until such time as the shooting schedule was over.

Q. You might give us the figures as to the fire department. A. The fire department at that time was five men.

Mr. Pollak: That is all.

(Witness excused.)

LOUIS B. MAYER, having been first duly sworn, took the stand and testified as follows:

437 Direct examination by Mr. Pollak:

Q. Mr. Mayer, what is your present position with Metro-Goldwyn-Mayer? A. Head of the studio.

Q. And what is your title? A. Well, head of the studio. You mean legal title as such? Vice-President.

Q. Vice-President. And you are the head of this whole immense plant that we have seen here? A. Yes.

Q. And you held the same position in 1932? A. Yes, sir.

Q. What position did Mr. Thalberg hold in 1932? A. Head of production.

Q. Under you? A. Yes, sir.

Q. And he was, himself, a famous producer, is that right?

438 A. Yes, sir.

Q. He died within the last few months? A. Yes.

Q. And who was Mr. Stromberg in 1932, Mr. Mayer? A. Producer.

Q. Subordinate to Mr. Thalberg? A. Yes, sir.

Q. Mr. Thalberg was the head of all the producers? A. Yes.

Q. And there would be a specific producer for a particular production, is that right? A. Yes, sir.

Q. Now, who was Mr. Brown in 1932? A. Clarence Brown?

Q. Yes, Clarence Brown. A. Director. 439

Q. Now, what we want particularly from you, Mr. Mayer, is a description in your own way of what the functions of a studio are in the general sense, what is it that makes the success or failure of a studio, as far as you can tell. A. Well, we have proved here that it is a question of manpower, as to who are good showmen to understand, first, to develop talent, second, to choose the right vehicle to cast the people correctly, and when you get the combination together you have a successful attraction.

Q. Now, I think I can follow you, a studio, of course, does not supply to the world a physical object that it sells, like shoes, does it? A. No. It is a creative proposition, of 440 course.

Q. It creates separately a new thing every time it turns out a production. That is true, is it not? A. Yes, sir.

Q. And the question, I suppose, in every production is of somehow selecting players and a story and adapting the players to play in such a way as to make it a success, is that true? A. Yes, sir.

Q. The capacity to do that—you have called it showmanship—I think must rest on a kind of intuitive flare, is that not so? A. Yes, backed up by experience.

Q. Backed up by experience. It is a thing that some persons just have, and others do not have? A. That is right.

Q. Some people have the gift of oratory, for instance, 441 which again depends on an understanding of people, which is entirely different? A. Yes.

Q. It is developed, I suppose, first, from a native gift, then by that vast experience? A. That is correct.

Q. How long has your own experience in the business been, Mr. Mayer? A. Since 1907.

Q. Since 1907? A. Yes.

Q. In other words, you have had just a quarter of a century of experience? A. Thirty years.

Q. No, in 1932 you would have just had a quarter of a century of experience? A. Yes, sir.

442 Q. And what had Mr. Thalberg's experience been in general? A. He was a producer and head of the production at Universal, before he joined me when I was an independent producer, and then jointly we came over here in 1924.

Q. And am I right in this, that you and Mr. Thalberg and Mr. Rubin constituted at least as far back as 1924 an experienced team that had worked together as a group? A. Yes. We had made pictures since—I think Mr. Driscoll would know when I got Stewart, because that is when he represented me.

Q. At least a large number of years before 1932? A. Yes.

Q. In association? A. Yes.

443 Q. Now, is there anything else you want to tell us about the general factors that make for success or failure in the operation of a studio? You say it is a matter of manpower. A. Yes, the proper manpower.

Q. The proper manpower. A. Every studio has manpower.

Q. I am sure of that. What I mean is this, is it true that a studio succeeds or fails, well, somewhat as a law office does, or a surgeon does, depending really not on a concrete product, but on its underlying capacity of certain unreplaceable men, is that a fact, is that a fair statement? A. That is correct. In 1924 when we came here we changed

444 some of the methods of systems that had been in vogue in picture making in the large studios, for which at that time we were ridiculed a great deal, and I accepted the ridicule, but every studio since then has taken on the same system of doing it, except that they don't seem to hit the ball.

Q. Well, tell us the changes you made, Mr. Mayer, in general? A. Well, there never was any unit production. It was one man that was the head of the organization. At Paramount they had a fellow named Frank Wood, for instance. So every picture had the same flavor, and

that was contrary to the great success of United Artists 445
at the time because they were making a custom-made picture to fit a certain star. When they announced a Mary Pickford picture, Mary Pickford got everything that could be gotten for her in that one picture. Had she worked for Paramount, she would get the same flavor in her picture as some other girl would get, because there was only one mind to pass on it.

Q. I see. A. Now, then, I took from that what made Mary Pickford's success was that she was interested in making Mary Pickford pictures. So then I said, "Why not the same thing in one big organization? I can beat Mary Pickford's proposition because I could have that in 10, 12 or 14 units, 12 or 14 Mary Pickford units, and then if I 446
did that I could back it up with a tremendous industrial organization that Mary Pickford couldn't afford in making two pictures a year, we will say."

Q. Yes. A. And develop a big stock company out of which you get new stars, and laboratories where you can invent new things, if you have sufficient units to make up 10 or 12.

Q. By a unit, you mean—go ahead. A. A producer under a major producer like Thalberg was, a young producer who can select the material. Thalberg would go over it with him to see whether he was right or wrong. If there was any doubt between them, I would get in on it 447
to see what I thought of it. Although Thalberg had full authority to go ahead, nevertheless he saw fit at times where he was in doubt to adopt that procedure. Sometimes the young producer would have just as good an idea, too, and we would then get together and agree. Well, then, that young producer would make that picture differently from another producer. That is the very result now which they can't obtain in the other studios. They just can't make the grade. That is why we go right ahead, because we have been first. Thalberg was a great pro-

ducer, probably the greatest that ever lived. We, in turn, developed these young producers. They had the benefit of Thalberg. Now, I was supposed to be, with all due modesty, a fine producer before I had Thalberg, and I had no one else. They were Louis B. Mayer pictures. Then I took young Thalberg from Universal and immediately I became more important because I added another great brain. In fact, he was the greatest production brain developed from the time I took him because together he developed faster, he broadened out. Now, all these young producers got the benefit of Thalberg and myself in their development, underlying which there was a policy and a system of making these pictures. There was all that talk of factory-made pictures which existed in 1924, and that and the thing that made United Artists outstanding was because their pictures weren't factory-made pictures where everything had the same flavor. All that talk disappeared since we put this system in.

Q. Will you explain the system of unit production? That is perfectly familiar to you, but I would like to have it for the record. A. I can only put it this way to you. I will try to paraphrase it with another industry. They asked me why I thought there ought to be a change, and how we could get away from the factory-made system where one man passed on all stories, and he is the one that says how all pictures should be made where we were making 50 of them a year. I said, "Let's take a custom-made tailor. He doesn't cut one 36 suit. He doesn't cut 1,000 36's like these large clothing manufacturers. Therefore he fits that one person where that certain fitting may have little peculiarities that just throws it out from being a perfect 36. Now, he has to have with him a cutter, a cutter, a designer. He doesn't care who sews the buttons on, or sews the linings in, providing they follow his special plan. Now, if I set up a building in which each floor has a young designer, a young producer, and give him certain

writers, give him a cutter, and then back that up by a large industrial organization, so when each designer sends out a set of plans and specifications, the industrial organization must deliver it in accordance with that special plan of specifications, each man having some different kind of a creative genius to make their story a little different than the other fellow would have made it, that would be the answer to the problem." 451

The physical part of this tremendous organization could take care of them better than if that one unit was alone somewhere making two pictures a year. However, they laughed at it and scoffed at it. I don't know why they did, because it was very obvious. It was the thing that had made Fairbanks successful, and Pickford, and Chaplin successful. That is exactly where I took it from. If I was successful all alone in making four pictures a year, and they said, "Louis Mayer was great, Tom Ince was great, and Joe Schenck was great making four pictures a year when Pickford was supreme, and Chaplin was supreme," it was very obvious for me that I could do it with these large plants. I could do the very same custom picture making by putting on each floor a set of different designers and creators, and then back it up by a tremendous industrial proposition and a large stock company, because we would need so many actors to take care of so many units that we could afford to take young talent, discover an unusual person, and therefore make stars. We have made them all, practically all, with very rare exceptions. We made stars out of raw talent. We scout the world for talent and bring them here and develop them. Do you understand that? I know Driscoll would. He knows the business. 452 453

Mr. Driscoll: I understand it perfectly, Mr. Mayer.

454 By Mr. Pollak:

Q. Would you tell us, for example, what you did in the case of Miss Crawford? A. Well, when we took her she got very little money when we first got her, but she was an intensive, ambitious girl. I was going to say she slept here, or the next thing to it. Nothing meant anything to her.

Q. This was about when, Mr. Mayer? A. 1924, I think, or '25. Either late in '24, or early in '25.

Q. Yes. A. She developed her body beautifully, and she was very ambitious. She would play any little part they could give her, and the directors liked her very much
455 because of her great ambition and desire to work. We developed her like we did Shearer or Gable, or any of those people.

Q. She came as a rather obscure person, is that right? A. Yes. She got $75.00 a week when we first took her, and we have been changing her contract ever since.

Q. Would you tell us something about Mr. Montgomery, your experience in connection with him? A. Montgomery had been in a picture for Mr. Goldwyn. That was his picture experience. He took him out as a failure, and he went into a play again on Broadway with Selwyn, Edgar Selwyn, who is a brother-in-law of Mr. Nicholas Schenck,
456 President of our company. The play was a failure. It didn't last long. This boy wanted to get back into the movies, and through Edgar Selwyn's connections he introduced him to Nicholas Schenck, who liked him. He was charming and entertained him, and he got us to see if we wouldn't be interested in trying this fellow out because he looked so good to him, and we did. We brought him out here and we all got kind of excited about him, and he has mounted until here the other day we gave him a tremendous contract again. We tore up the old one and gave him another one.

Q. What was the position of Miss Crawford in 1932, 457
was she then a distinguished actress? A. Oh, yes. She was one of the top-notchers. She was at the height of her career around 1930.

Q. And thereafter, including '32? A. Well, she is tremendous now, bigger than she was then.

Q. But she was one of the leading actresses? A. One of the leading stars in the business.

Q. And was Mr. Montgomery one of the leading stars in 1932? A. In the men, yes.

Q. Among the men? A. Yes. He wasn't the top, but among them, among the first seven or eight.

Q. And Miss Crawford, if you wanted to put a numerical valuation on her, it would be among the first what 458
number? A. The first four.

Q. In 1932? A. Yes.

Q. In the whole country? A. Yes.

Mr. Driscoll: And that means the world?

The Witness: I wouldn't say the world. There is a distinction there, because, take Garbo, who is in Europe tremendous, here not as strong as Crawford. Crawford isn't as strong in Europe as Garbo. That varies. Dressler was tremendous in America, not in Europe. They didn't understand her.

459

By Mr. Pollak:

Q. Is this true, Mr. Mayer, that the gift of a great management consists very largely in finding an actor or actress that at the given moment hasn't attained greatness and may have specific defects, but in whom you can see the germ of greatness with proper treatment? A. That is it.

Q. Perhaps my sentence is not good. Did you get my sentence? A. Yes, I think I understood you.

Q. Go ahead. A. We took this boy Taylor, for example. This company wouldn't take, I don't think, a million or a

160 million and a half for his contract. He was getting $35.00 a week. He had never acted. He went into amateur theatricals at Pomona College and we developed him. We fixed his hair. We plucked his eyebrows and taught him to dress properly, and taught him to speak lines, and gradually built him up. We will be busy changing contracts with that fellow. If they don't succeed we are in trouble. If they do succeed we keep changing contracts.

Mr. Driscoll: That is like baseball players, and everybody else. They hold out when they are good, don't they?

461 The Witness: Yes, sure. We beat them to it now, Driscoll. We increase them and change them before they get a chance to get lawyers in and have a fight.

By Mr. Pollak:

Q. Well, Mr. Mayer, a serious part of a successful management consists in picking actors that have not yet attained fame, in whom you can see the capacity for future development? A. Well, we have done it in two days. We have had those that are raw material, absolutely raw, and never have acted. Then we have taken the ones that have
462 been a failure with the other studios, who have gone downhill. William Powell was one. He was finished. He is at the top today, one of the top-notchers. He became so in two or three pictures here. We took Wallace Beery from Paramount after they got through with him and we built him back, but we have to have the feeling that they have mishandled him, and we do something to bring him back. Then we change the characterization of a person. You take Jean Harlow who was nothing, and by making her into a comedienne instead of a melodramatic, serious person—they played her as a gunman's moll. With "Redheaded Woman" we turned her into a big star with

one picture, just by the proper casting. We reversed the casting. 463

Q. Do you sometimes find that an actor or actress, for whatever reason, isn't a success and you have to find a substitute? A. Oh, yes. One of the greatest in America failed in pictures, and she knew why, and I know why. God wasn't kind to her. She wasn't good-looking.

Q. Well, what I mean is this: Sometimes after you have started production you have to put in a new actress? A. Oh, yes. Often we take a fine star out of a picture. Myrna Loy couldn't understand the characterization of "Escapade", and we put Rainer in, which was quite an undertaking because Myrna Loy was very big with Powell, they are a great team together, but I had to do it and take my chances. I thought that was the best judgment to use. That made Rainer. 464

Q. She had not been famous before that? A. No. She hadn't played anything. We brought her over from Europe. One of our scouts found her, and the lawyers are giving us trouble with her right now because she is successful.

Q. Well, now, I suppose quite as important as actors and actresses even is the selection of producers, is that right? A. Well, I think it starts there first.

Q. It starts there. Will you tell us about that, unless you wanted to say something more about this other phase. A. What phase? 465

Q. About the selection and the development of actors and actresses. A. Well, if you have a great producer you are going to have great pictures, and you are going to have stars. If you haven't great producers and only have stars, you will have no stars tomorrow.

Q. Why is that, Mr. Mayer? A. Because they miscast them. They have no understanding. Why did they kill Powell? Mary Pickford wouldn't have lasted as long as she lasted if she stayed in that factory over there. There was no one there to handle her. It is very obvious what would happen.

466 Q. Then the producer— A. —that is the great first No. 1, a big No. 1.

Q. Well, now, will you tell us about that, if you will? A. Well, if he is a great showman and is really inspired, what he will do first, he will find an idea, or a play, or a book. Our great successes have been in the original stories developed here. The next thing he does is develop talent, because without personalities great pictures, with rare exceptions, go right down through the floor.

Q. Without attractive stars? A. You bet.

Q. I see. A. With some pictures we have made here, without those stars we wouldn't dare to attempt it. We 467 wouldn't even make such a picture in Class B. The moment you put those stars in you have a different proposition.

Q. Now, go ahead and tell us more about the producer, and what he does. A. Well, he gets his idea, the story material, and then he has to find a personality, without which he is licked. Then he selects the proper director. Then he watches his rushes, each day's films that they took the day before to see whether the director is keeping up the tempo and the spirit and the suspense that the story and the script call for. Often they will get away from it, they will get too slow or too fast. He really is behind the director constantly all through the picture until 468 it is finished. Then the editing becomes a very important matter in which the producer is supreme. Regardless of what the director wants, unless the producer sees it that way, it is the producer's last word, last verdict.

Q. It is the producer that determines what is to be done in the picture? A. Right straight through, completely.

Q. The director is the executive man who does it, in a sense? A. He is the man that directs the picture on the sets, and each day is told by the producer whether he is satisfied with what he did the day before. If he is not

satisfied, they have a talk and discussion, and the pro- 469
ducer shows him the film, and the director goes back the next day, or some time, and re-does it in order to keep up with the idea that the producer had when he developed this story.

Q. Now, the particular producer of this picture under Mr. Thalberg was, as I understand, Mr. Stromberg? A. Stromberg, I think, as I remember it.

Q. What was his standing, in your judgment, as a producer? A. Well, he had made some of our best pictures, next to Thalberg. Thalberg made the best pictures, then Stromberg.

Q. In other words, Stromberg stood very high himself? 470
A. Yes, and today the best there is.

Q. Let me get this straight. The management assigns a given producer to a given production, is that right? A. No. What we do first is, we have story meetings, and ideas spring up for original stories. Then I have a committee to pass on it with me. If it is already created material, whether it is a book, or a play, or a historical subject, it is discussed. If I see it, I agree either to the development of the original idea, or the buying of a certain property. Usually there is something wrong with it for pictures, with rare exceptions. We try to see the goodness in them and then we go and rebuild the rest of it.

Q. No story is accepted for production without the sanc- 471
tion of the executive management? A. No.

Q. None without your sanction? A. Then I have to sell it to the producer.

Q. I see. A. If this producer doesn't like it, I try another one that I think would have a feel for that kind of a story, for that kind of an idea.

Q. You adapt the individual producer? A. You have to.

Q. To the individual production? A. Oh, you have to.

Q. And the same with the director, Mr. Mayer? A. Well, then the producer, in turn, discusses with me now—it used

472 to be with Thalberg—which director in our judgment ought to direct that particular story, because he has to be cast properly or you are in trouble. Very often we have to take them off, the director just can't seem to understand it.

Q. I see. A. And we have to substitute another director. Then you are in terrible trouble because then he doesn't like what the other fellow had done, and he tries to change all that, and eventually you have to remake the whole thing.

Q. The executive management chooses every producer, of course? A. Every producer.

Q. And assigns every producer to each production? A. Right.

473 Q. And in the same way, chooses the director? The producer does that, doesn't he? A. That is done in conjunction with the producer.

Q. But the original selection of a director would never be made without your approval? A. Oh, no.

Q. And the signing of his contract is always dependent on your approval, isn't that so? A. On every person.

Q. Including all producers and all directors? A. In fact, on all the talent and the creative side, I pass on all of them.

Q. And this was substantially true in 1932? A. Well, either Thalberg or myself.

Q. Either Thalberg or you? A. And even then Thalberg
471 would get my approval.

Q. And that goes for all the stars, too? A. Everybody.

Q. Everybody. A. On the creative and the artistic side.

Q. Then the determination entirely of what producer to have, what director to have with what producer, and what stars to use, all of that is for the executive management? A. It comes into my hands now. It used to be Thalberg and I.

Q. Those are the things that are essentially determinative of the quality of a studio's production, isn't that so? A. Why, of course. That is all there is to it.

Q. What do you have to do, the executive management, with the Art Department, as an illustration, Mr. Mayer? A. Well, I select the head and he, in turn, picks his assistants, subject to the approval of the General Manager, and the Studio Manager, and Production Manager. 475

Q. Now, the major problems, I suppose, of the several departments might come to the executive management, might they not? A. The major problems of what?

Q. Well, of the separate departments. For instance, if Mr. Nickolaus wants to conduct a series of elaborate experiments he would take that up with you, might he? A. No, take it up with the General Manager, Mannix, who, in turn, would take it up with me. 476

Q. He would take it up with the executive management? A. That is right.

Q. Will you tell us something about the creation of the laboratory here, Mr. Mayer, Mr. Nickolaus' laboratory? A. We used to give out our film to develop and print in the commercial laboratory. I had fought with Thalberg for years to try to get the best photography that was humanly possible to get to enhance the beauty of the women that we engage, because they are supposed to be beautiful. Well, then, you spend a lot of money, and with your money, which goes very rapidly, it takes time to properly light a personality. Then we give the film to the commercial laboratory, and because they gave us a low price on the film they would ruin all the beauty of what was in the negative. That was perfectly human, they wanted to make a profit, and the faster they could turn this thing out the more profit they would make. I tried to sell our people on building our own laboratory, not to make any money on it. I brought Mr. Zukor over at that time, who was a veteran, a dean, to show Mr. Schenck and get him to agree with me that were still selling photography, that was our business. The moving picture is a series of photographs, and the more attractive the photo- 477

478 graphs were, the finer merchandise you had for the public to sell, and by all means to have our own laboratory. That was the start of that. I think we have as good—we always say the best—but at least as good as there is so far in the world that I have ever seen. We stopped at nothing to get that perfection in the laboratory. Then we angled to get this fellow Nickolaus, who has been here ever since we built that plant. Before that we had a small plant just for dailies, and I had the same important man to do that. That was the importance I placed on having a beautiful negative, and then I would get high blood pressure when I would see the prints come out from
479 this commercial laboratory. But instead of losing money on it, this laboratory has made money on the price that we would pay a commercial laboratory, and we get every bit of the value that is humanly possible to get out of that negative that went on it.

Q. How about the sound work? Did you select Mr. Shearer, or you and Mr. Thalberg? A. No. It was Mr. Mannix and Mr. Thalberg that selected him and sold me the idea that he would be the fellow.

Q. Well, you approved? A. Oh, yes.

Q. It was taken up with you? A. With every head of a department so far I have either had the selection or the approval of.

480

Mr. Driscoll: Shearer was here before sound, as a matter of fact?

The Witness: Yes, he came to me before there was any talking pictures and gave me the theory that he could make pictures talk, and I couldn't understand what he was talking about. It is Greek to me. I don't know much about it now, except that if the picture isn't right in sound I have raised so much hell about sound for the last six years since it has been in that now we get yearly the award for

the best sound, and I wouldn't stop until I got there. 481
I gave them no peace and kept shifting and changing until today I think we have the best sound in the world, and the proof is that we keep getting the award each year.

Q. You mean from the Academy? A. Yes, and we have tough competition, as far as sound goes. We have no competition otherwise. Since United Artists, Pickford and Chaplin have gone we have no competition at all.

Q. United Artists was a concern in which several prominent motion picture actors joined and made individual productions? A. Pickford made hers, Fairbanks made his, Chaplin made his, and they did beautiful work 482
because each one was custom-made to fit that personality, and nothing was left undone to make that picture attractive. That inspired me when I thought about how to make a big studio do the same thing and get the benefit of a huge organization. You see, Pickford had one disadvantage. She couldn't have a stock company of 100 players from which to pick and have scouts all over the world to get a Gable or a Taylor or a Crawford or a Shearer. And so, as the clock went on and Miss Pickford was getting older, she was getting right to the edge where she couldn't go on any further, while as ours will get older we have young ones coming up constantly to replace them, while the others 483
go into character roles. Now, you see, our stars have lasted ever since I am here. Crawford, I think, came in '24 or '25. Shearer came before that. I had her on Mission Road when I was alone. She has been with me for 14 years. Garbo I brought over from Berlin some time in the latter part of '24 or early in '25. She has been here ever since. She is on the top of the heap now. No other studio has ever been able to accomplish that except Pickford, Chaplin and Fairbanks because they used the system that inspired me to use the same system.

484 Q. You created outside of that studio this until production studio? A. That was the first time it happened in '24 when I took it on.

Q. And in that studio each artist was his own producer, really, is that it? A. Yes.

Q. Now, Mr. Mayer, tell us in a general way what Mr. Schenck does, Nicholas Schenck, that is? A. Well, he is the whole boss of the whole works, and he comes out here. His big problem is to confer with us where I don't want to take the responsibility of an important change of policy. He comes out about three or four times a year. I used to go back east very often when Thalberg was here so
485 I could leave the studio, and I do the conferring with him on policy.

Q. He is the President? A. He is the President.

Q. You are in charge of actual physical production? A. I am in charge of the studio completely, and he has all three branches under him.

Q. By the three, you mean— A. Distribution, exhibition and producing, and while he doesn't interfere with our operation here, I want the benefit of his brains and judgment. It has been a great help because he is a great showman, I think he is the greatest chief executive that has been in the business.

Q. And would you tell us who Mr. Mannix is? A. He is
486 the General Manager I brought here. He used to produce pictures for Joe Schenck, Norma Talmadge and Constance Talmadge pictures 20 years ago, and I took him from them, and he has been General Manager. He was assistant to me, assistant to Thalberg. He came right up in the work.

Q. And in 1932 he was what? A. I think he was—yes, he was assisting Mr. Thalberg.

Q. I see. A. Because Thalberg produced his own and took care of the other producers on top of that. He had to have help.

Q. That is, Thalberg would sometimes act directly on the productions? A. Oh, yes, he made pictures.

Q. And also supervised? A. Yes, all the scripts came 487
rough him.

Q. By the way, does the executive management bother with shorts? A. Well, we had a man. We had a department for that. Mr. Rapf was taking care of that. Mr. Mannix, as General Manager, had a good deal to say to him, and the head of the Shorts Sales would come out here and would order what he thought he needed for his program.

Q. But you and Mr. Thalberg, I suppose, would not bother with it? A. Very little with the shorts. If there was a change of the head, why, we would have to get someone to do that, but once they got started, unless there 488
was trouble, we didn't bother with it.

Q. Mr. Mayer, generally speaking, which would be the more important factor in the success of a given picture, the original story or—Mr. Schwartz corrects me—the literary material or the production given by the producer, including the whole works?

Mr. Driscoll: I submit, Mr. Special Master, that question is not before the Special Master. The decision of the Circuit Court of Appeals here stands on this proposition, and we can't change it now. It is just wasting time to go into any such proposition.

Special Master Auchincloss: I think you have 489
gone far enough, Mr. Pollak. You have brought out the facts——

Mr. Pollak: Mr. Master, I want to show definitely what the maximum contribution of the written material to the profit was, what, at the outside, would be the profits derived because of the infringement. I may say that I am relying particularly in this very proof on the authority of two cases in the Supreme Court of the United States, the Westinghouse case, 225 U. S., the Dowagiac case, 235 U. S.

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both patent cases involving admittedly similar issues, in which the court with great care said that in cases where both the plaintiff and the defendant had made some contributions to the ultimate result, that the defendant could show exactly, if it could, what proportion of the contribution was its own, and if it couldn't show it exactly, could show at least with approximation what proportion was its own. I think the evidence is, in the highest degree, material and relevant. I further submit, if your Honor please, that in any event, it is the function of a Master to take the evidence so the evidence can be before the District Court and the Circuit Court of Appeals and, if need be, the Supreme Court if, in the view of any one of those courts, the evidence is material. I think the question should certainly be answered.

Special Master Auchincloss: I should think it would be opinion evidence, anyway.

Mr. Pollak: It is opinion evidence.

Special Master Auchincloss: Of course, Mr. Mayer is an expert, I suppose.

Mr. Pollak: We have carefully qualified him.

Special Master Auchincloss: I haven't read either of those cases, and I am inclined to let the testimony go in, with the right to strike it out later on.

Mr. Driscoll: I want to get my objection on the record.

Special Master Auchincloss: Yes.

Mr. Driscoll: Because there is but one question referred to the Special Master, and that is the question of the accounting, dollars and cents, and this particular thing that Mr. Pollak wants to bring into this proceeding now is not before the Special Master, and the Special Master has no authority to make a finding on it. And if he hasn't any

authority to make a finding on it, then the evidence is absolutely lost, it doesn't belong in the situation at all. Now, I object to it as incompetent, irrelevant and immaterial and not within the issues that have been referred to the Special Master to decide. 493

Special Master Auchincloss: The objection is overruled, and the testimony will be taken.

Mr. Driscoll: Exception.

By Mr. Pollak:

Q. Will you read the question?

(The question was read by the Reporter.) 491

The Witness: Well, it is rather difficult to give it so you can understand what I want to get at.

Q. Answer it in your own way, and give your own opinion in your own way. A. To me it has proven over the long stretch of time that the star, if you have any, makes the difference between failure and success. Occasionally there is a tremendous, well known, powerful story that has been a tremendous success on Broadway, or a book that has sold a tremendous number of copies, like "Gone With The Wind" right now, which has a terrific value, a chance at least to put your money in without stars and hope to get away with it. Now, if you have stars in there and the property is well known and as popular as that, and if you do a good job and make a good picture, then you have the maximum out of it. We have made stories here, original ideas. If we didn't have stars we wouldn't dare to put them out, and yet we take in a tremendous gross on them. There was one little picture here recently, "His Brother's Wife", that went over because Bob Taylor was in it. As a small picture we wouldn't dare to make it. I think it has done a million domestic already. 495

496 Q. In your opinion, Mr. Mayer, in the case of a profitable picture, if that distinguished picture has distinguished stars appearing in it, what proportion of the success would you think would normally be ascribable to the stars?

Mr. Driscoll: I object to it as incompetent, irrelevant and immaterial, and not within the issues that have been referred to the Special Master to hear and report.

Special Master Auchincloss: The testimony will be taken over the objection, with an exception.

Mr. Pollak: Do you want the question read?

497 The Witness: I know what you are talking about. I understand it. We have so many different cases—you mean what percentage?

By Mr. Pollak:

Q. Yes. A. Well, I can show you pictures that would apply 100 per cent. It seems incredible because we wouldn't dare attempt to produce the material if we didn't have the stars. I will name them to you: "Libeled Lady" is one. "Forsaking All Others" is another. "His Brother's Wife" is another. "Personal Property" is another. We wouldn't dare touch them except for those stars, what
498 they do to it. Well, now, in that case, I don't know, it sounds silly to say 100 per cent., but it is as close to that as you have the courage to say it.

Q. Well, taking a conservative estimate applicable throughout the general field of picture production, what proportion would you say would be ascribable to the drawing power of the stars, as compared with the written material?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues that have

been referred to the Special Master to hear and report. 499

Special Master Auchincloss: The testimony will be taken with an exception.

Mr. Driscoll: Exception.

The Witness: Would you mind repeating that?

Mr. Pollak: Read the question.

(The question was read by the Reporter.)

The Witness: Well, the star has been the whole thing from the beginning of this industry, and at least 75 per cent. I would say to me it is the whole thing, if you have a real star.

By Mr. Pollak: 500

Q. Well, Miss Crawford was a real star in 1932? A. One of the biggest we had.

Q. Am I right in this, Mr. Mayer, that the proportion ascribable to the stars is obviously greater if the stars are greater? A. Why, of course. That is the whole history of motion pictures. That is why the other studios say, "How can you beat them? They take ordinary material and put those stars in and it becomes great material the moment those stars get in, and we haven't got the stars". Well, if they did have them they would kill them anyway, they wouldn't know what to do with them. 501

Q. Mr. Mayer, am I right in this, that the proportion ascribable to the literary material is less if the literary material bears no well known name? A. Why, of course, obviously.

Q. Take the case of a play which has first appeared as a play, but its name is not used in the picture. Does that tend to increase or diminish the portion ascribable to the literary material?

Mr. Driscoll: Object to that as immaterial, incompetent and irelevant, not within any of the is-

502 sues that have been referred to the Special Master to hear and report.

Special Master Auchincloss: Same ruling and exception.

Mr. Driscoll: Exception.

By Mr. Pollak:

Q. Have you got the question? A. Obviously, if the play has been a big hit, terribly advertised and magazines have written about it; when you lose the title you have lost what you pay for, a part of it, a good part. We have bought stories because the title became famous. We have
503 just now bought a book where we are not going to use one word of it, but the title was so highly advertised all over the nation that that is what we bought. That was "The Great Waltz". We are not going to use a line of it.

Q. In the case, Mr. Mayer, where the title of the play does not appear as the title of the picture, and where the play has not been a conspicuous success when produced on the stage, what would you say in such a case would be a fair proportion to ascribe to the drawing power of the stars as a minimum?

Mr. Driscoll: That is objected to as incompetent,
504 irrelevant and immaterial, not within the issues that have been referred to the Special Master to hear and report, based solely upon a hypothetical case and having nothing whatever to do with any issue that is now being tried out, or has been tried out, heretofore in this action.

Special Master Auchincloss: The same ruling, with the exception.

The Witness: Well, it would be entirely the star in the kind of picture you made because the material isn't known to the public so they couldn't be going for the material.

By Mr. Pollak: 505

Q. In other words, the share ascribable to the stars increase with the importance of the stars? A. Indeed.

Mr. Driscoll: Objected to as incompetent and irrelevant and immaterial.

Mr. Pollak: I will stipulate that your objection goes to the whole line of testimony and need not be repeated.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial and not within the issues that have been referred to the Special Master to determine here; and on the further ground that it is 506 leading.

Mr. Pollak: I can cure the leading if you really press that.

Mr. Driscoll: I am going to press it, yes.

Mr. Pollak: All right, I will recast the question, Mr. Master.

Q. Mr. Mayer, there is one particular thing that has been testified you are a little proud of and, as the head of the studio, I would like to ask you about that. You have told us, I think, about your care in production. Does that include a regular technique of retakes if the production, when it is first started, is not successful? A. We 507 practically were the originators of it here. They used to call this "Mayer's Garden of Retakes", or "Mayer's Valley of Retakes". Those were the caricatures made of me when I first started that system in '24.

Q. And the point of the retakes is, of course, to— A. —to perfect what is imperfect, to enhance the entertainment value, because I don't think any man knows at the time he is doing it whether he has it licked or not.

Q. Do the previews fit into that system of retakes? A. That is what we have the previews for. We have the

508 writers, directors and producers all go to look it over and then sit down the next morning and pass on the picture.

Q. And you also have actual tests of the reactions of audiences? A. Yes. We give them cards when they go out and we get them back the next day through the mail as to what they thought about this, that and the other part of the picture, their own criticism.

Q. There is another personality I would like to have you tell us about. Who was Mr. Adrian? A. He is the head of the wardrobe. He is the chief designer.

Q. And was he chief designer in 1932? A. I believe so.

509 Q. What is his position, in your opinion, as a designer? A. I think he is one of the best in the world. Prior to him I brought a man over from Paris called Erte. He was an international figure.

Q. I don't think he was concerned in this. I would like to ask you this, Mr. Mayer, you have given your opinion as to the drawing power of stars. Is there also a certain drawing power in the fact of production by a distinguished producer in your opinion?

Mr. Driscoll: I am making the same objection to that question, as irrelevant, incompetent and immaterial and not within the issues that have been referred to the Special Master for hearing and report.

510 Special Master Auchincloss: Same ruling and exception.

The Witness: Well, of course the finer the producer is, the finer the result is, tremendously so.

By Mr. Pollak:

Q. Is there, in your opinion, a drawing power in actual box office receipts ascribable to the reputation of the Metro-Goldwyn-Mayer Studios? A. I think that is the accepted fact.

Mr. Driscoll: Same objection and exception.

By Mr. Pollak: 511

Q. What was that true in 1932? A. Yes.

Special Master Auchincloss: Same ruling.

Mr. Pollak: You may cross examine, Mr. Driscoll.

Cross examination by Mr. Driscoll:

Q. Mr. Mayer, it is a fact, isn't it, that a number of stars have been ruined by bad material? A. Well, not entirely bad material; bad development and bad direction.

Q. Well, isn't it a fact that a story can be so bad that 512
it will ruin any star, any star? A. Well, of course, obviously you can't make a picture with bad material.

Mr. Driscoll: That is all.

Re-direct examination by Mr. Pollak:

Q. Mr. Mayer, I think there is one further question. Am I right in this, that the compensation that was paid you in whatever form, in connection with your services to Metro-Goldwyn-Mayer included not only executive management, but your specific experience and contribution as a producer? A. Well, that was when I came over here. 513

Q. Well, you were continually thereafter reimbursed for both services? A. Yes.

Q. As far as you can differentiate them, as executive and as producer, is that right? A. Yes.

Q. Did the same thing go for Mr. Thalberg? A. Well, he was practically entirely a producer and head of the production, but myself, for instance, I went over and did "Ben Hur" in Europe. I was a producer at that time. Then I brought it back here and Thalberg finished the part we made in America.

526 Q. Did it exist in 1932? A. No.

Q. I will withdraw the question. What is Studio News? Did that exist in '32? A. That is right.

Q. Tell us about that. A. Studio News is a publication that we put out with every important picture. We put it out about three weeks in advance of the picture. That goes also to every Metro-Goldwyn-Mayer account and to trade papers and newspapers all over the United States.

Q. Do all these things go out free? A. Yes.

Q. And, for instance, did you regard "Letty Lynton" as an important picture? A. A very important picture at that time.

527 Q. Which was included in Studio News? A. That is right.

Q. Now, tell us about the photo service. Well, on each picture we have a man assigned that makes still photographs. In addition, we have three portrait photographers. We have three publicity photographers, and their job is to get enough photographs to supply all the types of publications. They are all classified. There is a certain kind of photograph for newspapers, a certain type for magazines, a certain type for other publications, and those are mailed out regularly to those papers and magazines.

Q. Let me ask you this, is your photo service in sheer extent more complicated than that of any other studio? A. Yes, it is.

528 Q. And was in 1932? A. Yes, sir.

Q. Now, tell us about exclusive mailings. A. Well, for instance, if you have four newspapers in the city, for instance, in Los Angeles you have the Examiner, the Times, the Herald and the News. Well, if a picture is going out like "Letty Lynton," we can't send every paper the same story, you know, and so we have it arranged so that we send one story to the Examiner, another kind of story to the Times, and another kind of story to the Herald.

Q. But you will try to cover each with a story? A. We do cover each with a story.

Q. And that applied in 1932? A. That is right. 529

Q. That is sent to numerous editors in different cities of the land? A. That is right.

Q. Tell us about spot news. A. The spot news is the news that goes over the wire services and is used by columnists. For instance, if Norma Shearer decided to come back to work right now it would be a big news story. That is spot news.

Q. Did that exist in '32? A. It did.

Q. And covered about how many theatre operators? A. Well, the spot news covers the newspapers. I mean where you include the press service and everything. It includes hundreds of thousands of newspapers.

Q. Well, it is mentioned here as including a postal card system. A. Oh, I'm sorry. We call that the postcard news. The postcard news is a postal card which we send out every 10 days which goes to all the Metro-Goldwyn-Mayer accounts, all theatre managers, which advises them in brief form of castings, new pictures we are starting, what is going on at the studio, what condition the pictures are in, and so forth. 530

Q. Especially concentrating, of course, on features? A. That is right.

Q. Now, do you have a system whereby editors are made free of the studio? A. Yes, sir.

Q. Tell us about that. A. Well, that is divided. There is plant and production. Their job is to transmit material that is produced, and when they get a story, to plant it in the paper. In 1932, as of now, we have on an average of about 150 out-of-town motion picture editors who come here. 531

Q. This was in 1932? A. That is right.

Mr. Schwartz: You take them through the studio?

The Witness: We take them through the studio and take them to dinner, and have them interview the stars.

514 Q. And Mr. Rubin, himself, had experience of production? A. Not much.

Q. Well, with production? A. He represented the studio and did everything we wanted and, by virtue of that, of course, he got certain experience of value in the kind of material wanted, the people wanted, and doing it up for us. If we wanted certain people, he discovered those people and brought them over.

Q. He did not confine himself to purely legal work? A. Oh, no. He is the business head of the studios in New York and in Europe.

Q. And in Europe? A. Yes.

Q. And that was substantially true in 1932? A. Yes.

515 Q. That is, he was a very important executive in 1932? A. Yes, sir.

Q. And Mr. Thalberg was an executive at least to the extent of supervising the other producers? A. All production was under Thalberg, and when there was any doubt he came back to me about it.

Q. Mr. Mayer, am I right in this, that the system of building up a reserve of stars on a long-time contract is, in your opinion, more economic than the system of hiring stars for particular pictures? A. Yes, because the price becomes fabulous after they are made.

Q. Had Miss Crawford, if you know, had successful productions before 1932? A. Yes.

516 Q. Regardless of material?. A. Yes, sir.

Q. And for a period after 1932? A. Yes, sir.

Q. That is, the Crawford productions, whatever they were, were great successes? A. Oh, sure. Look at the figures and you can see it.

Mr. Pollak: All right. That is all.

(Witness excused.)

(At the hour of 4:30 o'clock p. m., the hearing was resumed.) 517

HOWARD STRICKLING, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Dollak:

Q. State your name, please. A. Howard Strickling.

Q. What is your position? A. Director of Publicity.

Q. And did you hold that position in 1932? A. I was not in charge. I was assistant at that time.

Q. I see. Now, we haven't very much time. We are going to ask you to exercise one of the greatest arts, either 518
of writing or speaking, which is condensation, and I am the last fellow to ask for it, but will you tell me in general terms and quickly what the nature of the Publicity Department function was in 1932? A. Here at the studio, the basis of the Publicity Department is the fact that we are selling personalities. I mean from the time a person comes under contract we start in and develop that person's personality. That is our first job. Secondly, our job is to sell motion pictures. So, from the time a picture starts we start selling that motion picture through the medium of magazines, newspapers, syndicates, and everything else.

Q. And who do you exploit personalities? A. Well, for 519
instance, in the case of Joan Crawford, when she came here her name was Lucille La Soeur. She had been a chorus girl at the Hippodrome Theatre in New York. The first thing we did was to change her name. We had a contest in the movie magazines for a name, and we selected Joan Crawford as a name for her. Then we took a lot of photographs of her and publicized her. Then as she came along and played her first part, they decided that she had personality and had possibilities. Then we took her over and we tried to develop a personality for her. At that time it was in the whoopie days of the flapper age, so she was

520 the flappers' delight, you know; so we publicized her as that. She was the shopgirls' delight. That was the slogan they used for her. She played in such pictures as "Modern Daughters", "Dancing Maidens", and all those things. Then as she came along, in time, she played more serious parts, and we changed her publicity so as to match what she did.

Q. And what did you do with this publicity, how did you get it over to the public? A. Through newspapers, magazines and syndicates. Here in Los Angeles are 380 people who make their living by writing about motion pictures. They represent all the news syndicates from all over the world, all the magazines from all over the world.

521 Q. And that was substantially the same, perhaps with different figures, in 1932? A. Yes.

Q. You are trying to throw your mind back to '32 now? A. That is right.

Q. Go ahead. A. Well I mean that is all there is to it. As I say, we publicize and sell personalities, and we sell motion pictures to the public. That is our job.

Q. Now, how do you get in touch with these 380 persons, or whatever the number is? A. We have a department of about 50 men and women here at the studio and it is divided up. One man handles syndicates. One man handles fan mail. One man handles fan magazines. One man

522 handles national magazines. One handles the foreign press, and so on down the line.

Q. And do you give syndicated material to these publications? A. We do.

Q. And do they then either publish it as is, or rewrite it, whatever they like? A. In most instances they publish it more or less as is.

Q. Well, do the great majority of them publish it in some form or another? A. That is right.

Q. Now, tell us about these fan magazines, what are they? A. There are about 16 fan magazines ranking from the

top one, which is called "Modern Screen", and the second 523
one is "Photoplay Magazine"—the top one has a circulation of around 750,000.

Q. They are interested essentially in the personalities of the screen? A. That is right.

Q. Now, let me ask you a few questions. Maybe I can make it quite speedy. Tell me what the weekly feature service is? A. The weekly feature service; we send out to about 800 newspapers throughout the United States each week a letter of the news happenings of the week, fashion pictures of our stars, beauty hints that our stars use, featured interviews, or anything else. We time that to tie up with the current picture. For instance, we are doing 524
"Letty Lynton". Near the time of the release of "Letty Lynton" we try and flood and supply newspapers with material on that picture so as to sell an individual picture.

Q. Would that include not only the women but, for instance, the men—in this instance Montgomery? A. Surely. It would include Montgomery, Clarence Brown, the director, and it would include the supporting players.

Q. What is Hollywood Today? A. Hollywood Today is a weekly bulletin we get out which goes to every Metro-Goldwyn-Mayer account in the world. We put out about 20,000 copies of it.

Q. By account, you mean theatres? A. Every theatre that buys Metro-Goldwyn-Mayer products. 525

Q. And what does it look like? A. It advises the theatre managers and theatre publicity men of what is going on at Metro-Goldwyn-Mayer. That is also timed so as to sell pictures. That supplies the theatre manager with material which he, in turn, can use in his house organ, his newspaper, and so on.

Q. What does it publicize, the stars? A. It publicizes the stars and the picture.

Q. And also the director, for instance? A. That is right.

Q. Now, how about Hollywood On The Air, what is that? A. Hollywood On The Air is a radio program.

532 By Mr. Pollak:

Q. And what is the effect of this inspection by out-of-town editors? A. It has been of great benefit to our individual pictures.

Q. How large was your organization in '32, the Publicity Department? A. About 70 people.

Q. Now, a great emphasis was and is placed on the personality of the stars? A. That is right.

Q. Is that predicated on a belief on your part that it is star appeal that chiefly carries a picture?

Mr. Driscoll: Objected to as incompetent, irrele-
533 vant and immaterial, not within the issues that have been referred to the Special Master.

Special Master Auchincloss: Same ruling.

Mr. Pollak: You may answer.

The Witness: What was the question?

(The question was read by the Reporter.)

The Witness: That has been a Metro-Goldwyn-Mayer policy. Metro-Goldwyn-Mayer believes in personalities. They develop personalities and sell personalities. That is why they have the largest Publicity Department, and probably spend more money than any other company publicizing and exploiting our people in pictures.

534 By Mr. Pollak:

Q. Well, is your publicity effort especially concentrated upon personalities? A. No. We sell personalities and we sell pictures.

Q. Yes, I know, but in developing news, is it your belief that the appeal of the picture is primarily predicated upon the personalities of stars, for instance? A. That is right, it is.

Q. And also to some extent upon the personalities of well

known directors? A. It has been proven many times. For instance, a picture like "Letty Lynton," as an example, or take "Libeled Lady" more recently, if it would have inferior people in that, people like Madge Evans or Betty Furness, people like that, the gross wouldn't have been as great as with Joan Crawford, Norma Shearer or Greta Garbo. 535

Q. Have you in any collected form reserved the publicity on "Letty Lynton"? A. No, I haven't. I have material of a similar nature that I could give you.

Q. No, I don't think that would do. Have you anything to do with the fan mail? A. Yes.

Q. Tell us in general terms what fan mail is. A. Fan mail are letters written to the stars, some requesting photographs, some of them wanting a letter, or wanting personal information. 536

Q. Yes. We have really had a good enough definition about that. A. Yes.

Q. But tell me what you do about fan mail. You answer it, in the first place? A. We send out photographs to everybody that writes in, and answer any personal letters.

Q. Have you any idea what the volume of Joan Crawford's fan mail was in 1932? A. Around 2,000 letters a week.

Q. And Montgomery? A. Montgomery around the same.

Q. Did that represent substantially the zenith of their fan mail, if you know? Was it ever materially higher than 1932? A. No. 537

Q. Do you regard fan mail as a good index of popularity? A. I do.

Q. And how did the 2,000 letters a week of Joan Crawford and Robert Montgomery compare, respectively, with the fan mail of other stars at that time? A. Very favorably.

Mr. Driscoll: Objected to as immaterial and irrelevant and incompetent, nothing to do with the issues that we are trying.

Special Master Auchincloss: Shorten it down as

538 much as you can, Mr. Pollak. I think you have made your point.

Mr. Pollak: That is all.

(Whereupon, the hearing was continued and adjourned at the hour of 4:45 o'clock p. m., until 10:00 o'clock a. m., March 6, 1937.)

HEARING OF MARCH 6, 1937.

Mr. Pollak: Mr. Schwartz is going to examine
539 this witness, with your permission.

Special Master Auchincloss: All right. Are you ready, Mr. Driscoll?

Mr. Driscoll: Yes.

H. F. METCALF, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Schwartz:

Q. Will you state your full name? A. H. F. Metcalf.

Q. And where do you live, Mr. Metcalf? A. In Pasadena, California.

540 Q. That is in the County of Los Angeles? A. The County of Los Angeles, yes, sir.

Q. How long have you lived in the County of Los Angeles? A. Since 1874.

Q. And, if it is not too embarrassing, how old are you? A. Sixty-two.

Q. What is your business at the present time? A. Realtor, the general business of realtor.

Q. And a realtor in Los Angeles means a dealer in real estate, does it not? A. It is a name given to a member of a local board who is affiliated with and a member of the National Board of Real Estate Exchanges.

Q. And are you a member of such boards? A. I am, 541
yes, sir.

Q. And have been for a number of years? A. For about 30 years, 32 years.

Q. How long have you been a realtor? A. This is about the 33rd year.

Q. Have you made an appraisement of the land upon which this Metro-Goldwyn-Mayer Studio at Culver City, California, stands? A. Yes, sir, I have.

Q. What has been your experience in appraisal work? A. It has been rather varied. I have appraised both for the city and county a great many times for alley and alley opening and road widening. I was on the Appraisal Board of the Mortgage Guarantee Company for upwards of five 542
years.

Q. What is the Mortgage Guarantee Company? A. The Mortgage Guarantee Company is a company loaning money on real estate.

Q. In Los Angeles? A. In Los Angeles, yes, sir. It has been in business here about 20 years. It is still functioning and active. I was on their Appraisal Board for better than five years.

Q. Appraising what types of property? A. Appraising all sorts of real property, acreage, office buildings, apartments, residences. They loan generally on all sorts of property.

Q. Continue with your experience as an appraiser, if you 543
had any other experience. A. I have appraised for the Pacific Mutual rather freely.

Q. That is the Pacific Mutual Life Insurance Company of California? A. The Pacific Mutual Life Insurance Company. I had occasion as Federal Receiver for the Sun Realty to appraise business property in Los Angeles rather freely. I was a member of the Appraisal Board of the Los Angeles Real Estate Board for some two or three years, and I have appraised generally for many purposes.

Q. Have you had any experience in appraising or deal-

544 ing as a real estate agent or realtor, dealing in studio properties, motion picture studio properties? A. Yes. I have had some experience in that. I have had occasion to appraise the realty underlying studios before. I have sold them some property. I had occasion to subdivide and sell a portion of the United Artists Studio at one time, in 1928, I think it was, '27 or '28. We somewhat recently sold the old Christie Studio in its entirety.

Q. That is on Sunset Boulevard? A. On Sunset Boulevard in Hollywood.

Q. You sold that to the Columbia Broadcasting Company? A. To the Columbia Broadcasting Company, yes, sir, together with some adjacent property.

545 Q. You say you have made an appraisement of the land upon which this studio stands. When did you commence to work upon that appraisal? A. About two or three weeks ago, about three weeks ago, I think.

Q. And have just recently completed it? A. I have.

Q. And what did you do in preparation for that appraisement, or in preparing to give an opinion as to the value of the land upon which this studio stands? A. Well, categorically I began by making a map of the metropolitan area and locating the studios on it together with their several acreages, got all the information I could regarding other studios, which was rather meager, I approached the

546 subject of this appraisal from such angles as I thought were pertinent, in fact, from every angle that I thought was pertinent.

Q. Such angles as what? A. Well, I attempted to work out a subdivision project here which projected the streets through the tract and put street work in.

Q. You mean in imagination? A. In imagination on paper, yes, sir, and sold it for such prices as I felt were pertinent at the time of this appraisal. I compared it in availability and suitability of purpose with various other properties in Los Angeles of a comparable nature. I found after some search an appraisal of an identical property

with this, an almost identical property with this, the appraisal for which in 1928 had been accepted by governmental authority. I approached the subject from every angle that I could possibly think of, Mr. Counsel. 547

Q. Mr. Metcalf, give us some general idea, without giving us metes and bounds and descriptions, unless they are required. You have them, have you? A. I have the description.

Q. The bounded description? A. Oh, yes. I have the description of the property here, both legal and general.

Q. Give us an idea for the record of what this property consists, that is, the physical property. The property, in a general way, the general description of the property would indicate that there are 65 acres of land under this appraisal, 40 of which are contiguous to and fronting on Culver Boulevard and on Washington Boulevard. 548

Q. Now, Washington Boulevard is this main through highway upon which the studio fronts, the main entrance fronts? A. Washington Boulevard is the main arterial thoroughfare from Los Angeles to——

Q. To the ocean? A. To the ocean, to Santa Monica or Venice.

Q. To the Pacific Ocean? A. And Culver Boulevard is practically the same boulevard with an arterial thoroughfare between Redondo, Hermosa and Los Angeles.

Q. Hermosa and Redondo being beaches along the ocean-front? A. Beaches along the Pacific Ocean. 549

Q. Generally south of Santa Monica and Venice where Washington Boulevard terminates? A. That is correct, yes, sir.

Q. There is something about 65 acres, you say? A. About 65 acres, yes, sir.

Q. Now, what, in your opinion, Mr. Metcalf, was the fair market value of the land to which you have just referred and upon which this studio stands in the year 1931-32?

550 Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues.

Special Master Auchincloss: The record may note an exception.

The Witness: May I answer?

Mr. Schwartz: Yes.

The Witness: I placed a conservative fair market value as of the time indicated, namely, December 1, 1932, and thereabouts, I placed a very conversative value on this land of $969,210.00.

By Mr. Schwartz:

551 Q. Would that opinion of the value which you give us apply as the end of the year 1932, as well as the end of 1931? A. Yes, sir, I think so.

Mr. Schwartz: You may cross examine, Mr. Driscoll.

Cross examination by Mr. Driscoll:

Q. You say you placed that value on the land alone? A. Yes, sir.

Mr. Schwartz: What was that question?

(The question was read by the Reporter.)

552 The Witness: That is, free of any improvements either on the land or under it.

By Mr. Driscoll:

Q. This particular land is occupied by different stages used in the making of motion pictures? A. It is occupied generally by the buildings pertinent to a general moving picture set-up. How many stages there are, I don't know. There is one very large one, I know.

Mr. Driscoll: I have no further questions.

(Witness excused.)

ELI BENNECHE, having been first duly sworn, took the stand and testified as follows: 553

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Eli Benneche.

Q. Miss Benneche, what is your position with Metro-Goldwyn-Mayer? A. I am the assistant to Mr. E. B. Willis, who is the head of the Property Department.

Q. And what was your position in 1932, Miss Benneche? A. The same.

Q. Would you tell us, in a general way, what the function of the department called, I think, props and set dressing is? Is that the official title? A. Yes.

Q. Just tell us what your department does, so the record 554 may show it. A. Well, we supply all of the props, as you say, and we are given sets to dress, and we furnish them completely.

Q. The Construction Department erects them, is that right? A. Yes, and we follow them.

Q. If this is a correct summary, perhaps you can confirm it: You had in 1932, I believe, five interior decorators, is that right? A. Yes, I should think so.

Q. And about how many property men? A. Well, that is hard for me to say.

Q. Would you want to set a minimum on it, Miss Benneche? A. Well, for instance, if we had 10 companies 555 going, we would have 10 property men. We have two divisions. We have a swing gang and the property men. A prop man is assigned to the company and he takes care of that particular company, and he sees that they are supplied with the necessary props. The swing gang man is a man that assists the set dresser in putting the furnishings in the set.

Q. One such man at least is assigned to each production, is that right? A. That is right, and an assistant.

Q. And an assistant? A. Yes.

556 Q. I think we ought to have a definition for the record of props, which is an abbreviation. What do you call props, Miss Benneche? A. A prop is something in the picture that has a definite purpose. For instance, if we have to have a wagon, we call that a prop. In another instance, we may have several wagons, but they are just properties. Where there is just one prop, that means that it is going to have a definite purpose. For instance, one of our men leading will be riding on it, or will have some particular thing to do with that background, with that wagon. Take, for instance, hand props. We have many hand props on a set, but one hand prop, a special hand
557 prop has to be okayed by the company.

Q. Okayed by whom? A. I mean the director.

Q. The director. A. Because that particular prop may have a closeup taken, or it has a definite reason in the story action.

Q. What would be a hand prop? A. Small things that you handle.

Q. An envelope might be a hand prop? A. Yes, or a mirror, or tooth brush. If you have a mirror it is going to be a closeup of it, and they are going to handle that thing, and you will see it on the screen.

Q. Well, tell us what a swing gang is. A. A swing gang is a group of men that are supplied for the set dressers
558 when they dress sets. For instance, a set dresser will be assigned to a set to dress on Stage 9, and he will go to the foreman of his men and he will say, "I need four men." He is given four men to go out and do this work. It is just more or less labor work like picking up desks and all that sort of thing.

Q. Will every set have a swing gang? A. For dressing?

Q. For dressing? A. Yes.

Q. That is, besides the prop man and the assistant prop man, is that right? A. Yes. That has nothing to do with the prop men at all, because he is off somewhere with his

company. When the set dressers finish dressing the set, 559
those men go back into the department. They have nothing to do with the company.

Q. The prop man is continuously with the production unit? A. Yes. He is part of the unit.

Q. Though supplied by your department? A. Yes.

Q. I see. You defined a property as some physical object that has a purpose in the picture? A. Yes.

Q. Well, isn't the whole physical equipment, apart from the stage, regarded as property and within your jurisdiction? A. Yes.

Q. In other words, nothing is supposed to be in the picture that hasn't a purpose, is that right? A. Right. 560

Q. You also call external objects, I suppose, property, including even objects that are affixed, like flowers, or don't you? A. Well, it depends.

Q. I beg your pardon? A. It all depends. The Construction Department takes care of that, I think they do. I really don't know. There have been some changes in it now.

Q. You have florists in your department? A. Yes, we have florists, but that is just for small flowers.

Q. Oh, I see. A. We don't have charge of the landscaping.

Q. Excuse me. That has already been explained as a part of construction. A. Yes. 561

Q. But you would handle a vase of flowers, for example? A. Oh, yes, we handle that.

Q. And you have an enormous collection of properties, is that right? A. Yes.

Q. Including some original antiques? A. Yes.

Q. How much of a physical plant has your department, Miss Benneche? A. How do you mean?

Q. Well, have you a building, to begin with? A. Yes.

Q. How many of them? A. In the department?

Q. Yes. A. I should say around 150.

562 Q. You mean 150 employees? A. Yes. Is that what you mean?

Q. No, I meant how many buildings. A. Oh, we just have one, and part of this one (indicating).

Q. And you have an upholstering department? A. Yes.

Q. A cabinet shop? A. Yes.

Q. A paint shop? A. Yes.

Q. And you manufacture your own artificial flowers? A. Yes.

Q. Do you manufacture other props, Miss Benneche? A. How do you mean?

Q. Well, here on the place if you want some particular kind of cabinet, or I don't know what all, do you some-
563 times manufacture it, or do you always buy it? A. Oh, yes, we do quite a bit of that.

Q. That is "Yes" to buying, or "Yes" to sometimes manufacturing? A. Both.

Q. That is, you do sometimes manufacture? A. Yes, we do.

Q. And you have a group, I suppose, of trained carpenters and cabinet workers? A. Yes.

Q. And upholsterers? A. Yes, sir.

Q. And what other technicians, if any, have you? A. Well, we have the paint department, and we have our own lamp shade department, and linen separate.

564 Q. How about furniture, furnishings? A. We also have that.

Q. You have said interior decorators already, have you not? A. Yes, I have.

Q. Of course, the repair of props comes under your department? A. Yes, sir.

Q. And the purchasing of new furniture if you need it? A. Yes.

Q. Do you also take care of the furnishing and decorating of the various offices of M-G-M? A. Yes, we do.

Q. The manufacturing of draperies, I suppose, for sets? A. Yes.

Q. You have said you thought there were about 150 persons in the department in 1932, is that right? A. Yes. I wouldn't want to make that as a definite statement. 565

Q. I see. I think that is not so very important, just what the number was, and I think you have given us what I wanted.

Mr. Driscoll?

Mr. Driscoll: No questions.

(Witness excused.)

JOHN ARNOLD, having been first duly sworn, took the stand and testified as follows: 566

Direct examination by Mr. Pollak:

Q. Mr. Arnold, what is your position with M-G-M? A. I am in charge of the Camera Department, in charge of all the cameramen, the routine follow-up and preparation, assignment of crews, technical problems that come up regarding photography.

Q. Did you hold the same position in 1932? A. Yes.

Q. Tell us, in a general way, what the Camera Department does. A. Well, we start out, first, of course, with the script of a picture which we analyze and we find out who the stars are, or featured players, and, of course, certain cameramen are assigned to certain stars who never work except when those stars work. Then, after that, we consult with the cameraman about various ways and means of photographing certain sets, and colors of sets. 567

Q. You consult with whom? A. The cameraman that goes on the picture. Then there is the assignment of a crew for him, the assignment of camera equipment. We follow that picture completely through to the finish. In other words, it is an expert case of supervision over the whole thing.

568 Q. You assign a camera unit, of course? A. Yes.

Q. To each picture? A. That is right.

Q. And what does a unit consist of? A. Well, on some pictures a unit of five men, and on some it is a unit of 10. It depends on the type of story, or the type of action which the thing calls for.

Q. What equipment do these cameramen take out with them? A. Well, they have the camera, the motion picture camera, then what we call a bungalow. That is a housing that goes around the camera. That is to keep it silent, and the supporting equipment, tripods and perambulators that are used for moving up, back and forth to the shots.

569 Then the still cameraman has a still camera to take out. He handles just a still camera for making stills. Then we have reflectors and lights, and so forth.

Q. We have had a lot of talk about it. Will you tell us what a goboe is? A. Yes. A goboe is in different sizes. It is 18 inches or 24 inches wide, possibly six feet high, and it is black cloth, or painted black on both sides. That is used to shade. For instance, if there is a strong light hitting you in the eye, we bring that in to the sides to shade off all extraneous light hitting toward the camera.

Q. I see. Thank you. Now, these cameramen that you send out are, I suppose, real artists, are they not? A. They are.

570 Q. Very highly trained men? A. They are.

Q. Now, it is a matter of individual selection in each case what cameramen to assign to a picture? A. Yes, because, as I said before, certain men can photograph certain stars better than others. It is just some little individual trick of theirs, or knack, which enables them to do that.

Q. That is, even with the finest machines, individual skill does enter into camera work? A. That is right.

Q. And these differences of function, do they apply also to the photographing of particular sets or scenes? A. Yes, because a man may go to work and light his set and take

the thing entirely away from the star, or the featured player. So he must always keep that in mind so as not to bring the set up to the illusion where it takes away from the players. 571

Q. Your department is called in at the beginning, the break-down of the story, is that right? A. Yes.

Q. In other words, to determine what camera unit or men to assign? A. That is right.

Q. And once assigned they work with and under the director, I suppose? A. That is right, except on photographic problems. Then I cooperate with the cameramen on that picture as to the best ways and means of doing certain things, tricks, and so forth.

Q. And if need be, you and the director confer? A. That is right. Very often a director wants something we can't do, so I go to the director and explain the reason to him. 572

Q. I suppose also you try to devise new techniques? A. Always.

Q. New techniques that will get what he wants? A. Yes.

Q. Mr. Arnold, in general, I haven't bothered with giving the qualifications of witnesses, but could you tell us, in a very general way, what your experience in camera work had been before you came here? A. Well, I have been through all the mergers and things. I have been with this firm a little over 20 years.

Q. And before that where were you? A. With the Biograph. 573

Q. I see. And before that? A. Thomas Edison.

Q. In other words, you have specialized in camera work all your life? A. That is right.

Q. And in motion picture work as long as there has been a motion picture industry? A. Yes.

Q. On a big scale? A. Yes.

Q. Do you know one Mr. Marsh? A. Yes.

Q. He was, I believe, the director of photography in "Letty Lynton"? A. That is right.

574 Q. Is that the same function as head cameraman? A. Well, in a sense he is the head cameraman on that company.

Q. That is what I mean. A. Yes.

Q. You mean on that unit? A. On that unit.

Q. I see. Is he still living? A. Yes.

Q. Was he in 1932 a man of distinction? A. Very much so.

Q. An especially skilled artist? A. Yes.

Q. He had a long experience? A. Yes.

Q. Tell us, in a general way, what the personnel of the department was in 1932. A. You mean in the number of people?

575 Q. Well, give it that way, if you want; yes. A. I think in the neighborhood of 55 or 60. I don't know exactly, somewhere between that number.

Q. Including about how many head cameramen? A. About 12 at that time.

Q. I see. And about how many second cameramen? A. I would say somewhere in the neighborhood of 18 or 20.

Q. And assistant cameramen? A. About 20 or 25.

Q. I see. Would every unit have a head, a second and an assistant? A. Yes, and a still man.

Q. And a still man? A. Yes.

576 Q. The still man for closeups? A. No. The still man makes all the 8 x 10 still pictures and portraits, and things on the set for advertising purposes.

Q. The stills being for advertising purposes? A. For advertising and publicity campaigns, and things of that kind. Those are the 8 x 10 photographs that you see around.

Q. Do you keep a whole force of mechanics, or a number of them, in order to keep your cameras in repair? A. Yes, we do.

Q. Have you any other mechanics? A. Well, yes, electricians that take care of the motors, and so forth, and we

have clerks that take care of the equipment that check it 577
in and out.

Q. Your cameras are electrically driven? A. Yes.

Q. Now, there is reference here to a motor maintenance man. A. That is the electrician. We call him the motor maintenance man. He takes care of all the motors and cables, and so forth. They are checked daily.

Mr. Pollak: That is all.

(Witness excused.)

JOHN M. NICKOLAUS, having been first duly sworn, took 578
the stand and testified as follows:

Direct examination by Mr. Schwartz:

Q. State your full name, please. A. John M. Nickolaus.

Q. Mr. Nickolaus, what is your position with the Metro-Goldwyn-Mayer Corporation? A. Superintendent of Photography.

Q. How long have you occupied that position? A. Eleven and one-half years.

Q. What was your experience in a general way in the same type of work before coming with Metro-Goldwyn-Mayer? A. I held the same position with Universal, later 579
at Paramount, then was part owner in a laboratory I financed and developed myself.

Q. The Standard Laboratory? A. Standard Laboratory.

Q. And then came here? A. And then I came here.

Q. The Master and counsel have been through your wonderful laboratory, but tell us, in a general way, for the record what the functions of your department are. A. Well, my chief functions are, in a sense, supervision of anything photographic in the laboratory.

Q. Pardon the interruption. You have nothing to do;

580 your department has nothing to do, with the actual photographing of the picture? A. Just merely in an advisory capacity, or a cooperative capacity.

Q. I see. Go ahead. A. You can plainly see that it would be pretty hard to eliminate an organization that is going to supply the negative stock to the cameramen and then have it come back and process it according to the art applied to it on the set without in some way being tied into it from the very inception.

Q. Well, yes. I simply wanted to distinguish between you as head of the laboratory, or processing department, and the director of photography who is head of the actual photographing of the picture. Go ahead, Mr. Nickolaus.

581 A. Therefore it brings us up to the fact that we supply the negative to the camermen, in the first place, take it back and develop it, go through the necessary functions—that includes, however, picture negative and sound track negative. We develop it, segregate it according to the scenes that are to be printed, and not to be printed, synchronize the sound track and the negative, preparing it for daily printing, making the daily prints and distributing them to the necessary departments, which include in this case the sound department, the producer, the cutter and the director.

Q. That is what we call rushes? A. Rushes.

582 Q. And then you also process the release prints? A. Well, under our supervision. Then we have the care of that negative until the picture is completed. Then we have to trim that negative and match the master print which the Editorial Department has developed from the whole process of making the picture.

Q. In the use of the word "development" there, you do not mean development in the sense of processing, which is your function? A. No.

Q. When you said the Editorial Department develops the negative, you mean it puts it into continuity? A. They are put into continuity. Then it is directed back to this

department for printing. The negatives are brought out 583
of the vaults and carefully cut to fit the print they have assembled. We have a final negative now. The negative goes to the laboratory then for release printing. We make all the release prints here, for the domestic market and some for the foreign negative. Then the negative is shipped east for certain types of work that we don't do here, couldn't do here, because we are too far away from the foreign department. That is to superimpose titles in all different languages, and so forth. That is done in New York.

Q. Then the prints are ready for distribution by the distributing organization to the theatres? A. We distribute them to the exchanges who, in turn, distribute them 584
to the theatres.

Q. Now, what departments have you under your control? A. The laboratory, motion picture laboratory, and still laboratory, machine shop and projectionists.

Q. Do you have a duplication department? A. Yes. That comes under the heading of the picture laboratory, and also a trick department, trick processing department.

Q. Were your physical facilities, and also your functions, substantially the same in 1931-32 as they are now? A. Yes.

Q. What is the personnel of your department, not by name, but by people? A. I should say those combined 585
departments would average, year in and year out, about 300 to 350 people.

Q. That would be true as of 1932? A. Yes. It doesn't change much.

Q. And into what would that large number of people be divided as groups? A. Well, in round figures——

Q. I don't mean figures. To begin with, you have an assistant, have you not? A. Yes.

Q. And you have a plant mechanical engineer? A. Yes.

586 Q. Now, what other department heads? A. We have the heads of practically every department, like we have a head of the duplication department, we have a head of the release department, we have a head of the negative department, negative assembling department, and the picture sound department.

Q. And the trick process department? A. The trick process department, the assembling department, the release assembling department.

Q. And each one of those men, I presume, is a foreman? A. Well, you can call him a foreman.

Q. Each one of those men have men working under them? A. Yes.

587 Q. Now, who is your assistant? A. Tucker.

Q. Who was he in 1932? A. The same man.

Q. And you have a man by the name of Wise? A. That is the plant engineer, the mechanical plant engineer.

Q. And what position did he hold in 1932? A. Exactly the same position.

Q. And what is his background, do you know, for this work? A. Well, I consider him the best versed motion picture mechanical engineer in the business today. His previous experience, his very first experience in this business, entering it as a high-class mechanic was with Bell & Howell, Chicago. He later represented Bell & Howell in Hollywood, the Hollywood office; he left there and took a 588 similar position to the one he has now with me at Paramount. Then later he went to the Standard with me, and later came here with me.

Q. Bell & Howell are well known manufacturers of motion picture cameras? A. Yes.

Q. And equipment? A. Possibly known as the best motion picture precision machine people in the country.

Q. And what are Wise's essential functions with you? A. Well, briefly, he is in charge of all the mechanics in the plant, and practically everything in our plant is mechanics.

He designs all our machinery, supervises its construction and supervises its operation. 589

Q. And do you build precision machinery of your own in your plant? A. We build whatever we have to build. For instance, all our developing machines are built by us.

Q. And designed by you? A. Designed and built. The Slitting machines, there are certain types of machines that we use that you can buy, that aren't made. There are other types of machines that are made but are not precision enough for our particular requirement. We are sticklers for accuracy, and if we can't buy it, we make it.

Q. You talked about precision machines, you mean for what purpose? A. Well, any machine that we use is a precision machine. It has to be. It is very easy to figure that out. 590

Q. What I am trying to get at is, what is the object or result of your work with precision machines, what result do you get? A. Well, very simply for the reason that we are in a peculiar phase of photography in motion pictures, inasmuch as we work so small and we enlarge to such a terrific degree. No place else in photography does that condition prevail. Invariably they make a small negative and enlarge it, but that is for a picture in your hand. We have a tough proposition, a thing that in the early days of pictures held it back, and they said it couldn't be done. However, we are doing it, but we are doing it by the means of high-class precision machinery, and until we had that we couldn't make moving pictures. 591

Q. To what extent do you magnify that little frame that we see upon the positive for the screen? A. We figure that the average increase in size is about 40,000 times in the average theatre.

Q. That is, each one of those little frames are something like an inch or inch and a half long. A. Less than that, three-quarters of an inch, but since we went into sound it is reduced. It was three-quarters by an inch in the early

592 days, but we made our game a little harder by reducing it when we went into sound to make room for the sound track.

Q. What is the size now of the normal frame? A. It is less than three-quarters of an inch.

Q. And that is magnified 40,000 times on the screen, approximately? A. The average screen in the United States, I should say, is 20 feet today. Some of them go as high as 40 feet.

Q. To what extent have you reached precision in your work? A. Just as fine as it is possible mechanically. For that reason we have a lot of difficulty, and will have for many years until we get some more trained men doing our
593 class of work. They have to be specialized. For instance, the gauge makers come from some of our finest plants in the east. While they are finished, polished, trained men, we still have two or three years' work to do with them to familiarize them to the thing we are doing. It is that terrific enlargement. The average mechanic can't get it. We have to work finer. For instance, the ordinary machine is a precision machine. I mean it can have a variation possibly in a fit of two-thousandths of an inch. That doesn't mean anything. You can't see it and you can't feel it. It is a physical machine. But ours is not a physical machine in that the thing it is reproducing has to be enlarged 40,000 times, so a variation of two-thousandths of an inch
594 is out of the question. We have to get the finest degree of accuracy where we are now, but even that isn't good enough. As the years go by we get a finer degree of refinement that makes our pictures better. For that reason you have less eye-strain today than you had two years ago. You had less eye-strain two years ago than you had five years ago, and so it goes back to 20 years ago when the picture wobbled all over the screen. You would be blind if you saw two features in one night. We can see two features in one night today and the fatigue is not so great.

Q. It is great enough, but not so great. A. Well, I should

say it is less. M-G-M, by their research, have eliminated, 595
I think, as we see it today, the last vestige of eye-strain.

Q. What was the type of that research? A. That is what we call turbulation. Up to two years ago the average theatre had equipment good enough to give you a steady picture mechanically. It didn't move. It was steady mechanically, but it did move chemically. You have to go into quite a chemical argument for that, but nevertheless the picture was steady mechanically, but moved chemically. We put in about two years of hard work on it and succeeded in taking the chemical movement out of it. Now we have a mechanically steady picture and a chemically steady picture.

Q. That is what you call turbulation? A. Yes. We 596
have taken out the chemical unevenness by turbulation. Turbulation is the term for a terrific agitation at the surface of the film during development.

Q. To what extent, in a general way, were you doing that type of experimentation for improvement in 1931-32? A. Well, that research was going on at that time.

Q. That particular research? A. Yes.

Q. And I presume research of other types? A. Oh, yes. We never stop. We can't afford to stop in this business. I will give you an illustration. When we succeeded in taking the directional effect, which is the uneven development, out of our negative, we had no idea that there was 597
any in positive. We didn't think there was. We had no way of telling since, in the negative that you are printing, you couldn't see through it. So after we had succeeded in putting turbulation on all our negative developing machines—I should judge it cost us about $20,000.00—it just proved one thing, that we had directional effect in positive. So we had to start all our research all over again to find out what we had to do to get it out of the positive, because it would be ridiculous to take it out of the negative and not take it out of the positive. One proves the other.

Q. Did you accomplish it? A. Yes.

598 Q. With the positive? A. Yes.

Q. In other words, while your actual daily processing is going on, you are also constantly conducting experimental and research work for the betterment of your product? A. We have to do it.

Q. And you are doing it? A. Oh, yes.

Q. And have been from the beginning? A. Yes. That is one of the principles of our company. They want us to do that. We don't necessarily have to make the grade on everything we try, because in research that doesn't happen. If you get one out of five of your chances in improvement of a product, that is worth going after. But it is hard to say how much money we spend in research because it
599 varies. Some tricks we go after are not so expensive. Some of them cost a lot of money, they run into a lot of money. Sometimes we spend as high as $20,000.00 or $30,000.00 and quit right there because the money we have spent convinces us we can't do the thing we are after.

Q. As an illustration of the type of experimentation and research that you do, can we properly cite the toning work that you have done in the last two or three pictures? A. Yes. That is a fair example of our progress as we go along as a result of that kind of work. Had we not succeeded in taking the directional effect out of the negative and the positive, we should never have attempted that.

600 Q. It couldn't be done without turbulation? A. No.

Q. And by toning, we mean the sepia color effect that you produced in "The Good Earth" instead of black and white? A. Well, any applied color as we would apply it in a laboratory.

Q. And in "May Time", which was just previewed the other night, you got a pink tone? A. We have a sepia and a pink.

Q. That was a result of how much experimentation? A. That is right.

Q. I say, how lengthy was the experimentation in order

to get that result? A. Well, we have been working on 601
that for about a year and a half.

Q. Did you build the machines by which that effect was produced? A. You mean the tone?

Q. The toning machine. A. We only built one. That is still our experimental machine. We have put it in production, but it is all we have going.

Q. You are still experimenting? A. Yes, but we won't build the rest until we do some more testing or research or refinement, whatever you want to call it, because we are not satisfied that we have got the best result we can in our present machine. But that is merely what the machine is. It is really a trial machine. They are still in research. 602
But there is no question about the fact that our new machines will look entirely different from that machine, because we have already found a lot of weaknesses in that set-up.

Q. Are you pretty familiar with other laboratories in the world, laboratories of your type? A. Yes.

Mr. Schwartz: Very well. That is all, Mr. Nickolaus. Any cross-examination?

Mr. Driscoll: No.

(Witness excused.)

603

DOUGLAS GRAHAM SHEARER, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Schwartz:

Q. State your name for the record. A. Douglas Graham Shearer.

Q. How old are you, Mr. Shearer? A. Thirty-seven.

Q. What is your position with Metro-Goldwyn-Mayer Corporation? A. Director of Recording.

604 Q. In other words, you are the head of the sound department? A. Yes, sir.

Q. And how long have you occupied that position? A. Since the beginning of sound in the studio.

Q. Which was about when? A. 1928. June, 1928, I was assigned to the work, but we didn't start recording until toward the end of the year.

Q. To what extent, if any, did you participate in the installation of sound equipment in the studio? A. Well, I was wholly occupied with it. That is, my participation was complete.

Q. In other words, you supervised the installation of
605 the sound in the studio? A. Yes, with what construction work had to be done, which, of course, was taken over by the people qualified in the construction of buildings, and so forth.

Q. Now, although we have been through the studio and you have given all of the people here present a demonstration in your plant as to its function, will you tell us for the record here, briefly, please, what the functions of your department are and were in 1932? I assume they are the same now as they were then? A. Yes, they are. Well, the function of the department is to provide the facilities and the technique to make a picture that otherwise would be silent into a sound picture. It consists of making avail-
606 able the proper type of equipment to record sound, sound to the limit of the known technique at any time. That is, we try to supply the most modern equipment that we know of or, failing in that, we have assumed to develop that type equipment.

Q. That is to say, the design and construction of it here yourself? A. Yes. We have designed and constructed a good deal of it. We have designed a lot of other equipment that is sold to us by outside companies after the design is completed.

Q. The equipment designed and developed here is used by other motion picture companies too? A. Yes. The elec-

tric companies supplied us with certain basic equipment in 607
the beginning which was, as far as they could anticipate, or was supposed to be, motion picture sound recording equipment. It actually was, in the sense that you could take a certain scene made in front of a camera and photograph and record what went on just in front of that camera. However, when cut together in a picture that would have made just a series of shots disassociated, no smoothness or continuity between them. Also, certain scenes in motion pictures that were customarily used in silent pictures could not be made with that new equipment on account of the physical inability to enact the scene in a manner that could be recorded and photographed both together, so that required the evolution of methods of apparatus to circumvent 608
the physical difficulties that were obvious if you were to try to make a complete scene happen with sound and picture both at once in front of the camera.

Q. Was that development made here? A. We did a great deal of that work. Our developments number about—I have a list of items—there are about 187 in number up to November 10, 1934.

Q. Give us a general idea of some of those 187 developments, briefly. You are now looking at a memorandum that you prepared yourself recently? A. No, this was prepared in 1934.

Q. By you? A. Yes, sir. The list shows, briefly, a 609
resume of the method, equipment and technique which has been developed and adopted by M-G-M Studios as a result of the advanced requirements of sound picture recording, as well as other elements affecting film in the laboratory and camera department. As stated in connection with a similar summary made in March, 1932, in many cases no recommendation had been received by the electric companies for the methods and apparatus needed, and in other cases recommendations had been suggested and analyses had been received by us after our adoption of a necessary device or method.

610 Q. I want to get an idea— A. That qualifies the detail. You want to pick out one item?

Q. Yes, one or two items. A. Pre-scoring is an item of some importance.

Q. What is pre-scoring? A. The method of photographing action in exact synchronization with previously recorded sound, to be ultimately released with the picture on special key or tempo tracks. The latter are used when the scene is not ready at the time of photography or produced picture effects which could not be otherwise handled in editing.

Q. Did that particular process require the designing and construction of machines? A. Yes, it did.

611 Q. Those machines have been adopted by other companies or studios? A. Yes, they have.

Q. By the electric companies? A. Yes.

Q. Machines are now made with your development? A. Yes.

Q. Just give us something of some major importance. A. Push-pull recording and reproducing.

Q. Explain that. A. That is a type of recording where two sound tracks are used adjacent to each other to increase the range of volume that can be recorded and reproduced. It was originated, developed and applied to commercial use in its complete method and equipment with

612 variable density film. The method provides increase in volume range, noise reduction with simplified apparatus. It is approaching the ultimately perfect system which required new light valves and new optical equipment, new reproducer heads, and is being sold now by the Electrical Research Products to the other studios.

Q. While you are doing your daily work in your department, are you also constantly conducting experimental and research work in connection with the development of your methods? A. Yes, we are.

Q. It is going on all the time? A. Yes.

Q. Was that true as of 1931-32? A. It was more true

then. For instance, in 1929 we had double the number of employees that we had in '31 and '32. The necessity of having all those men in the early days was to foster the rapid development of these methods and devices which the pictures later on received the benefit of. 613

Q. Have you given us pretty completely the functions of your department? A. No, I haven't.

Q. Will you continue? A. After we have a system available for use in the studio, our next function is to analyze the shooting scripts of each picture to be made and pick out any problems that might occur in that script which requires special treatment. We try to pick those out ahead of time before the script is put into production. We assign a crew to the company, taking into account the temperament of the director, the people he is to work with, and so forth and so on. We select a man who we think can work more smoothly with the particular picture, and then we provide facilities on each set every day by dispatching the channel wiring, providing the recording machines, setting up the microphones, and the crew which has been assigned to that company uses those facilities during each day's work. That film is recorded during the day and sent down to the laboratory where it is developed, and the following day it comes back to us where we inspect it. We analyze the quality of the scenes, reject any scenes which are inadequate from a technical standpoint, make remarks on a log which is sent to the producer, director and film editor as to what scene we think most advisable to avoid or to use in special cases where some item in the scene might pass their notice. In that manner we clear off each day's work and pass it completely out of our hands as quickly as possible to the editor, who then takes that material and literally builds his picture out of it with the picture film associated, of course. During that editorial period we don't have much to do with the film. After the picture is finished shooting and the editorial work is complete enough to run the production in more or less continuity, it again 614 615

616 comes back to us for the addition of sound effects and corrective measures, such as bad jumps in the sound, or irregularities which have appeared after the editorial work is done. We take it in and we give it a brushing up, so to speak. We supply sound effects. A sequence such as the earthquake in San Francisco would come to us, just the picture film alone, no sound whatever with it. We assign a crew to that and they either obtain from our sound film library the necessary sounds, or they go out and actually create new sounds that might not be in the library which would be suitable for composing an earthquake effect in that sequence. During the time we are running our daily, that is, the dailies are each day's work that we in-

617 spect that I mentioned before, we have a man who watches for any sound in the ordinary sense which could be used for library purposes. As the scenes run by, if he should hear, for instance, an old car drive up and the brakes squeak as it stopped, that scene would be noted on a log and the log sent down to the negative laboratory and that particular negative would be taken out of the regular vault and put in a special vault and saved as a library stock scene. That allows us to use that scene in the future when we should want to have such an effect as that, if we didn't have one when the picture was shot. After the sound effects have been built into the picture, we have presumably recorded a

618 physical score for all of or some parts of the picture. I say "we have"—a musical score has been made which we have recorded, and that musical score is lined up in conjunction with the various reels of the picture, or the parts of the reel that it is intended for. The sound effects, musical score, dialogue track and the whole are re-recorded on to one single film, from which we can make a print to take out and show to the public. That print is only one copy. That is, we couldn't make a number of those prints. The negative from which we made it wouldn't be of a type where we could print many issues. The print we would derive from that would have to have special handling in

order to make it acceptable for the picture theatres in the intended version. We take that out and show it to the public and get their reactions. 619

Q. That is a preview? A. At a preview. If, either for technical reasons or dramatic reasons, any part of our sound work is unsatisfactory, we then have an opportunity to correct it, having the public as a guide as to what we think would be the best correction to make. That is, the public reaction is taken strongly into account in those corrective measures.

(Here followed discussion off the record.)

By Mr. Schwartz:

620

Q. Now, to get back to our record, you were just telling about re-recordation. You remember that the Master and counsel made a tour through your sound department. A. Yes.

Q. And we finished our tour at a little projection room where part of the picture was thrown upon the screen where two men were sitting, working at the controls. Is that the department where the re-recording is done? A. Yes, it is.

Q. And through that, as we were told by you, a number of separate prints, one print, for instance, of the train whistling, another print of a bell ringing, another print of dialogue, and another print of music are put through 621 an operation by which they all come out together on the same final print? A. Yes. That operation, by the way, was a development that was made in the studio.

Q. Of re-recordation? A. Yes, it was. When the initial equipment was supplied to us, and the initial technique, we did not anticipate that.

Q. How did you get all the various effects together before this development? A. It was necessary to make the scene with all the effects present in the original scene. We had scenes made here in the very early days where a whole

628 new print on all the sound track and other effects that we use there, is then assembled in proper relationship on different reels and a re-recording job is done from all these prints which supplies us the negative which we hope to use for the final printing of copies, the printing of copies which we distribute to the theatres. That operation of revising and re-recording for previews I have seen happen five and six times on some pictures. It is usually twice, and rarely they do it once, and quite frequently about three times. When the print from the re-recording negative is made, it comes up to us with the sound picture both together on it because at the same time the picture negative has been
629 receiving similar treatment in the hands of the laboratory. We then have what we call a movietone answer print. Due to the form of the released sound track having certain limitations—the released sound track is of a different form than our original track, our original track being a special push-pull type which I spoke of—we then release our product with the sound track of a conventional form track on account of the theatres throughout the country not being equipped to run the newer kind of sound track as yet. The standard sound track has certain limitations with respect to natural volume range that can't be obtained without excessive surface noise or background hiss. We developed a technique of recording or re-recording each scene
630 in a picture more or less for what it is worth with respect to that particular section of film. That is, if we have a softly spoken scene or sequence, we don't necessarily record that softly on the film, because if we did, the background noise would be high. That is, if we only used 10 per cent of the available range of the film with the desired record, it would be the same effect as receiving a distant radio program. We would have lots of atmospheric disturbance because of the weakness of the signal. There would be a lot of natural disturbances that would come in on the wire as a matter of course. Now, we record that particular sequence more robustly on that piece of film so that the

ratio of the desired signal to the extraneous and unavoidable noises of the film medium itself is higher. That ratio is higher. Instead of recording to 10 per cent of what we could on the film, we would record to 80 per cent. Then by a laboratory move we print down the sound track to a darker density than the former sound track density. When we print down a sound track, that robust signal which we have laid down on there more robustly than we wanted is reduced in strength because the dark print inhibits the amount of light coming through the photo-electric cell system. 631

Q. And also correspondingly reduces the extraneous noises? A. Obviously, because they are carried on the same medium as the desired signal. 632

Q. Have you about completed the actual general function of your department? A. This is the last step in our treatment of the track. The movietone print that I spoke of is run on the screen in front of us and we note the scenes that need this printing down treatment that I described, and we give the laboratory directions to that effect. They incorporate those changes in the printing light intensities and make us up a second print. We observe that as to whether these corrections have operated correctly, and if so, we tell them to go ahead with their release copies which they print up in number and distribute. If not, we make further corrections and then finally give them an okay on the negative. 633

Q. Will you give us, in a general way—I don't care about names, of course—the personnel and departments of your department, and the subdivisions of your department? A. You want them as of now?

Q. As of '32. A. '32.

Q. '32. Before you go into that, essentially all that you have given us so far applied to '31 and '32 as well as today? A. Yes.

Q. Will you give us some idea of the extent of your

622 orchestra would play on the set while the actors were doing their scene. It was very cumbersome.

Q. They were all trying to out-holler each other? A. Yes, and also the scene had to be planned in such continuity that the music could continue right along, which is almost an impossible feat to make it a satisfactory scene. Lionel Barrymore directed a short subject for us where even the title music and the end title music was included right in the scene on the stage. All during the making of the nine-minute scene that orchestra was sitting there waiting to play when their time came. That was because we had no apparatus or method developed for re-recording from separate tracks to a finished negative.

623 Q. By reason of this development of which you speak, you are now able to take your orchestra by itself in a separate room, and your dialogue by itself in another room, and all other effects by themselves, and then bring them all together at the finish? A. Yes, we are.

Q. Now, will you continue with your recital? A. I believe I reached the point where we had prepared a preview negative by re-recording it, which negative would be used only for that one preview print. After the preview has been digested by the producer and the other people interested in the quality of the picture, certain changes are made. The picture might be shortened. Entire new sequences might be photographed and recorded for it. The editorial 624 arrangement might be changed. In any case, the picture would come back to us for further treatment after the physical changes in the film of the picture were set, and we would have to re-arrange our complete line-up of sound effects, music, dialogue and other elements that originally went into it, and usually we would re-do the re-recording job for a second preview. That is nearly always the rule. It is a very exceptional case when we have one preview and go to press, so to speak. The second preview is a repetition of the technique of the first, and after further changes have been made on the second preview, when we are satisfied

with the appearance at that time, we take all our effects, 625
music tracks and other elements that went into the sound end and give them a thorough going over, brushing up, removing little spurious clicks or damaged film that might have caused an extraneous sound, sometimes adding a frame or two of film on the end of a scene where a word has been clipped off a little too shortly, or where the interval in a speech between one scene and another has the wrong cadence or length. We prepare a master print from the last editorial print.

Q. The last editorial negative? A. No, the last editorial print.

Q. The print. I see. A. That master print is then sent down to the laboratory with whatever indications we have 626
inscribed on it for treatment in negative cutting. That is, we might have the end of a sound scene on which we mark "Extend this scene two frames long," and that might be to avoid the clipping off of a final syllable of a word, or the cutting too close to someone's speech. When the negative has been cut, which is done by getting out all the negative that has been recorded and photographed on the picture and selecting the scenes, the negative scenes included in the master print which we have sent down there, when that negative has been cut and joined up, properly spliced, and the splices treated on the sound tracks so they won't make a noise as they go through the reproducer, we then get a
complete, fresh print off the cut negative. That is this 627
sound print I am speaking of. We also take our negatives out of the music tracks that we have been using for re-recording and get a clean, fresh print from them. The reason for that is, these prints we have been using in re-recording operation and in the editorial work have been man-handled quite a bit. They have been run back and forth through little viewing machines and they have been dropped on the floor, and they have been handled and they contain a lot of noise and extraneous disturbances that we don't like. So this new print from the cut negative, and

634 department buildings and departments and personnel in 1932, in a general way? A. In 1932 there were about 100 people in the department, divided up with an associate assistant engineer to me, an amplifier system supervisor, a recording room supervisor, a re-recording supervisor, sound film editing supervisor, a man in charge of sound effect cutting, storeroom, projection, that is, reproduction machine maintenance supervisor, a foreign sound effects department, traffic and office department and storeroom, a man in charge of photographic sensitometry, light valves and test equipment.

Q. And, of course, necessary assistants and employees in each department under the supervisor? A. Yes. The 635 amplifier system supervisor would have charge of the recording mixers, those men who operate on the set with the company. Also their stage men, that is, their microphone boys, the amplifier men who work in the amplifier rooms on the patch courts, location equipment and the projection maintenance, those would all come under that one supervisor.

Q. Have you given us practically all of the departments at this time? A. Yes.

Q. In a general way, what, in 1931-32 were your physical facilities, that is, to what extent did you use buildings and machinery? A. Well, our buildings—are they to include 636 the stages on which we record?

Q. No. A. Well——

Special Master Auchincloss: Just give it in a general way, Mr. Shearer.

Mr. Schwartz: We understand, of course, that you have stages. I mean your own department by itself.

The Witness: Well, we had two buildings, one 30 feet wide and two stories high, 150 feet long; another building 80 feet wide and 120 feet long and two stories high. That building was especially con-

structed with deep foundations to avoid vibration. 637
The columns under the building go down 20 or 30 feet into a sand bed. It was very expensive production, so that our devices wouldn't be shaken by passing trucks. The equipment consists of 22 recording channels.

By Mr. Schwartz:

Q. What is a recording channel? A. A recording channel is a complete assembly of apparatus which extends from the microphone through the amplifier system right to the recording machine that lays the exposure onto the sound film. 638

Q. Is this as of 1932? A. This is, as nearly as I can tell, about what we had in 1932. We had about 75 miscophones, 200 loudspeaker units, about 200 reproducing machines. It would be more than that then. It would be about 30. We have 79 now, and naturally many hundreds of jack plugs, connection plugs and amplifier switches.

Q. I wanted to get the larger equipment in a general way. A. Well, those things become large in their assemblage. There is no one particular item in the plant that looks like a large piece of apparatus. It is the combined assemblage of a lot of small things that make up the large units. We had the largest recording plant in the world. 639
We still have. That includes the broadcasting plants of N. B. C., and any other studio or recording plant.

Q. Well, I think that covers the ground very well. Mr. Craig suggests—and perhaps he is right—we can have a little more in detail what a channel is. It didn't mean a thing to me when you first told me about a channel. A. The word "channel" is used because it describes the apparatus through which something can flow in one direction and arrive somewhere. It starts with the microphone. The microphone contains an amplifier.

640 Q. The microphone may be on a stage? A. Yes. That amplifier is included in the microphone to raise the strength of the signal immediately before it has to travel any distance. The wires from the microphone are arranged to run to a control booth. In that control booth——

Q. That is also on the stage? A. It is adjacent to the stage. It usually overlooks the stage, or may be situated on the stage in the form of a booth or box on wheels that can be rolled in. That control booth contains dials, meters, a horn, loudspeaker, and another amplifier. That sound is reproduced directly from the microphone through this amplifier in the control booth, fed to the horn in the booth
641 where the recording mixer can hear what the microphone is receiving, through the system, not directly from the set. From that booth the wire is run back to the recording plant where they go to further amplifiers which build them up in strength and distribute them after the proper connections have been made to their recording machine. Also, in connection with that channel, or as a part of the channel, is a power distributing system so that the motors of the camera and the recording machine will run in synchronism with each other. Those elements taken together make up what we call a channel.

Q. And, of course, includes all the necessary motors and batteries and amplifiers, and all the other apparatus neces-
642 sary? A. Yes, certain auxiliary equipment such as batteries and power supply which, of course, is essentially a part of the channel.

Mr. Schwartz: That is all. Any further questions?

Mr. Driscoll: No.

(Witness excused.)

(Whereupon, at 12:00 o'clock noon, an adjournment was taken until 9:30 o'clock A. M., Monday, March 8, 1937.)

HEARING OF MARCH 8, 1937:

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Special Master Auchincloss: Proceed, gentlemen.

WILLARD K. CRAIG, having been previously duly sworn, resumed the stand and further testified as follows:

Re-direct examination by Mr. Hilborn (resumed):

Q. Mr. Craig, when you testified with reference to John Meehan, you said there was one item you wanted to check up. Will you please give us the detail with reference to Meehan? A. Yes, sir. There was one item of $833.34 which was necessary to complete the total of $23,333.34 charged to "Letty Lynton" in Meehan's time. The explanation is 644
this, that on December 23rd, I testified that we paid Meehan $666.67 for work on "Letty Lynton". That represents four days' salary. The facts of the case are, the scenario report showed that he worked six days in that week, but the week prior to the time that he started on "Letty Lynton", that is the week ending December 2nd, 1931, he was out of town two days and we did not get the notice of that two days' absence until the week of December 23rd. Having paid him the full week of December 2nd, we paid him only four days in the week of December 23rd to make up that time, and failed at the immediate time to make the correct charge, charging only four days to "Letty Lynton". That
was corrected later by a journal entry. So that in the 645
week of February 10th, we charged by journal entry, $833.34, representing the adjustment of the two days that had not been charged in the week of December 23rd.

Q. So that the item in the Exhibit A in the amended accounting showing Meehan's salary is the correct amount paid to Mr. Meehan for services on "Letty Lynton"? A. That is correct.

Q. Now, will you also give us the apportionment of the Joan Crawford time? A. In my original testimony, I had a little difficulty in getting the days together at the moment.

646 I testified that Crawford started work on "Letty Lynton" on February 24th, 1932, and was closed on March 28th, 1932, which represented a lapse of time of four weeks and five days. However, on March 23rd, 1932, she made a retake on a prior picture No. 603, so that that one day was charged to the picture in which she was making the retake and not to "Letty Lynton", resulting in our having charged her four weeks and four days in the regular production of the picture at $3000 a week, or $14,000. Her rate changed on March 30th, 1932, to $3500 a week. She made retakes on "Letty Lynton" on April 1st—no, pardon me—April 1st to April 4th inclusive, 1932, four days, and one day on
647 April 12th, a total of five days retakes at $3500 a week, resulting in a charge of $2,916.68.

Mr. Driscoll: What was that figure?

The Witness: $2,916.68. Crawford had finished work in production, 603, Grand Hotel on February 18th. She started on "Letty Lynton" on February 24th, 1932, resulting in four days between pictures at $3000 a week, or $2000, which was charged as an accumulation against "Letty Lynton", making the total charge of $18,916.68 the correct charge as represented in the amended accounting.

648 Q. Mr. Craig, have you prepared a schedule of the shorts upon which work was done in the fiscal year 31-32? A. Yes, I have.

Mr. Hillborn: I think Mr. Driscoll has one of these (handing document to the Special Master).

Q. Can you tell us, Mr. Craig, how much money was spent by the Studio on shorts in the fiscal year 31-32? A. (Witness examines memorandum.) The shorts produced in 1932 cost a total of $110,231.86.

By Mr. Hillborn: 649

Q. In other words, the amount of money paid by the studio for the direct labor and the $7000 which you testified to for overhead on the shorts in the fiscal year 31-32, was $110,231.86?

Q. In order that we may put in the record the information that Mr. Driscoll asked last week, how many shorts were released in the fiscal year 31-32? A. There were eight shorts released during the fiscal year 31-32. That is, the fiscal year ending August 24, 1932.

Q. That is Trader Airedale, Olympic Events, Pearls & Devilfish, Sharks & Swordfish, Trout Fishing, Aquarium Short, Sea Elephants and Winter Sports? A. That is correct. 650

Q. Mr. Craig, what position did the shorts bear to the business of M-G-M in this fiscal year?

Mr. Driscoll: What does that mean? I don't understand that.

Mr. Hillborn: I think the answer will be clear.

Mr. Driscoll: Maybe we ought to have a question that we understand before we allow the answer to go in.

Q. What relation did shorts bear to features so far as the activity of the studio was concerned? A. Well, entirely secondary, more or less of a salvage nature to features, because we had the sets and equipment and personnel available that could be used in making shorts with very little expense. I think the best evidence is probably the fact that out of a total production cost of $16,000,000, there was only $110,000 spent on shorts. 651

Q. Do you know, Mr. Craig, what, if any, time of the executives, was used on shorts? A. Very little.

Q. Mr. Craig, can you tell us if the aggregate of the salaries paid to stars was picked up in succeeding produc-

652 tions in the same way as the salary of Crawford and Montgomery were picked up in this picture?

Mr. Driscoll: That is objected to as immaterial, having nothing to do with the issues.

Special Master Auchincloss: I don't see what that has to do with it.

Mr. Hillborn: Well, it has this to do, may the Court please: If Mr. Driscoll will claim that the time was improperly charged to the picture, then it is properly chargeable, we will claim, to studio overhead. Now, in the same way and in the same
653 method of computation, what was charged to other pictures should be taken out of them and put into studio overhead. So far as we are concerned, what we desire to do is to have the fact in the record so that whatever method of computation is finally adopted, it may be similarly used for all productions.

Mr. Driscoll: We had testimony last week that it was carried over in the succeeding picture each time.

Mr. Hillborn: We have the picture that was carried over but we haven't the detail of the amount that was carried over. The only point is, we want
654 the facts in the record so that whatever method of computing is finally reached, the fact will be in the record to be used in that computation.

Special Master Auchincloss: Go ahead, put it in.

The Witness: Will you please give me the question?

(Question was read by the reporter.)

Mr. Hillborn: In this fiscal year.

The Witness: Total of stars' salaries assigned to production in the fiscal year '32, and I use the word assigned to distinguish it from those salaries that

are charged direct for working time, amounted to $492,866.75. 655

Q. Now, Mr. Craig, can you tell us what a camera-day is? A. A camera-day is a term used for a shooting day, a day on which production is actually in the process of being photographed.

Q. Can you tell me how many camera-days there were used on "Letty Lynton"? A. 33 camera-days on "Letty Lynton".

Q. Mr. Craig, what was the practice of the studio with reference to charging overhead on the camera-day basis in the fiscal year 31-32? A. Our normal policy was to charge overhead to a feature production at the rate of $1559 per camera-day. The exception to that being those pictures made for Cosmopolitan, under whose contract we were required to charge only $1250 per day or $125 per hour for retakes, and further for shorts which were not charged on a camera-day basis for the fiscal year. 656

Q. Was that a method adopted by the studio in an effort to absorb the studio overhead to the pictures?

Mr. Driscoll: Objected to, the particular purpose for which it was adopted. We are only concerned with the facts, and it was adopted.

Mr. Hillborn: We are entitled to show, I think, the basis, the reason for the studio's method of accounting. 657

The Witness: It was charged to the overhead.

Special Master Auchincloss: To cover the overhead.

Mr. Hillborn: And, can you tell us the aggregate amount which was charged to "Letty Lynton" for the 33 days? I think it is $51,447.

A. $51,447.

664 Mr. Hillborn: All right.

Mr. Driscoll: That was evidently the overhead charge until this accounting. Then it was changed to $136,000, is that it?

Mr. Hillborn: That isn't correct at all. I think that Mr. Craig can answer the question.

The Witness: The rate of $1559 was predicated on the experience of several years prior to 1932. I do not recall just what year that was based on. The reason for not changing the overhead rate from year to year is that we endeavor, in order to control our studio costs, to have comparative costs, costs
665 that will compare from year to year as closely as we can, and for that reason the rate of $1559 per day has existed from the time it was established in '30 or '31, up to today, the same rate per day for our accounting, for our studio accounting purposes. The balance of the unabsorbed general studio overhead, including all the various departmental unabsorbed and overabsorbed, was transferred to New York at the end of the fiscal year and pro-rated to the pictures at that point.

Q. Did $1559 per day ever absorb the total overhead of the studio and the New York overhead?

666 Mr. Driscoll: That is objected to. The facts will have to be proven without a conclusion of that sort.

Special Master Auchincloss: I think you ought to prove the facts out on that. Mr. Craig's answer, as I understand it, was that that amount was charged through their experience in the matter, but is there any other basis for it than that?

The Witness: Well, do you mean for the amount of the daily charge, for the reason of using a camera day basis?

Special Master Auchincloss: No, the amount of 667
the daily charge.

The Witness: Well, that was the experience in one year, as I say. I can't say offhand what year it was. It was a year, I think, either in '29, '30 or '31, and has been retained for studio purposes for the basis of comparative costs from year to year on pictures.

Mr. Driscoll: What time did you say it started?

The Witness: I can't tell you. I can't testify to the exact year; but, as I recall, it was after the advent of sound which was in '28. It was either '29, '30 or '31.

Mr. Hilborn: You can get the exact date, can't 668
you, Mr. Craig?

A. I can get the date.

Q. Will you get it for us? A. All right.

By Mr. Hilborn:

Q. Mr. Craig, have you prepared a computation which shows the amount paid for manufacturing costs on all the pictures in the fiscal year 31-32? A. I have.

Q. And does that statement include the number of camera-days on each picture for that fiscal year 31-32? 669
A. The statement includes all the camera-days on feature pictures for that year, yes, sir.

Q. And does it also include as to each picture, the number of studio camera-days at $1559 per day? A. Yes, sir, with the exception of Cosmopolitan.

Q. Will you explain the schedule, then, Mr. Craig?

Mr. Driscoll: Have you copies of this that we can follow?

Mr. Hilborn: Yes.

658 Special Master Auchincloss: For my information, where does that come into this, or what figures on this accounting (indicating)?

Mr. Hillborn: That does not appear on the amended accounting because it did not, as will appear from the evidence, absorb all of the overhead and the amended accounting as submitted was an absorption of all the overhead and distributed among all the pictures.

Special Master Auchincloss: I don't quite get that.

Mr. Driscoll: It is something that isn't in the
659 amended accounting at all.

Mr. Hillborn: This figure of $51,447, does not appear on the account for this reason, the figure $1,559 charged per camera-day was not sufficient to absorb the total overhead of the studio in the fiscal year. So, the figure that has been placed upon the account was a figure of $136,000 for this picture, which would absorb its share of the total overhead. (In Defendants' Exhibit 18-D5 this figure is $163,649.29.)

Mr. Driscoll: Well, you propose to charge this in addition to the figures $136,000?

Mr. Hillborn: No, the figure $51,000 is included in the figure $136,000.

660 Mr. Driscoll: Well, then, why do you prove it here? What has it got to do with the account? You say it is not in the amended account. Where does it come into this situation?

Special Master Auchincloss: It is, in a sense, in the amended account, since he says it is included in the figure $136,000.

Mr. Driscoll: That figure $136,000 is a fractional part of the overhead that they are trying to charge to "Letty Lynton".

Special Master Auchincloss: Yes.

Mr. Driscoll: But he says actual overhead 661
charged by custom would be $15. per camera-day, and therefore for 33 days "Letty Lynton" ought to be charged $51,447 instead of $136,000. I assume that is his argument.

Mr. Hillborn: No.

Mr. Driscoll: Of course, that is his object. I shouldn't say very much. I should let him go on and argue.

Mr. Cohen: That is not it.

Special Master Auchincloss: Let him argue it later. All we are trying to do now is get the facts. I think you have put it in. Now you can explain it to me. Just exactly what does it represent? 662

Mr. Hillborn: The figure $1559 did not cover, was not intended to cover in the first place, the items which appear upon this account on page 5 (Defendants' Exhibit 18-D5) addition to reserve for continuities, salaries paid by New York, unabsorbed studio depreciation and interest paid, it wasn't contemplated that it would include those items. It was an effort to absorb all of the $2,246,793.28 into the feature pictures which were produced during the fiscal year. It didn't absorb it completely. Is that correct, Mr. Craig?

The Witness: That is true. 663

Mr. Hillborn: So that the figure of $136,000 which is included in this account, includes, among other things, the figure $51,447 which was charged for the 33 camera-days, the items which were not intended to be included and the unabsorbed studio overhead which was not included in the 33 camera-days at $1559.

Special Master Auchincloss: Well, in order that we may have all the facts before us, would you mind asking him a few questions as to how they determined the amount to be charged per camera-day?

670 Special Master Auchincloss: Do I understand that these are offered as exhibits or not?

Mr. Driscoll: Not yet they haven't, but he is testifying from the schedule so I thought it would be only fair that we look at them to see what it is all about.

Mr. Hilborn: We will put them in.

Mr. Driscoll: You are marking the short schedule in evidence?

(The instrument in question was marked Defendants' Exhibit C-24.)

671 Mr. Hilborn: The Exhibit C-24, may it please the Court, with a caption 1932, means the fiscal year ending in August '32, and '31 means the fiscal year ending in August, '31.

Mr. Driscoll: Is this being offered in evidence (indicating)?

Mr. Hilborn: Yes.

(The instrument in question was marked Defendants' Exhibit C-25.)

The Witness: I am ready, Mr. Hilborn.

672 Mr. Hilborn: Will you explain the schedule, Mr. Craig, please?

Mr. Schwartz: That is Exhibit C-25 that he is talking about.

The Witness: This schedule submitted as Exhibit C-25, represents the feature productions which were worked on during the fiscal year ending August 24th, 1932, listing each of those feature pictures by name, showing the costs that had accrued at the end of the prior fiscal year, that is, August 26th, 1931, the number of camera-days that those productions had been worked on in the fiscal year ending August

26th, 1931, and the second column shows the increase 673
in production costs for the fiscal year ending August 24th, 1932, with the additional camera-days and hours in the case of Cosmopolitan Productions, which had accrued during the fiscal year 1932. Will you read that answer as far as I have gone?

(Desired testimony was read by the reporter.)

The Witness: Thank you. The following column shows the total days and hours to entirely complete production and the final costs to complete production. There is also a column showing the three pictures which were rejected at a later date and the last two columns on the schedule show the periods that the work in 1932 represents to the final, 674
completed costs, or rather in the first column the percentage is based on the days in 1932 to the total days. In the second column the percentage is the 1932 costs as to the complete final costs of the picture.

By Mr. Hilldrn:

Q. Now, Mr. Craig, referring to "Letty Lynton" on this picture 611, the figure of $316,139.48 appears. What does it represent, Mr. Craig? A. Well, that represents, the figure $316,139.48 represents the costs that accrued during the fiscal year 1932 on "Letty Lynton". There were evi- 675
dently some straggling charges amounting to some fifty odd dollars that went into finally complete the picture, but for our purposes here, we consider the picture here as 100% completed in the fiscal year ending August 24th, 1932.

Q. Now, Mr. Craig, that includes the figures which are on the amended account beginning with the item of $75,575.42 appearing on Page 1, down to and including the item of $36,849.55 on Page 4, plus the $51,447 for the 33 camera-days at $1559 a day? A. That is correct.

676 Q. And does not include any portion of the New York overhead or of the unabsorbed studio overhead? A. No, it does not include any of that.

Q. Now, in addition to the cost for the feature pictures you have shown on Page 2 of the Exhibit C-25, the cost of the foreign versions and other items. Will you explain those other items, Mr. Craig? A. The cost of the foreign versions amounts to $734,585.45 which represents all studio costs and foreign versions worked on in that particular fiscal year or fiscal year ending August 24th, 1932.

Special Master Auchincloss: Let's keep that foreign stuff out. Let's keep it separate.

677 The Witness: May I complete this? I want to tie my total figure here up to my total manufacturing costs. It is merely a reconciliation.

Special Master Auchincloss: Yes.

The Witness: Frequently before we started the actual production and consider a picture in production, we have charges that accrue from many different sources. We refer to them as suspense production. So we have an item cost of suspense production, $308,796.96. The cost of pictures completed in prior years, $59,267.71. Costs of shorts as listed in the schedule immediately preceding this exhibit, $110,231.86. The total production costs for the fiscal 678 year ending August 24th, 1932, $16,204,197.54.

By Mr. Hilborn:

Q. Mr. Craig, I want to be sure of one thing. This Exhibit C-25 contains an item of 299½ hours. Those were hours on Cosmopolitan Pictures, were they? A. That is correct.

Q. And charged to Cosmopolitan at what rate? A. $125 per hour.

Q. Does this show how many Cosmopolitan pictures were

worked on in the fiscal year? A. No, this does not exactly. 679
I will have to verify that. I can say this, that all of the pictures on which hours are shown here in this fiscal year 1932 were Cosmopolitan pictures, but it is just possible that we did a Cosmo picture on which there were no retakes, in which case, the hours wouldn't show.

Q. There are six here. A. Let me verify that, if you will.

Q. Mr. Craig. A. Yes, sir.

Q. On this Exhibit C-25, the first group of pictures ending with freaks were pictures which were begun in '31, the fiscal year ending August 26, '31, and completed in the fiscal year ending August 24, '32? 680

Mr. Driscoll: And some others down below.

Mr. Hilborn: And some few below.

The Witness: Yes, sir. I would say this, I think you will find on some of those pictures that we had probably had work done in '31 and we had more work done in '32 and we may have had work done subsequent to that time.

Q. In other words, this schedule shows the work done in '31 on certain pictures which were finished in '32 and the work done in '32 on pictures which were completed in '33? A. Yes, sir. 681

Q. Also pictures which were begun and completed in '32? A. That is correct.

Q. In other words, it shows every picture on which any work was done in '32? A. Yes, sir. This shows in detail every feature picture on which any work was done in '32.

Re-cross examination by Mr. Driscoll (resumed):

Q. Mr. Craig, in accordance with Schedule C-25, the final cost of "Letty Lynton", including overhead, in so far

MICRO CARD
TRADE MARK ®
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MATTHEW BENDER & COMPANY
MB
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microcard

682 as you are concerned and your books are concerned, is $316,192.23? A. That is correct.

Q. And when you sent your cost to the home office in New York City, you charge against each one of these pictures overhead, general overhead at camera-day cost of $1559 for each picture? A. That is correct.

Q. And if that is not sufficient to absorb the overhead, the rest is charged to profit and loss, isn't it? In other words, you consider it as a losing operation? A. That is something I can't testify to.

Q. Well, isn't that the nature of your report? When you charge $1559 a camera-day against a picture and you
683 have left unabsorbed overhead, that unabsorbed overhead is referred to the home office in the nature of profit and loss? A. No.

Q. How is it then reported to the home office? A. I charged it to the home office the same as I would a negative cost.

Q. You charged it and say nothing about it and let them classify it as they will, is that correct? A. That is correct. They handle the consolidated books of the corporation.

Q. But as a matter of accountancy, it is profit and loss, it is loss, isn't it, and it is charged to the account which ordinarily is known as profit and loss? A. That, I couldn't say, because I don't have the profit and loss accounts. I
684 don't make the charge.

Q. Well, Mr. Craig, when you take a certain fixed overhead and your overhead does not absorb the cost, then there is an item left that is loss, isn't there? A. I don't think you can interpret it that way any more than you can interpret the loss that we charged into the picture.

Q. Let me say it this way, then: That item must be recovered out of the general surplus of the company? A. That is a matter I don't think I am qualified to testify to, because I am not speaking in generalities and I don't think I should be expected to.

Q. Well, I am asking you as an accountant. You are an accountant and you certainly know, Mr. Craig, whether as an accountancy proposition, that is not charged to the general surplus of the company. 685

By Mr. Driscoll:

Q. In this case, Mr. Craig, there isn't any question as to what was done, is there? Isn't it a fact that you did charge on your books, overhead to this picture at the rate of $1559 a camera-day? A. That is correct.

Q. That was what was done, isn't it, Mr. Craig? A. That was what was done.

Q. And you understand it and I understand it, don't we, Mr. Craig? 686

Mr. Schwartz: So do I.

The Witness: Yes.

By Mr. Driscoll:

Q. Now, then, coming back to our original proposition, our original question that Mr. Schwartz is confusing because we don't know what was done in this case, coming back to that proposition, when you charged $1559 a camera-day to this picture and that leaves unabsorbed overhead, isn't it a matter of fact and a matter of bookkeeping that that unabsorbed item is charged to he general surplus of the company? A. No, sir. 687

Q. It is not? A. To the best of my knowledge, it isn't charged to the surplus.

Q. Then, where did you get the money to pay it? A. That is the reason I hesitate to testify in this case because I have to testify from hearsay and from second-hand knowledge.

Q. As a matter of accountancy, where did you get the money to pay it? It has to be paid, doesn't it? A. Naturally it has to be paid.

688 By Mr. Driscoll:

Q. It has got to come out either of your operation or it has to come out of your surplus, hasn't it, or your capital?

Mr. Schwartz: Now, we object to the question on the ground that it calls for a conclusion of the witness and for hearsay testimony, he having testified that he has nothing to do with that feature of this accounting. It goes to New York. He doesn't pay it or doesn't account for its payment.

(Discussion was had off the record.)

689 Mr. Schwartz: I accept the amended suggestion to me by one of my associates and object upon the ground that he has testified he doesn't determine out of what fund it is paid or how it is paid and his books don't show it. He keeps no bookkeeping account of it, so that that would obviously be hearsay.

Special Master Auchincloss: Well, Mr. Craig—as I understand Mr. Craig's position here, he is in charge of the production, the accounts relative to the production end of this business. He is also an expert accountant. Now, all Mr. Driscoll is trying to find out—I don't think he ought to go into hypothetical questions as to how corporate losses are

690 charged or one thing or another like that necessarily—but I think he can bring out all the facts as to what he does. So far as I can see, Mr. Craig has got a loss here according to his way of operations that he charged against New York.

By Mr. Driscoll:

Q. Well, as a matter of fact, you haven't any loss here, have you, Mr. Craig? A. I have no profit and loss accounts at all. I don't consider it as such. This is merely a manufacturing account.

Q. The overhead that you put on each one of these pictures was sufficient—the charges you made against each individual picture for overhead were sufficient to absorb the overhead in so far as you were concerned? A. No, that was not the intention. 691

Q. What did you have left over? A. We have in our general overhead for the fiscal year 1932——

Q. Yes. A. —we have some $787,498.48 left over of our general overhead.

Q. Where does that appear? A. It does not appear.

Q. What is the amount again? A. It is a part of that figure of $2,000,000.

Q. Let's get the figure first. 692

(Desired testimony was read by the reporter.)

The Witness: That is merely the figure for the general overhead. It does not include all the departmental overhead, on absorbed overhead or the stock company operation.

Q. Well, first let's take C-25. You mean that that figure of $787,000 odd dollars is not included in this total cost that you have set forth in C-25? A. No, it is not.

Q. It is not included there at all? A. No, sir.

Q. That is a separate item? A. It is a part of the $2,246,793.28. 693

Q. You say it is a part of what item? Let me have that again. A. On page 5 of the amended accounting you have the studio overhead detail and schedule A annexed hereto, $2,246,793.24 (Defendants' Exhibits 18-D 5, 18-E 1 and 18-E 2).

Q. And that is made up of this detail that appears in Schedule A, pages 1 and 2? (18-E 1 and 18-E 2.) A. That is right.

Q. The $2,000,000? A. If I understand your question, originally you were trying to find out what portion of our

694 general studio overhead was not absorbed by our $1559 a day?

Q. That is right. A. We have a certain group of overhead accounts that we call General Studio Overhead, which we credit the $1559 a day to charge the pictures.

Q. Yes. A. We have certain other accounts that are departmental operations to which I have already testified that they are absorbed on a percentage basis or other varied bases that we have discussed here. We have over and under absorbed in those cases. That is not a part of the general figure that I gave you of $787,000.

Q. Now, let's see a little further. On this camera-day
695 overhead of $1559, you made no such charge against any of the shorts except two, was it? A. Yes, there were two shorts.

Q. Two shorts. Which ones of the list that appears on C-24, did you make a charge for overhead against? A. Would you mind letting me answer that question later? I have it some place, but I can't put my finger on it. I have so many papers here.

Q. You said that you released eight shorts during that fiscal year. How many shorts did you distribute during that fiscal year, if you know? When I say you, I mean the Metro Company, pardon me. A. I don't know.

Q. Did you know that they distributed 90 shorts in 1931
696 calendar year and 143 shorts in 1932 calendar year? A. Well, I didn't know the exact number, but I know that we bought and we made or had made outside of the studio many other shorts than the ones that I have shown here. I have submitted only the shorts that were worked on in the studio in Culver City.

Q. And you charged overhead against two of them? A. That is correct.

Q. And those you are going to look up for us? A. I will give you those two. I can't do it offhand.

Q. Let's turn then to Exhibit C-1, the camera depart-

ment overhead. You have that statement, haven't you? 697
A. I will have it in just a minute. Yes, I have it here.

Q. Take the amount allocated to "Letty Lynton" $1,045.17, I think. A. That is correct.

Q. And that was on a basis of 25% of the direct labor that was charged to "Letty Lynton"? A. That is right.

Q. Now, then, in addition to that 25% that was charged to "Letty Lynton" for camera department and for the other items as we will come to them, there was this charge of general overhead of $1559 per camera-day? A. That is correct.

Q. Now, this charge of 25% of direct labor that you made to "Letty Lynton", I assume, was exactly the same charge that you made to each and every other picture 698
that the studio was working on during that fiscal year? A. Every other feature picture, yes.

Q. Every other feature picture. In other words, no matter whether it was Grand Hotel or whether it was something else, the camera department made an overhead charge, departmental overhead charge to that picture of 25% of the direct labor? A. That is right.

Q. And those were picked up each week? A. That is correct.

Q. So that that overhead applied to all pictures worked on by the studio during the fiscal year, regardless of whether or not they were released that year? A. That is 699
correct.

Q. Your method of bookkeeping enabled you to pick it up from week to week and charge it in that manner? A. Usually, yes. It was usually a week later, a week to week basis.

Q. So that with the camera department, we have that 25% charge and of course the amount of the charges differed with each picture? A. That is correct.

Q. Because there are no two pictures that cost exactly the same, that is impossible, isn't it? A. Yes.

700 Q. It is based on that percentage basis and the amount of the charge varies? A. That is right.

Q. Now, then, we have on C-2 the break down of the overhead of the editorial department, and there again that is 8% of the labor cost? A. That is right.

Q. And in that same manner you make that same charge against labor costs for each of the other pictures that were worked on in the studio in that fiscal year? A. That is correct.

Q. Picking it up from week to week, you were generally a week later, but every week it is picked up? A. That is right.

701 Q. Now, in the camera department, there is an unabsorbed item left after the departmental cost was charged to the picture? A. That is right.

Q. And that is reflected in Schedule A-2 (18-E 2) of the amended account? A. Yes, sir.

Q. And that is in there in addition to this $1559 a camera day that was charged to the picture? A. Yes; the 25% of the camera direct salaries in addition to the $1559 a day.

Q. Let's put it this way: Isn't this the situation, Mr. Craig, actually, the $1559 per camera day per picture is not reflected at all in this amended accounting? A. That is true.

702 Q. But you have adopted in this amended account or whoever made up the amended account, I don't accuse you of it, I don't think you would do this—in this amended account, an entirely different system was used, isn't that right, Mr. Craig? A. Yes. It differs from our studio procedure.

Special Master Auchincloss: Well, so that I may understand, may I ask a question? I understand that that $1559 does not appear in the unabsorbed overhead of the camera department?

Mr. Driscoll: That is correct. 703

The Witness: That is right, yes. We have a certain group of accounts that we refer to as our general overhead accounts. They consist of the executives' salaries, the accounting department salaries, the production office salaries, the maintenance and facilities around the studio, the repairs and maintenance of buildings. That is the account under which we try to absorb or which we charge the studio on the basis of $1559 per day. Now, the individual departments endeavor to distribute those overheads on the basis of the direct labor as contributed to the various productions.

Mr. Driscoll: And then, after you have done 704
that, after you have charged on the basis of $1559 per camera day against the picture and charged your departmental overhead on a percentage basis and picked up your unabsorbed departmental overhead, you put the whole thing together and you have a cost against Letty Lynton of $316,000 plus, or whatever it was, that is right, isn't it?

A. That is right, $316,000.

Q. Now, the amended account didn't use that method at all. They ignored the charge of $1559 per camera day and set it up by first making the departmental overhead 705
charges against the individual picture, throwing the unabsorbed part into the summary account which appears here as A-2 (18-E 2) and then trwing in these other items that they say are justifiable overhead, and dividing it all up in 41 parts. That is what they did, isn't it? A. That is right.

Q. Now, the editorial department overhead is on the basis of 8% of labor? A. That is correct.

Q. Then, we have C-3, the scenario department and there it is 12%. The overhead is charged, the departmental

706 overhead is charged to the individual picture on the basis of 12% of the writers' compensation, is that right? A. That is correct.

Q. And that is done, that was done by each picture worked on by the studio during that fiscal year? A. That is correct.

Q. So the amount of the charge would depend upon the proportion of labor. A picture that had more time used of writers would have a larger charge for departmental overhead? A. Commensurate with salaries.

Q. Commensurate with salaries; that is correct, isn't it? A. Yes.

707 Q. Now, then, we come to wardrobe, and there it is a charge of $2500 fixed by Mr. Rapf. It has nothing to do with labor or material. That is, it is fixed by Mr. Rapf. Let's leave it that way. A. Yes.

Q. It has nothing to do with labor and material. I will let it stand that way rather than start an argument. It is a charge of $2500 fixed by Mr. Rapf? A. Yes, sir.

Q. That is C-4. Then we have C-5. That is the mechanical department, lighting, and there the overhead is on the basis of 8% of direct labor? A. That is right.

Q. Then we come to the publicity department, and there it is done on a somewhat different basis; you take the number of pictures that are in shooting and you charge

708 70% of the overhead against those pictures that are in shooting and you split up that figure, whatever it might be, in accordance with the number of pictures. Here it is a numerical proposition instead of a cost proposition, is that right? A. That is correct.

Q. Up to this point it has all been cost, a cost basis of apportioning your overhead except in the case of Mr. Rapf. The others have all been cost, and the same percentage for each picture? A. That is correct.

Q. And in this case it is a numerical proposition, splitting it up among the number of pictures that were in

shooting and among the number of pictures that were in preparation? A. Yes. The basis is that we estimate that 70% of the publicity department salaries and expense is devoted to productions in process. 30% is devoted to productions in preparation or subsequent to production. 709

Q. So that if two pictures like Letty Lynton which had a final cost of $316,000, and Prosperity, which had a final cost of $625,000, pretty nearly twice as much, which were in shooting at the same time, although one was a picture that ultimately cost twice as much as the other, yet they contribute equally to this publicity department overhead?

Mr. Hilborn: I think that question contains an assumption which is contrary to fact. 710

Mr. Driscoll: What is the contrary to fact?

Mr. Hilborn: That the shooting time of both pictures is identical because Mr. Craig has testified that they were charged 70% of the publicity on the shooting time, not per-picture.

Mr. Driscoll: Well, refine the question then, to that extent, Mr. Craig, every week that there are charges against both pictures, it would be for the same amount, wouldn't it?

A. If they were shooting in the same week, both of them shooting the same week, they would have the same charge, but that is not telling the whole story, because your element of time comes in. You had 89 shooting days on Prosperity. You have 33 on Letty Lynton. 711

Q. Yes. A. So Prosperity probably took more than twice as much publicity charges as did Letty Lynton. You must look at the completed column of days there in order to get your comparison. It happened that in the fiscal year 1932, you had 33 and 38. The final answer is 33 and 89.

Q. All right. Now, then, as a matter of fact, Letty Lynton had 33 days and had a final cost of $316,000.

748 versions. On the French versions we charged $375 per version for the foreign supervision, foreign assistance.

Q. $375? A. Yes, per version. On the German we charged $750 per version.

Q. It cost more to be a German? A. It cost more to make the German pictures.

Q. Now, the $1500 allocation doesn't appear in this amended account of Metro. It appears in the Culver account. That is correct, isn't it, cost of foreign versions, just to keep the record straight? A. I believe I am to produce in evidence the foreign version costs that were accrued at the studio.

749 Mr. Hilborn: We haven't put that in yet, Mr. Driscoll.

Mr. Driscoll: Does this $1500 item appear in this amended account of the Metro in any place?

Mr. Hilborn: No.

The Witness: I believe that appears in the Culver account.

Mr. Driscoll: It appears in the Culver accounting, that is exactly what I said, and the $500, does that appear in the amended accounting of Metro or does it appear in the Culver?

The Witness: Mr. Driscoll, may I amend that
750 statement a little bit. In Schedule A, page 2 of your amended accounting in the last item is foreign department overhead (unabsorbed), $17,173.36 (18-E 2).

Q. That is right. A. Now, the charges which resulted in the absorption of this foreign department overhead, are represented in the Culver accounting.

Q. Yes. That is what I wanted to put on the record. The absorption is in the Culver accounting. The unabsorbed portion of $17,173.36 is the last item in this Metro account. A. That is right.

Q. Now, so much for that. That makes that clear, I think. The supervision also appears in the Culver accounting, doesn't it? A. Yes, sir. 751

Q. Under the head of direction? A. Under the head of miscellaneous production assistance.

Q. Miscellaneous production assistance, $750, I see. A. You will see in the French version there is $375.

Q. Yes. A. It is on page 2, second item.

Q. Yes. That clears that up fairly well, Mr. Craig. Then, on this account I won't ask you that just now. On this C-25 that you have offered into evidence, you have the names and titles, or the numbers and titles of all the pictures that were worked on, on the lot, during the fiscal year? A. With the exception of those items which appear as in summarized form at the end of the Schedule, yes, sir. The end of the Schedule, cost of foreign versions, cost of suspense productions, cost of pictures completed in prior years and cost of shorts. 752

Q. Well, perhaps I would be more accurate if I said there is a list of feature pictures worked on, all of the feature pictures. A. Which were in actual production during the fiscal year 1932.

Q. And they were 56 in number? A. I frankly haven't counted them, I don't know.

Q. I think that is correct. My figures are subject to correction by Mr. Schwartz, Mr. Hilborn, Mr. Pellak and Mr. Cohen. A. I will count them if you wish. 753

Mr. Schwartz: Jointly and severally.

Mr. Driscoll: Yes, jointly and severally. I will say there are 56 in number. Now, then, those 56 productions, for instance, the first of the list, I presume, are the ones that were already—in fact it is demonstrated right here on the statement C-25—for instance, 553, 561, 569, 570 and all of those immediately following down to 598, were the pictures

for 100 hours, would pay twice as much as a picture that used facilities for 50 hours? A. That is correct.

Q. It is proportioned with the amount of time that the picture used the facilities? A. That is right.

Q. And is not based on labor, it corresponds with a charge which is a percentage of the direct charge of labor? A. Yes.

Q. It is not just merely a numerical division of the overhead? A. That is right.

Q. That is C-13. Then we have C-14. We have there absorbed in the cost, $91,944.15. I wish you would turn to the amended account and show me just where that is reflected in this account. A. Well, it is on page 2. I don't know whether my accounts are numbered the same. The sheet is headed Schedule A continued, Studio overhead, and it is the third item in the credit column, $14,287.16 (18-E 2).

Q. Yes. That is the over absorption. That isn't what I am referring to. I am referring to the part that was absorbed, the $91,000. A. Pardon me.

Q. What? A. That $91,000 is absorbed in the pictures and in the various departmental expenses.

Q. Well, where is it reflected in this account as a charge against this picture? Where does it come in? A. You are looking at the detailed classification of the account now.

Q. Yes, the amended account. How does it come in there? I know how the over absorption comes in, but I don't know how $91,944.15 comes in. A. At the head of page 3 in the "Letty Lynton" accounting you have automobile and truck hire, company equipment, $372.49 (Exhibit 18-D 3). That is "Letty Lynton's" portion of this $91,000.

Q. The company equipment, then, is the "Letty Lynton" portion of the departmental overhead of the automotive department? A. No, this distribution is made on the basis

of the use of cars, company equipment. We charge them out on an hourly rate. "Letty Lynton" used automobiles amounting to $372.49 from our company equipment. 721

Q. So a record is kept of the use of the facilities by the particular picture, and the particular picture is charged accordingly? A. That is correct.

Q. So it depends upon the amount of labor again, or a proportion of the amount of labor or facilities? A. That is right.

Q. Used by the particular picture? And a similar charge was made against every other picture worked on during the fiscal year? A. That is right.

Q. And those charges altogether amounted to $91,944.15, which gave an over absorbed item of $14,287.16? A. That is right. 722

Q. Now, the negative development you have already testified to there, I think. In that particular instance the account makes a footage charge and the profit is carried over into the A-2 statement? A. That is right.

Q. So that the charge against the individual picture is on a footage basis which corresponds to the use of facilities basis. It is not a numerical basis like the publicity department, for instance? A. Well, it is based on what we commonly call a commercial basis, on a footage basis.

Q. It is the relative amount of work done? A. Yes, sir. 723

Q. For each picture? A. Yes, sir.

Q. And a similar charge is made against each picture? A. That is right.

Q. And the amount of those charges, of course, vary with each picture? A. That is right.

Q. Because it depends entirely upon the footage for each picture? A. That is right.

Q. Then, if there is a profit it is carried over into this A-2 account. That happens to be a profit here? A. Yes, sir.

724 Q. Now, your still department is C-15, Mr. Craig. Now, there you have an item absorbed into costs of $50,442.35. Where does that appear in the amended account? Where is it reflected in the amended account? A. Absorbed into costs, $70,442.35—certainly.

Q. Well, there is something wrong then.

Mr. Hilborn: No, there isn't, Mr. Driscoll.

Mr. Driscoll: Now you have it unabsorbed $20,060.

A. Let me explain that. Your total costs of your still department are $52,300.34. That is correct according to your statement?

725 Q. Yes. A. We had a credit from outside sales of $2,431.47.

Q. Yes. A. We had credits from work done for our own productions, publicity department and so forth, $70,442.35, our total credit.

Q. Wait a minute, now. A. The total credit includes the cash sales and the charges $72,873.82.

Q. I see. A. Minus your $52,000 cost which leaves you an over absorbed item of $20,573.48.

Q. Then it was right in the first place? A. Yes.

Q. Well, why did you make us change that first? A. I'm
726 sorry, I don't know.

Q. Then, we come back, Mr. Craig, to this absorption into the costs of $70,442.35. Now, I want to know for my own information as well as the Court's, where that is reflected in this amended account? A. On page 3 of your "Letty Lynton" accounting, down to about the fifth or sixth item from the bottom of the page, you have an item headed stills.

Q. Yes. A. Salary of a still man.

Q. Yes. A. And the second item is number of stills. $709.62.

Q. On what basis is that charge of $709.62 made? A. It 727
is based on the number of stills at various prices for various priced stills.

Q. The $709.62 is part of this $70,442.35? A. That is right.

Q. The $444.31 is not part of the $70,000? A. That is a direct charge for the still man.

Q. A direct salary, so that the basis of apportioning this $70,442.35 is in proportion to the service that has been rendered, that is, service and material, we will call it, to each picture? A. Yes, sir.

Q. And that particular method of apportioning that overhead is in keeping with the apportionment of the other overheads of the other departments that we have thus far 728
examined, with the exception of wardrobe and publicity, based on service, labor or material? A. Based on service, on measured service of some nature.

Q. Yes. Now, then, we come to the precision machine shop. That is C-17. We have absorbed into cost there an item of $9,287.81. Where does that reflect itself in the amended account? A. The basis on which the precision machine shop overhead was spread, was as follows: That machine shop is a precision machine shop as you have seen it used or have seen the results in the laboratory, in the sound department and in the camera department. We charge 35% of the weekly precision machine shop work to 729
the camera department. We charge 50% to the laboratory and we charge 15% to the sound department. That is the approximate use of the various departments, the use which they make on the precision machine shop. That will appear as an item in those various departmental accounts. It is an item that follows through.

Q. Well, now, let me see, the $9,287.81, then, in so far as this amended account is concerned, is reflected in what particular item? I want to see. A. Well, it will be part of your——

736 Q. We will come back to Newcombe. Now, we come to C-21, print shop. There is an absorbed item of overhead there, departmental overhead of $5,930.14. Is that the other material on Newcombe? A. I was going to look at that.

Q. All right. Where is that reflected in this (indicating)? A. On the print shop?

Q. Yes. A. We maintained our own print shop at that time, and if the accounting department had forms printed, they were charged on material and time basis, or if we charged them into our printing and stationery account, which was done largely, and this is the cost of operating the department and the costs that were charged out for
737 work done.

Q. This is a cost charged to the various departments, is that it? A. Department or stores account.

Q. It is not a direct charge then, no part of that? A. Very little of it would be a direct charge to pictures unless we would have an insert printed on a hand bill or something like that. It would be a very small amount. Most of it is represented in work done for office supplies, forms and things of that nature.

Q. And the charge is made on the basis of time, labor and material? A. That is right.

Q. All right. Let's turn to C-22. That is the salvage
738 yard. That is not reflected against in the summarization, I presume, in the amended account? A. No, sir. That is salvage material that is sold. None of that is charged back to pictures because we do not charge our salvage back to pictures.

Q. The advertising department, C-23, you had an absorbed item there of $29,062.56. Where is that reflected? A. That is charged directly to New York.

Q. To New York? A. Yes, on the pictures worked on.

Q. And if it appears in this amended account, you don't know where it appears, is that it? A. I could only assume

where it might appear. You have on the first sheet an 739
advertising direct charge.

Q. The first sheet of the amended account, advertising, direct charge of $24,301.72, is that correct? A. Yes. I can only assume what is in that, though, because it might be that the amount we charged would be in that.

Q. Did you attempt to allocate this $29,062.56 that appears on C-23, to the individual pictures? A. Yes, we did.

Q. You allocated it and referred it to New York, is that it? A. Yes, sir.

Q. On what basis did you allocate it? A. It was the basis of direct charges in all cases where we could.

Q. Shall we mark that to come back to it, too? A. Just a minute. I think maybe I can give you the answer here. 740
I am sorry, Mr. Driscoll. We had better pass that up and I will get you the exact figures on it.

Q. All right, then, we will pass that for the present and come back to it. A. Yes. May we go back to the Newcombe department?

Q. Yes. That is Schedule C-20. A. C-20.

Q. Yes, and it appears on the amended account on page 3, item under special shots. A. I don't know how I can explain this very much better than I did before. This journal shows the people who were working in the department during the week. This particular journal shows 98% of the week's charges was to Picture 606 and 2% to No. 611. 741

Mr. Hilborn: It also shows, Mr. Craig, what was done on the picture that week?

The Witness: Yes. That was based on the following reports: 2 shots to Wood's production 606, 98%; 1 shot to Brown production, 611, 2%. Naturally the nature of the shot has a great deal to do with the percentage that it is based on.

Mr. Driscoll: Well, is it fair to say, then, that this allocation of this item of $49,575.44 was the

742 amount of labor and material devoted by that department to the particular picture?

A. Yes, that is correct.

Q. That is, what Newcombe tried to do, was to allocate the overhead for the week between the various pictures he was working on? A. Because there is no basis on which he could actually measure the time or expense. He had to estimate it.

Q. So that that goes into the classification or is allocated on the basis of labor and material? A. Yes, sir. Now, then, may we go back to the precision machine shop, and I will try to clear that up?

743 Q. Yes, all right. Now, here you said that the absorbed item is $9,287.81, which was charged 35% to camera department, 50% to laboratory and 15% to sound. Now, I wanted you to tie that in with the amended account so that I could see where the charge, for instance, to the camera department, was reflected in this amended accounting. A. Well, if you will look at your camera account under 428, miscellaneous expense, there is the charge of the proportion of the precision machine department expense. It is charged in the camera department as miscellaneous expense, account 428.

Q. $4,678.72? A. That doesn't necessarily represent it

744 all, because there might have been other miscellaneous expenses. We had it subdivided. I may be able to give it to you in detail.

Q. Then, 35% of this item of $9,287.81 is charged against the camera department and is in that item No. 428? A. That is correct.

Q. And the camera department, in turn, is allocated on a basis of 25% of direct labor? A. That is correct.

Q. All right, and the 50%, does that appear in the laboratory statement in a similar manner? A. It appears in the laboratory statement under account 313-5.

Q. 313-5? 745

Mr. Driscoll: 313-5, yes. So that 50% of this absorbed item of the precision machine shop is charged against the laboratory department under Item 313-5, and in turn then, reflects itself into our amended account on the basis of the amount of work done by the laboratory for "Letty Lynton".

A. That is right.

Q. Now, the 15% that is charged to sound, will you trace that for me? A. That is charged in account 608. It would be on the first page of your sound department accounting, 608, percentage of precision shop overhead on C-13. 746

By Mr. Driscoll:

Q. And the 15% of this item of $9,287.81 is charged to the sound department appearing in C-13 under item 608 and the departmental overhead of that department, in turn, is allocated to various pictures in accordance with footage and— A. Channel hours.

Q. And channel hours? A. Yes.

Q. In other words, the facilities used? A. That is correct.

Q. All right, that cleans that up. Are you ready to clean up this advertising department? You said you would come back to that one. A. That is something I would like to study a moment. 747

Q. All right. Then, that brings us down to C-11, which is foreign department. There is an absorbed item of $94,016.56. I understand that that is allocated to the various pictures on the basis of $1500 for each foreign version and $500 for each synchronization. A. There is an additional spread on that too, that I will explain to you. In addition, Mr. Driscoll, to the $1500 and $500 overhead of which I spoke a while ago, we had a charge for supervision of foreign

712 Polly of the Circus had 33 days. Exhibit C-25, I am reading from and it says that up at the top there, so I don't want to mislead you about anything that I name this particular item. There is a final cost of Letty Lynton of $316,000 plus, and it had 33 shooting days. There is a final cost on Polly of the Circus which had 33 shooting days of $430,000. There those two pictures paid exactly the same per day camera overhead expense, did they not, in spite of the fact that one cost 33% more than the other? A. That is true.

Q. Then, we come to C-7, the music department, and there also we have it on 23% of the direct labor; that is correct, isn't it, Mr. Craig? A. Yes, sir.

713 Q. And the departmental overhead, therefore, the music department as to all of the pictures, was on a percentage of the labor? A. That is correct.

Q. And the charges would vary in accordance with the labor; direct labor charges, to each individual picture? A. That is correct.

Q. That is a different basis from this other one, the publicity department, isn't it, a decidedly different basis? A. Yes.

Q. Then we come to the art department, C-8, and the basis of charging, distributing the departmental overhead in that instance is 65% of labor charged against the individual picture? A. That is correct.

714 Q. And that, too, would vary in accordance with the amount of labor charged to each picture? A. That is right.

Q. And that is the same scheme of allocating the departmental overhead that we have had in each and every one of these different departments with the exception of wardrobe and publicity? A. Yes.

Q. The answer is yes. Then we come to the construction department, C-9, and the basis of allocating departmental overhead there is 5% of labor and materials? A. 5% is correct.

Q. To the direct charges against each picture? A. Yes. 715

Q. Of course that one in turn would vary also in accordance with the charge of labor and material to the individual picture? A. That is right.

Q. And that conforms with the others that we have had with the exception of wardrobe and publicity. Then we come to property department, C-10, and the basis of distributing the department overhead there is 14% of labor? A. That is correct.

Q. Against the direct labor charge for each picture, and that, of course, would vary in accordance with the direct labor charge? A. Yes, sir.

Q. And it is consistent with all of the others that we 716
have had thus far, except publicity and wardrobe? A. Yes.

Q. Now, then, we come to C-11, that is the foreign. We haven't taken that up yet. We won't come to that. We'll pass that until we take it up on direct. The next one is commissary, revenue and expense report. There is no departmental overhead expense charge against pictures there, is there? A. No, sir. That is, only direct charges against pictures are included in that statement.

Q. Direct charges, yes. A. That would show under the company charges in the revenue group.

Q. Then we come to sound charges, C-13, and there you charge on a channel hour basis, do you not? A. That is 717
correct.

Q. Against each picture? A. Yes, a channel hour basis against each picture and also a footage basis on the re-recording film.

Q. So that that is really based upon labor. It varies? A. No, not based on labor, entirely. It is based on the time that the facilities of the sound department are utilized by a company. It includes system labor and everything else.

Q. In other words, a picture that would use the facilities

730 Q. Let's turn to camera department and see what item it is reflected in. Is it in there in that figure of $1,045.17? A. Do you want to continue and let me pick that up later? I will have to locate a journal in order to be sure which account that is.

Q. We will come back to that, that is C-17. Now, we come to C-18, portrait department. We have an item there absorbed in the cost of $21,571.50. Now, will you show me how that is reflected in the amended account? A. The entire portion of the portrait department expense represented by 599 that is absorbed in the cost, goes directly into your publicity expense under account 532. If you will turn to Exhibit C-6, you will see account 532 includes
731 a charge, portrait department expense $21,599.11.

Q. Exhibit C-6, $21,000? A. There is a slight difference; that is, C-6, carries a few dollars more than the total portrait department expense absorbed into the costs.

Q. That is the 532 item? A. Yes.

Q. $21,599.11. That item is $21,571.50. A. There is a slight difference there, but that is where the cost goes. It goes entirely except for the outside sale of photos. In other words, the portrait department is a function of the publicity department for purposes of accounting which we carry in a separate departmental expense and charge the entire expense into the publicity department.

732 Q. Then, this item of $21,571.50 is only reflected indirectly into the amended account, that is true? A. Through your publicity charge.

Q. Through your publicity department? A. That is correct.

Q. In the publicity department we have already discussed. That is where we divide the overhead 70% to shooting pictures and 30% to preparation of pictures. A. That is correct.

Q. All right. Now, then, let's turn to C-19, miniature and trick department. I take it that no part of that is absorbed by the individual pictures? A. No. That becomes

a general overhead item because it is a purely experimental department. It appears in your amended accounting, miniature and trick department with a debit of $12,280.69 for the year. 733

Q. That is— A. —in part of your general overhead expense.

Q. Schedule A, page 1? (Defendants' Exhibit 18E-2.) A. Page 2.

Q. Page 2? A. Yes.

Q. Then we come to Newcombe's Department, C-20. There we have an item absorbed into costs of $49,575.44. Where is that reflected in the amended account? A. On page 3 of the "Betty Lynton" accounting, we have an item about the 5th from the bottom of the page, page entitled Special Shots. 734

Q. Yes. A. Newcombe shots $1,092.80.

Q. Yes. A. And it is so reflected in the other pictures throughout the year.

Q. What was the basis of that allocation? A. The distribution that is made by Newcombe covering his departmental expenditures for the week.

Q. Beyond that, beyond the fact that it is made by Newcombe, do you know what the basis is? A. Well, no. He is the only man that can tell what his department is doing. He can't do it on a time basis because it is a very small department consisting of himself and two or three assistants and they are working on a number of different jobs all the time. So, I have to depend on him to tell me what portion of the time he has spent on the various pictures. That is the basis of the distribution. 735

Q. While they are getting that out on this other item under Special Shots, Reis shots, $195.75, that is a direct charge? A. That is a direct charge, yes. That comes from his time card. Reis is a trick camera man who does trick photography work on a camera mounted on some kind of an apparatus. I have forgotten. I don't know hardly how to describe it, but it is a trick camera processing shot.

778 By Mr. Hilborn:

Q. Which we have in C-25. Now, that would make a different Schedule A-2, because part of what is now in Schedule A-2, would then appear in the production costs of "Letty Lynton"? A. Yes.

Q. So that we would have to have— A. You take the same out for all the other pictures.

Q. That is correct. You see what I mean, in other words, you could prepare an account which put into the cost of "Letty Lynton" part of the studio overhead and the unabsorbed portion in a new schedule A-1 and A-2? A. Yes.

779 Q. Will you do that for us? A. I will prepare it for you, yes, sir.

Re-direct examination by Mr. Pollak (continued):

Q. Mr. Craig, would you turn to Exhibit C-25. A. Yes, sir.

Q. That exhibit shows in next to the last column, a computation by days on a percentage basis of the varions pictures, totalling 56, that were in whole or in part produced during the year 1932, is that right? A. Yes, sir.

780 Q. Completely. There are three sets of pictures, those only produced in the fiscal year 1932, those partly produced in the fiscal year 1931 and partly in the fiscal year 1932; those partly produced in the fiscal year 1932 and partly in the fiscal year, 1933, is that right? A. That is correct.

Q. Now, then, if you take the pictures wholly produced in the year 1932 and add to them the total of the percentages of pictures produced in 1931 and partly in 1932, and the percentages of pictures partly produced in 1932 and 1933, proceeding by days, how many pictures do you get as produced in 1932. It is a mere matter of addition, but

I think the record should show it. A. The addition of the 781
percentages as shown in that next to the last column which is a percentage of the days shot in 1932, represented to the shooting days, added together is 3,702.1. To get the number of completed pictures represented by that percentage, you would divide that figure by 100 and you would have 37 completed pictures.

Q. Now, then, the last column again takes the pictures partly produced in 1931 and partly in 1932, the pictures wholly produced in 1932 and the pictures partly produced in 1922 and partly in 1933, does it not? A. Yes.

Q. Tabulating them this time, not by shooting days, but by cost; is that right, by cost? A. By cost, yes, sir. 782

Q. And on that basis, how many pictures do you get as produced in the year 1932? A. The total percentages there amount to 3,640.7. Divided by 100, it would give you thirty-six and four-tenths pictures completed.

Q. Now, Mr. Craig, there are one or two minor matters.

Special Master Auchincloss: Just before you leave that.

Mr. Pollak: Yes.

Special Master Auchincloss: What theory are you proceeding under, 41 pictures or 37 or 36?

Mr. Pollak: Well, Judge, it is a question of law which will arise at the end of the case. We have 783
thought that on this important matter of overhead as to which the courts have said that the exact method of computation is a matter that in effect is arbitrary, because the whole element is an element that by definition is incapable of exact measurement or apportionment, we thought we should put in all the theories that seemed to us right. Now, speaking for myself——

Special Master Auchincloss: Well——

Mr. Pollak: I beg pardon?

784 Special Master Auchincloss: I don't mean to preclude all this argument, but let me get this straight: When you set up this amended account——

Mr. Pollak: Yes.

Special Master Auchincloss: You predicated your overhead on one forty-first of a certain amount.

Mr. Pollak: Yes.

Special Master Auchincloss: Now, what was that based on?

Mr. Pollak: That was based, as I understand, on release dates.

Special Master Auchincloss: On what kind of release dates?

785 Mr. Pollak: Do you know, Mr. Cohen?

Mr. Driscoll: 41 pictures turned out to the public during that fiscal year.

Special Master Auchincloss: Well, what I am trying to find out is, take the item of "Grand Hotel" that Mr. Driscoll raised. Was that one of the pictures which was included in this one-forty-first?

Mr. Driscoll: No.

The Witness: Yes, it was.

Mr. Pollak: It was.

Special Master Auchincloss: Why shouldn't you say which one you applied to this thing?

786 Mr. Pollak: I am perfectly free to say in the first place—suppose we get the facts straight—you understand that neither Mr. Craig nor Mr. Schwartz nor Mr. Hilborn nor I had anything to do with this New York accounting, this 41 business.

Mr. Driscoll: That puts it right up to Mr. Cohen.

Mr. Pollak: It is a problem of accounting that seems to have arisen with the New York accountant, not with the New York lawyers, as a matter of fact.

Special Master Auchincloss: No, I know all that, but I am trying to get at this fact——

Mr. Pollak: Suppose you get the 41 pictures listed 787
to see how many of them are in here. We will give you the 41 pictures and that will answer your question in a moment after we have the 41.

The Witness: Do you want me to call the pictures off?

Mr. Pollak: Yes, I would read them off.

Special Master Auchincloss: Call them by number, will you?

Mr. Pollak: All right.

The Witness: I don't have the numbers.

Mr. Pollak: Then, call them by names.

Mr. Hilborn: We will have several lists.

788

Special Master Auchincloss: What is this (indicating)?

Mr. Pollak: An exhibit showing the pictures.

Special Master Auchincloss: Are we going to mark this as an exhibit?

Mr. Pollak: It might be well to mark it. This is a list of pictures released.

Special Master Auchincloss: This is Exhibit 27, isn't it?

Mr. Pollak: It is a list of pictures released during the fiscal year 1932 regardless of when they were produced.

789

(Instrument in question was marked Defendants' Exhibit C-27.)

Special Master Auchincloss: And this totals 41 pictures, is that it?

Mr. Pollak: We will count it to make sure.

Mr. Driscoll: That is right. There are 41 pictures there.

Mr. Pollak: Now, state your question to me, Judge.

The Witness: I can't tell you either. I don't have the releases out here.

Mr. Driscoll: I have considerable information, but not that. The release date that I have is September 10th, 1932.

A. Well, what I have here now—I am not in a position to testify to this absolutely, because as I say, I haven't the release schedule, but I have the New York release date here as April 12th, 1932. I think that is the date that the first showing of Grand Hotel was made.

Q. You mean— A. April 12th, 1932.

Q. It came within this fiscal year? A. Yes, a month after "Letty Lynton" was made. You have got the general release date there. I think that is what you have.

Q. Yes, probably the general release date. But it was the general release date that you used in figuring 41 releases during the year?

Mr. Pollak: He didn't figure it.

The Witness: I didn't figure it.

Mr. Driscoll: Somebody else figured it. If you know how it was figured, can you tell me if it was the general release date that was used?

A. I don't know. I can't say.

Q. Can you tell me this, isn't it a fact that you had 41 general releases during the fiscal year, that fiscal year, 31-32? A. The only thing I can tell you is that there were 41 pictures used for this accounting based on the release dates.

Q. That is all you know about it? A. That is all I know about it.

Q. All right. Well, the point that I want to make is this: Assuming that the general release date of Grand Hotel was September 10th, 1932, which was after this fiscal year,

it is a fact, nevertheless, is it not, Mr. Craig, that practically the entire final cost of Grand Hotel was expended prior to the expiration of this fiscal year and a total of $695,067 was charged off prior to the expiration of this fiscal year? A. That is correct. 763

Q. So that less than $300 went into the following fiscal year, whether the general release date came in the next year or not? A. That is right.

Q. Now, one other question, Mr. Craig, which I think might be helpful to us and to the Special Master. You have on your Schedule C-25, a total production cost for the fiscal year of 1932, of $16,204,197.54. In that you have charges for overhead, studio overhead against each picture on the basis of camera-shooting days. A. That is correct. 764

Q. Now, turning to the amended account, Mr. Craig, you have this overhead item of $2,246,793.28. How much of that $2,246,793.28 is in this $16,204,197.54? A. There was absorbed in the—let's see now. Perhaps you had better read the question so that I will be sure.

Q. (The question was read by the reporter.) A. A. $2,153,868.

Q. $2,246,793.28 is included in the production costs for the fiscal year totalling $16,204,197.54, is that correct? A. That is correct.

Q. Now, Mr. Craig, previously you testified, unless I misunderstood you, that there was an item of unabsorbed costs of $787,498.48 which I understood to be part of that $2,246,793.28, and if that is correct, there would be unabsorbed of that $2,246,000, $1,459,294.80, so the two things don't synchronize, the sound or the picture is off, one or the other. A. Well, I think you have got a combination of questions there, Mr. Driscoll. The first question that you asked me, we were talking about general overhead and I tried at the time to explain to you that I was distinguishing from the departmental overhead and from the various overheads like the unabsorbed stock company. 765

Q. Yes. A. Now, you are switching me back to a statement that includes all of those things as a part of the net figure. I am trying to reconcile the two.

Q. I may be entirely in a fog, but I am just anxious to get out of that fog and to grasp these figures if it is possible for me to do so. A. If you will take your amended accounting, Schedule A (Defendants' Exhibits 18-E1 and 18-E2).

Q. Yes. A. You have listed there in detail the various departmental expenses and other miscellaneous expenses that go into the studio overhead.

Q. Yes. A. That takes up all of page 1 (18-E1).

Q. Yes. A. Then page 2 continues (18-E2), the statement adding the various under and over absorbed items for the year.

Q. Yes. A. The result being a net overhead charge of $2,246,793.28.

Q. Yes. That is both departmental and everything balanced up. A. That is correct. Now, when you were asking me the question awhile ago as to the amount of general overhead that I had unabsorbed at the end of the year, I was speaking from a statement that represented only the general overhead items that show on the first page of this accounting.

Q. I see. A. Which total $2,941,366.48.

Q. Yes. A. That leaves the figure of $2,153,868, which I have just given you.

Q. Yes. A. It gives you the original figure of unabsorbed general studio overhead that I gave you in the first instance, $787,498.48.

Q. I see. In other words, the difference comes in the unabsorbed portions of departmental overhead? A. That is right. We are talking about two different statements.

Q. Yes. I am glad to be shown the light, not deprived of the light. Now, let's turn to C-25 again, on the second page there. There are some parts of that that are not clear to

me. I don't presume to understand all of it or much of it, as a matter of fact. The second page there, Mr. Craig. We have here that first summarization after your row of figures, you have a cost at August 26th, 1931, 234 days. You get the figure I am referring to? A. Yes, I see it. 769

Q. Now, then, in your next classification, it is increased for the fiscal year ending August 24, 1932, and your summarization of days is 1360 days. A. That is correct.

Q. I take it that that is the item of days that were added during that fiscal year to the various productions? A. That is true.

Q. Now, then, why is it that those two items do not total this total of 2,122? A. Simply because I have not gone into the statement by adding the amount increased subsequent to that and then a total. I was only trying to get the total percentage that the 1932 costs represented to the picture. Now, the difference between those three, the first two columns plus whatever increase there might have been subsequent to August 24th, 1932, represents the total. I could have put another column in there, but I didn't need it. I thought it would be a more cumbersome statement to add the items subsequent to completion and it is self-apparent. 770

Q. In other words, to get this total of 2,122 days, you would have to have the items of 234 plus the item of 1360, plus another item of days required during the next fiscal year, to finish those pictures? A. You can see it on the last item there. In the White Sister there were no production days at all during '32, but we had 58 later. 771

Q. I see. A. So your difference is subsequent days later.

Q. Yes. Now, there is one other thing here that hasn't been clear to me and I would like to have you explain it. Under that increase for fiscal year ending August 24th, 1932, you have first a column of days, then you have hours, 299½. Just why is that? Why isn't that in terms of days, or how does that come about? A. Well, under the Cosmo-

790 Special Master Auchincloss: Now, was this a basis of the amended accounting?

Mr. Pollak: I understand it was.

Mr. Cohen: It was.

Mr. Pollak: As far as your question to me is concerned, Judge, subject to correction by further information that I may get from the New York office, if you just want my personal attitude at this time, I do not believe that this 41 basis is right.

Special Master Auchincloss: That is all right. I don't care so much about that at this particular moment.

791 Mr. Pollak: Yes.

Special Master Auchincloss: All I want to do is try to get this basis for this amended accounting and then other facts you want to put in.

Mr. Driscoll: This is marked in evidence?

Special Master Auchincloss: Yes.

(At 2:00 o'clock P. M. the hearing was resumed, all parties being present.)

HARRY COHN, having been first duly sworn, took the 792 stand and testified as follows:

Direct examination by Mr. Pollak:

Q. Will you state your full name? A. Harry Cohn.

Q. Mr. Cohn, what is your present occupation? A. President, Columbia Pictures Corporation.

Q. That is a producing company? A. Producing and distributing.

Q. Producing and distributing, and will you tell us in general terms your experience in the motion picture industry? A. From what point?

Q. Well, as long as you have been in it, but in a rather 793
general way, what positions you have held and where they were and so on. A. I was with the Universal Film Company for a year and then I organized the C. B. C. Film Sales Corporation which consisted of my brother, Jack Cohn, Mr. Joe Brandt and myself. Three years later we changed the name of the company to Columbia Pictures Corporation, with Mr. Joe Brandt as President, myself as Vice-President and my brother as Secretary-Treasurer. In 1931 I purchased Mr. Joe Brandt's stock and became the president of the corporation. I have been out here 20 years and I would say between 15 and 20 years as the producing head of the company. I have been so since its 794
inception.

Q. I think that is sufficient for our purposes. Now, Mr. Cohn, about how many pictures do you make a year, just in round figures. A. 50.

Q. About 50? A. 50 besides shorts.

Q. 50 feature pictures? A. 50 feature pictures.

Q. You have testified that you are connected with the distribution as well as the production end? A. Well, I wouldn't say that I am connected with distribution, as well. Being the head of the company, I naturally know what is going on in the distribution end of the business. I know the distribution end to a certain extent.

Q. Now, from your experience with production and dis- 795
tribution, have you formed an opinion—don't tell us what it is at the moment—but just tell us whether you have or not formed an opinion as to the relative drawing power of written material which we will call the story, and of the production. Have you formed an opinion? Just yes or no. A. Well, I know, yes.

Q. I take it in connection with any given picture, the ratio between the two depends on a great many factors, does it not, Mr. Cohn? A. Yes, sir.

Q. The greater a star is, the greater his contribution

754 that were in production at the end of the fiscal year ending in August, 1931, and overlapped into the fiscal year of 1932?

The Witness: That is correct.

Q. And the same is true of those four items down below? A. Yes, sir, and two on the succeeding page.

Q. Yes. Now, when you charged up departmental overhead allocated on the basis of labor and material, you allocated to those pictures similar charges during such weeks as they were actually in production in this fiscal year? A. That is correct.

755 Q. And so, at the end of the year, we come to a time when you again close your fiscal year and you have certain incompleted pictures that carry over into the following fiscal year? A. That is true.

Q. And those also appear on this list here, those further down toward the end of the list, that carry it over into the following fiscal year? A. Yes, sir.

Q. And as to those pictures, up to the end of the fiscal year, that is, up to the end of August, 1932 in a similar manner from week to week, you carried over the allocation, you charged up the allocation of this departmental overhead, these various departmental overhead items? A. Yes, we did.

756 Q. Now, in this amended accounting, when they came to charge up an overhead item of $2,246,793.28, that is divided up on an entirely different basis, isn't it? It is divided up on one forty-first to each picture regardless of cost or time taken in the shooting, isn't that correct? A. There has been no change made in the distribution of the departmental costs in the amended account.

Q. I am not talking about that, Mr. Craig. See if you can follow my question. I thought I made it clear. I am not talking about the departmental allocation. We have already covered that in detail. That was allocated from

week to week on the basis that we set forth here as to each department, most of them being on the basis of labor and material or one or the other. A. That is correct. 757

Q. And was done from week to week and went into the direct charges against the picture. A. That is right.

Q. Now, aside and apart from those allocations of departmental overhead, we have an item on this account of overhead, $2,246,793.28. That is divided up one forty-first against each picture. That is the method that is used in this accounting, isn't it? A. Yes, sir, in the amended accounting.

Q. Yes, for dividing up that item of $2,246,793.28, and that method of dividing up that overhead is an entirely different method from the method that you have used as to these 56 pictures that were in production at the studio during that fiscal year? A. That is correct. 758

Q. This division here in the one forty-first for each picture does not in any way depend upon either the cost of the picture, the labor or the material or the use of facilities. It is a numerical division based on pictures released. That is correct, isn't it? A. That is correct.

Q. It is not even depending upon the pictures that were worked on during the year; it is just on pictures released regardless of when they were made. That is right, isn't it? A. Yes, sir.

Q. And as a matter of fact, you take Grand Hotel, that was released right after the expiration of this fiscal year, isn't that correct? It was released on the 10th of September, 1932. A. I haven't the release schedule, Mr. Driscoll. 759

Q. Well, you do know that it was released shortly after the end of the fiscal year, don't you, Mr. Craig? A. If I remember rightly, Grand Hotel was road showed, was it not?

Mr. Cohen: Yes, it was.

Mr. Driscoll: I can't tell you that.

772 politan contract, I have explained before, we had an arrangement whereby we would charge them on an hourly basis for retakes on their pictures, rather than on a daily basis. We charged them $1250 a day for shooting days and when they were in retakes, we charged them $125 an hour. They might have shot one hour or eight hours a day.

Q. This item of 2991/2 hours— A. —represents the retake hours made on Cosmopolitan productions during that year.

Q. On Cosmopolitan productions during that year? A. That is right. I have set it out that way rather than try to confuse by an arbitrary break down into days.

Q. I am not criticizing that. I am looking for information. A. I am trying to explain why I put it that way.
773 There are many ways of trying to figure that out as to what the days constitute.

Q. How many camera hours are there in a camera shooting day? A. There are no fixed hours because it depends on your day's work. Sometimes they shoot three hours. Sometimes they shoot two hours. They are all camera days. We have the argument that they have tied the studio facilities up for that day whether they used them all day or part of the day.

Q. You say there is no recognized standard of camera shooting hours to camera shooting days? A. No.

Q. So it would be impossible, then, to reduce this Cosmo-
774 politan time to camera shooting days so as to co-ordinate it with the other camera shooting days of the studio? A. The only basis that you could do that on was that in 1932 our normal working day was eight hours. We would assume the day for a camera man, 48 hours per week.

Mr. Driscoll: That is all.

Re-direct examination by Mr. Hilborn (resumed):

Q. Mr. Craig, in order to straighten out one thing in connection with your general studio overhead, you attempted

to absorb it at the rate of $1559 per camera day in the same way that you attempted to absorb your camera department overhead upon the basis of a percentage of the direct costs? A. Yes, sir. 775

Q. And to a certain extent that might have been under absorbed or over absorbed? I mean your general studio overhead might be through the charge of $1559 a camera day? A. It might have been, yes.

Q. And you could prepare a schedule for A-2 (18-E-2) showing the total studio overhead, the unabsorbed studio overhead at the rate of $1559 a day, couldn't you? A. You have it in your accounting there, Mr. Hilborn.

Q. Well— A. It is not set out as a separate item, but if you will add your—maybe I didn't understand your question. 776

Q. Well, what I mean is this, you could prepare for us an account which showed the cost of "Letty Lynton" including in the cost the 33 camera days at $1559 a day and showing the unabsorbed studio overhead in the Schedule A-2, so far as the general studio overhead accounts are concerned in the same manner as it has been shown now for the departmental overhead, and showing the total amount of unabsorbed studio overhead based upon a total cost of $316,000 for the "Letty Lynton" production costs?

Mr. Driscoll: It is simply the difference between the two accounts, the difference of $316,000. 777

The Witness: I don't quite follow your question. First I can give you the cost of "Letty Lynton" including the 33 days at 1559 a day?

Q. Yes.

Mr. Driscoll: Which we have in C-25.

A. That is right.

802 Cross examination by Mr. Driscoll:

Q. Mr. Cohn, how much was paid for Abie's Irish Rose? A. I wouldn't know. You would have to ask Mr. Zukor that. He made it.

Q. How much was paid for Way Down East? A. I think you will have to ask Mr. Zukor that, he made that, too.

Q. How much was paid for Gone with the Wind? A. I think about $40,000.

Q. As a matter of fact, Mr. Cohn, the cost of a well known story or well known play is substantially more than 5% of the cost of the picture, isn't it?

803

Mr. Driscoll: Well, isn't it usually substantially more than 5% of the cost of the picture?

A. Not necessarily.

Q. Well, it isn't a case of "necessarily". I want to know if it isn't usual? A. No, I wouldn't think so.

Q. You don't think so? A. No.

Q. Can you give me an instance of a well known story or play where the cost of the story was less than 5% of the cost of the picture? A. Yes, I think I can.

Q. Give me one, please. A. Criminal Code. $25,000.

804 Q. The story cost $25,000? A. $25,000.

Q. Was that a play or a story? A. A play.

Q. And what did the picture cost? A. About $600,000.

Q. The picture cost $600,000 and the story cost $25,000? A. $25,000.

Q. Can you make a picture, Mr. Cohn, without material? A. Not very well.

Q. You have to have literary material, haven't you? A. That is right.

Q. You have to have a story and you have to have a play? A. You have to have a story or a play.

Q. Or a play, yes, and it isn't unusual or strange for 805
the management or maker of the picture to pay a writer doing the story, doing the picture story work, $25,000 for a single picture, is it, after buying his story and after buying his original story or his original play? A. I don't agree with that.

Q. Well, do you know that in this case they paid John Meehan above $24,000 to write "Letty Lynton"? A. It is possible.

Q. After buying the book? A. That is possible.

Q. Yes; and that is not unusual, is it, Mr. Cohn? A. Yes, but you are talking now about the continuity.

Q. I am talking about the work done by the writer, 806
right within the studio. A. Your question first was about the purchase of a play. Now you are talking about getting it ready for the screen.

Q. I am talking about something else now, Mr. Cohn. I am not talking about the cost of the original play now or the original book. I am talking about the cost of getting it ready for the screen. A. Yes.

Q. Yes. Now, then, when you buy a play, you don't have to do as much work on it as you do on a story, do you? A. I think you have to do just as much work. I have found it that way.

Q. Oh, you have. Now, let me see, Mr. Cohn. Your play is in dramatic form, isn't it? A. Yes. 807

Q. Your story is not in dramatic form, is it? A. It wouldn't make any difference.

Q. I see. Your play is reduced to a certain number of characters, isn't it? A. Yes.

Q. Your book is not reduced to any small number of characters or story? A. Right.

Q. So, you have to reduce your characters, you have to reduce your dialogue, you have to get your dialogue out of that book? A. Yes.

Q. And you have to reduce the number of scenes? A. That is right.

814 no. I wouldn't even say well known—any fair piece of property.

Q. All right. Now, then, are we justified in taking as your testimony that you fix 5% of the receipts as due to the story if it is any fair, well known piece of property? A. Fairly well known.

Q. Fairly well known piece of property? A. Yes.

Q. You fix 5%? A. Yes.

Q. So that there wouldn't be over 5% difference in the receipts of the picture between a fairly well known piece of property used as a story and any original story that one of your staff writers might write? A. That is right.

Q. That wouldn't be over 5%? A. No.

815 Q. Mr. Cohn, aren't there many elements that enter into the success of a picture or any play? A. I don't understand your question.

Q. Well, aren't there many contributing factors, put it that way, to the success of any play or any picture? A. Definitely.

Q. It is necessarily so, isn't it? A. Definitely.

Q. Don't you know, Mr. Cohn, that it requires many things to manufacture a successful automobile? A. Yes, and it requires the same thing to a motion picture.

Q. Yes. A. I will agree with that.

Q. Yes, fine. Now, we are getting somewhere. We are
816 agreeing. In the making of a motion picture, taking a successful play after the play has had a run on Broadway and has established a name for itself, there are several elements of value in that play, aren't there? A. Several in the play?

Q. Yes. A. Possibly, yes.

Q. You have the literary material? A. Yes.

Q. You have the name? A. The name of what?

Q. The name of the play. You have the names of the authors if they are well known authors, isn't that right? A. I don't think it means a thing.

Q. You don't think George Kaufman's name in connec-

tion with a motion picture means any more than my name 817
would mean? A. Not if it wasn't a good picture.

Q. Well, let's get away from that for a minute, Mr. Cohn. Necessarily you have to have a good picture or you can't sell it. You have to have a good hat or you can't sell it. A. Well, I would say Kaufman is a very good name.

Q. And Kaufman's name means something in connection with a play, doesn't it? A. No, sir.

Q. It doesn't mean anything? A. I don't think it sells any tickets at all.

Q. Well, then, do you think the name M G M sells any tickets? A. Yes.

Q. Of course it does, and so does Kaufman's name as 818
the author of the play. A. I wouldn't agree with that. It might sell a few but not enough to take into great consideration.

Q. Well, by the same token, then, let's see, Mr. Cohn. We have in connection with a successful play the material. We have the name of the play which has received certain advertising through the run of the play. We have the good will that the play has built up with the public. The public has come to regard a certain piece of property of certain value because of the advertising it has received. That is true, isn't it? A. To a certain extent.

Q. Yes. A. I would have to know where that play 819
played, did it play all over the United States or did it just play in New York?

Q. If it played all over the United States it would have just so much greater good will than if it had only played in Providence, Rhode Island, or Albany, New York? A. I would say that might enhance its value a little.

Q. And if it had had a New York run, it would have considerably greater value and good will than if it just played Philadelphia? A. It all depends how long it ran in New York and if it ran in other parts of the United States.

Q. In other words, the run of the play means consider-

832 Q. So you did have a great script in making this picture? A. Yes, I would say we had a very good script.

Q. Yes. Now, then, let me understand. Maybe I misunderstand you, Mr. Cohn. This 5% that you put upon material is simply the original material that you purchase, is that it? A. Yes.

Q. And the story that you make into a picture as it appears on the screen is definitely worth something more than 5% of the gross receipts? A. Yes, I will add a little more.

Q. Oh, I see. All right. That is all.

833 Mr. Pollak: No re-direct. Thank you very much. Do you want the information about the story?

Mr. Rubin: Yes.

Mr. Driscoll: No, I didn't ask for it.

(Discussion was had off the record.)

Mr. Cohn: The original story was entitled "Night Bus" and the writer was Francis Adams.

(Witness excused.)

ADOLPH ZUKOR, having been first duly sworn, took the stand and testified as follows:

831 Direct examination by Mr. Pollak:

Q. Mr. Zukor, would you tell us your experience in the motion picture business, including your present position? A. I have been in the motion picture producing business, producing motion pictures for the last 25 years. The firm name was Famous Players Film Company originally, which was incorporated in 1912, I believe, and the present corporation is Paramount Pictures Corporation, the successor of Famous Players. I have been with it ever since its inception.

Q. What is your present post with it? A. I am in charge 835
of production at the Hollywood studio.

Q. What is your title? A. Chairman of the Board of Directors.

Q. Had you previously been president of the corporation? A. I was president of the corporation to two years ago.

Q. And you were president in 1932? A. Yes, sir.

Q. Now, Mr. Zukor, you have heard the testimony of the last witness, or some of it? A. Not all of it, I was out of the room.

Q. First, some rather general questions: Am I right in this, Mr. Zukor, that in the case of any given picture, 836
the portion of its gross receipts that is ascribable to the original written material and the portion that is ascribable to the production including under production the producer, the director, the distributor, the executive organization, the proportion that you can ascribe to the story and the proportion that you can ascribe to all these other factors, varies from picture to picture, is that right? A. It does.

Q. Am I also right in this, that the more distinguished the stars are, the greater their contribution to the success of the picture will be? A. Yes.

Q. Now, in 1932, were you familiar with the position as a star, of Miss Joan Crawford? A. Yes.

Q. And what would you say that position was? 837

Mr. Driscoll: I take it that this is all subject to my objection to all of this line of testimony?

Special Master Auchincloss: Yes.

Mr. Driscoll: As having nothing to do with this, and not within the issues that are referred to the Special Master to hear and report.

Special Master Auchincloss: With the same exception.

796 to the drawing power of a picture, is that right? A. That is right.

Q. And the greater a given producer is, the greater his contribution will be, is that right? A. That is right.

Q. And the same for the director? A. That is right.

Q. And I take it the better the reputation of the producing company is, the greater the attraction of the producing company taking it as a whole, is that right? A. Right.

Q. Mr. Cohn, is this also true, that the attraction of the story will be greater if the story is identified by name with some very well known play or novel, for example?

797 Mr. Driscoll: Well, I want to object to this entire line of evidence as incompetent, irrelevant and immaterial and having nothing to do with the issues that have been referred to the Special Master to try in this proceeding. I want my objection on the record. I don't think the testimony makes any difference at all, but at the same time I think it is just clogging the record here with stuff that doesn't belong there, and I want to object to it.

Special Master Auchincloss: The objection is overruled with an exception.

The Witness: That is right.

798 By Mr. Pollak:

Q. And on the same principle, if the picture is not identified at all by name with any well known play or novel, the attractive power of the story will be less, is that correct? A. Right.

Q. Now, you are familiar, are you not, with the position of Miss Crawford, Miss Joan Crawford, as a star in 1932; just are you or are you not familiar with that position? A. Yes, sir.

Q. And what would you say that position was? A. 799
You mean as a star?

Q. Yes. A. I would say she was a very big star.

Q. Would you say she was one of the leading half dozen stars? A. I would.

Q. Among the female stars, roughly, where would you classify her as of 1932? A. As one of the top notchers.

Q. And how for Mr. Montgomery, Robert Montgomery? A. Also a topnotcher.

Q. Would you say that he also was within the first half dozen as of 1932? A. He would be right up there.

Q. Realizing what you have already testified to, that the ratio between the story and the other contributions 800
does vary from picture to picture, but, however, based on your general experience with the whole range of motion pictures, what would you say would be a high percentage of the gross receipts of a motion picture to be ascribed to the story?

Mr. Driscoll: Object to this as mere speculation, absolute speculation and nothing else.

Special Master Auchincloss: We will take the testimony under your objection with an exception.

The Witness: I would say about 5%.

Mr. Pollak: Now, take a picture with Crawford and Montgomery as stars, Stromberg as pro- 801
ducer, Brown as director, bearing a name not identified with any well known play or story, under conditions existing in 1932, what proportion of the gross receipts would you say was ascribable to the story?

Mr. Driscoll: Same objection to that.

Special Master Auchincloss: The same ruling.

The Witness: The same percentage, about 5%.

820 able; the greater the territory it covered, the longer the run, the more valuable the play? A. I would like to know how long it ran in New York first, how long it ran in other places. Then I could give you a better opinion.

Q. I am not asking you to fix a figure on it. A. I am not going to.

Q. I am asking you, Mr. Cohn, if it isn't true, that if it has had an extensive run, it is of more value than if it hadn't had an extensive run? A. Yes.

Q. Of course it is true. A. It would have more value.

Q. There can't be any question about it. Now, by the same token, you want to tell me it doesn't make any difference whether the material is any good in the motion

821 picture? A. I didn't say that.

Q. No, but at any rate it wouldn't attract over 5% of the gross receipts? A. That is right.

Q. Now, how would you divide up the other 95%, Mr. Cohn? You gave 5% to material. What would you do with the other 95%? A. I would divide that up between the stars, the director——

Q. How much for stars? A. About 60% to 65%.

Q. 60% is due to the names of the stars? A. Right.

Q. All right, what would you do with the other 35%? A. The 35% remaining I would divide between the director——

822 Q. How much would you give to the director? A. I would give the director about 10%.

Q. Don't put it too high. You might have to boost their salaries if you do. 10% to directors and how much to the rest? What would you do with the rest? A. Divide that between the balance, organization, production.

Q. 25% would be due to organization and what else? A. Organization, that would take in the producer and everybody.

Q. Everything else. Now, how do you fix 60% to the stars? A. How do I fix 60% to the stars?

Q. Exactly how do you fix 60% to the stars? A. Well.

if I had a picture that would gross, we will say $350,000, and if I had two stars in my picture, I think my picture would gross a million if the stars' names were big enough. 823

Q. All right, how do your fix 10% to the directors? A. How do I fix 10%?

Q. Yes, how do you fix 10% to the director? A. I put 10% down for the director.

Q. I see. How do you know that it was 10% of the receipts of the picture which were due to the director? A. Well, if I had a big director, I would figure 10% definitely to my director, a director of reputation.

Q. As a matter of fact, Mr. Cohn, you have to have proper direction or you haven't any picture at all, isn't that true? A. That is why I put 10% down. 824

Q. And you have to have proper literary material or you haven't any picture at all? A. That is why I put 5% down.

Q. And you have to have proper management and organization or you haven't got any picture at all? A. The same thing. I answered those things.

Q. Isn't it a fact that you can't allocate any definite percentages to any of those elements? A. Not necessarily.

Q. Well, I am not asking you about necessarily, I am asking you if it isn't a fact that you can't allocate it to it? A. Why can't I? I said I can.

Q. Because there is no way of fixing it except to guess at it, isn't that true, Mr. Cohn? A. We have done some pretty good guessing in our studio. 825

Q. Yes, I know you have. You have been very successful. I am not questioning that, Mr. Cohn. You have been very successful, but that doesn't change this situation here. Now, you take "Three Men on a Horse", is that a successful picture? A. I don't know. I didn't see "Three Men on a Horse".

Q. You don't know anything about it? A. I know the play was very good.

826 Q. How much of the success of that picture would you say was due to the fact that it was made from "Three Men on a Horse", the play that played in New York City? A. Do you mind asking that question again?

Q. I want to know what part of the box office receipts of that picture do you ascribe to the fact that it is made from a successful play, "Three Men on a Horse". A. I don't know.

Special Master Auchincloss: Well, are the box receipts before us?

Mr. Driscoll: No. That is why I said it is impossible for anybody to put 5% down——

827 The Witness: I never even saw the picture.

Mr. Driscoll: —on the literary material. Who starred in the picture "Three Men on a Horse"?

The Witness: I didn't see the picture. I don't know.

Q. You don't know anything about that picture? A. No.

Q. Well, let's take one of your successes, Mr. Cohn. You have had a lot of them. A. Which one would you like?

Q. Let's take one of your best. A. "It Happened One Night."

828 Q. "It Happened One Night"? A. Yes.

Q. What was the story, was that an original play or was it— A. No, we bought a story. I think we paid $10,000 for the story.

Q. Yes. Was that a musical? A. No. It was a picture and we borrowed Clark Gable from Metro and Claudette Colbert from Paramount. That picture cost $350,000 to $400,000 to produce. It grossed about $2,000,000.

Q. And 60% of that $2,000,000 is due to the two stars? A. Definitely.

Q. And 10% to direction? A. Yes. You could add a little more to the director there because that is the greatest director in the motion picture business, with all due apologies to Metro. 829

Q. These percentages vary then? A. I just raised it up in that case.

Q. How high would you raise it in that case? A. 5%.

Q. Five more, that would be 15? A. Yes.

Q. And where would you take the extra 5% from so as to get it within 100? A. I would take it off production.

Q. That would make production 20%? A. Right.

Q. Because the director was 15? A. Because it was a cheap production as the total cost proves to you. If the cost was $400,000, it was a cheap production. We put all the money there into the stars. 830

Q. The stars were still responsible for 60% of the receipts? A. Definitely.

Q. Definitely, and your material was responsible for only 5% of the receipts? A. Yes. You see, it was a short story. It had a great script on it that we didn't get out of the play, that we didn't get out of the material purchased, see? We bought a short story. I don't remember exactly—I could find out for you by the use of a telephone—I think it was in the Cosmopolitan Magazine.

831

Mr. Rubin: A Will Irwin Story, wasn't it?

The Witness: No, it wasn't Irwin.

Mr. Hilborn: "A Night in an Omnibus"?

The Witness: No.

Mr. Driscoll: But you had a great script there, didn't you, Mr. Cohn?

The Witness: No—the great script was written from the material we bought.

Q. I thought you said you had a great script? A. That is right. A great script was written from the original story that we purchased.

Q. But you say that it doesn't make any difference whether it is in play form or book form? If that is your testimony, Mr. Cohn, I just want you to say yes and that is all. I am willing to take it just for what you say. A. Yes.

Q. That is your testimony? A. I say just as much work either way.

Q. All right. Now, then, Mr. Cohn, let me ask you how did you fix 5% as the receipts that may be ascribed to the story? A. Well, let's say that a picture grossed one million dollars for the sake of argument. I would say 5% was tops.

Q. So that it would only make 5% difference in that story, in that picture, whether you used, for instance, Uncle Tom's Cabin or Way Down East? A. Oh, Mr. Driscoll, you have a well known vehicle before you start when you take Way Down East.

Q. Yes. A. Or Uncle Tom's Cabin.

Q. They are both well known, aren't they? A. You have a terrific sale, you have no sales resistance. That will sell before you start, see?

Q. Yes. A. You take a play that is not well known or is fairly well known.

Q. Yes. A. I don't think you will get anything like that.

Q. You say it doesn't make any difference whether it is a play, it is not going to make over 5% difference whether the story is an original story or whether it is a well known play, it is not going to make over 5% difference in the receipts? A. No, I didn't say that. You mentioned Way Down East and you have mentioned—what is the other?

Q. Uncle Tom's Cabin? A. You mentioned two. I don't think there has been a greater seller than Way Down East, with the possible exception of the Bible.

Q. Yes, all right. Let's take something else. You say that 5% is due to the material or to the story? A. Yes.

Q. Now, then, in your opinion, Mr. Cohn, it doesn't make over 5% difference in the receipts the gross receipts of a picture, whether you have a well known play like First Lady, for instance, or whether you have an original story? A. First Lady? 811

Q. Yes. A. I don't know what you mean by First Lady.

Q. Well, there is a play called First Lady, isn't there? A. Yes.

Q. Jane Cowl's play? A. Yes.

Q. And it wouldn't make over 5% difference maximum in the receipts of the picture whether you had a play of the rank of First Lady or Once in a Lifetime, or any well known play, or whether you had an ordinary original story? A. Well, now, again you go into Once in a Lifetime, that is well known. 812

Q. Yes. But your testimony, Mr. Cohn— A. Yes.

Q. —is that you can't ascribe over 5% of the gross receipts to the story. A. It all depends on two things. First you say a well known play. That is entirely different. I can raise a little bit on that.

Q. How much would you raise on that?

Mr. Pollak: He hadn't finished the answer.

The Witness: That all would depend on who you would put in the picture, who would direct the picture, who would produce the picture. 813

By Mr. Driscoll:

Q. All right. Coming back to your answer, Mr. Cohn, you were asked to fix a percentage, which I say is foolish, but you were asked to fix a percentage of receipts that you would ascribe to story and you said 5%. A. What kind of a story? If you will ask that.

Q. I don't know. I didn't answer the question, Mr. Cohn, you did. What kind of a story did you have in mind when you fixed 5%? A. Any fairly well known—well,

874 Cross examination by Mr. Driscoll:

Q. What depreciation do you allow on those buildings from year to year? A. On the Class A buildings, reenforced concrete structures, steel, 1½%.

Q. Annually? A. Annually, yes, depreciated annually.

Q. And on the other buildings? A. On the others from two to three per cent. They vary.

Q. That would be 1½%. You figure the life of the buildings to be about 65 years. A. Yes.

Q. And on the others you figure up to 50 years? A. Yes.

875 Mr. Driscoll: That is all.

Mr. Schwartz: That is all, Mr. Hubert. Thank you very much.

(Witness excused.)

Special Master Auchincloss: Well, are you all finished, Mr. Pollak?

Mr. Pollak: I think we are.

New York Hearings (Continued).

At the offices of the Special Master, No. 50 Broadway, New York, N. Y., April 20, 1937, 10:30 A. M.

876 Pursuant to mesne adjournments.

JESSE T. MILLS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Mills, what is your occupation? A. Accountant; I think that is all-embracing.

Q. You are in the employ of what corporation? A. Loew's Incorporated and its various subsidiaries.

Q. How long have you been connected with Loew's Incorporated or its subsidiaries or any of the corporations that entered into that organization? A. From their inception in 1919, from the inception of its incorporation; prior to that with their predecessors, since 1913, I would say. 877

Q. Mr. Beery here is an associate of yours? A. Yes, he is a member of the staff.

Q. And the items concerning which you will testify, you have familiarized yourself with by examination of the books? A. That is correct.

Q. Mr. Cohen here informs me that you are a little modest in stating your position. You are not only an accountant; but you have a definite function in the organization? A. Yes, that is true. 878

Q. What office is that? A. Comptroller and Assistant Secretary, having charge of the accounts in general; the auditing of them; the financial reports, assembling of the various data that go into them, of course; the annual reports and periodical reports.

Q. Are you the head of the auditing department here in New York? A. I am.

Q. As to the M P P D A, will you please explain what those mystic initials mean? A. M P P D A, Motion Picture Producers and Distributors of America; that is ordinarily known as the Hays organization, of which we are members, and to cover their expenses all distributors pay a fee based on one-half of one per cent. of their gross receipts. 879

Q. Of each picture? A. We take the figures for the year and set the rate for the coming year, that is, your gross business, so that it means each picture.

Q. It is really the sum of the grosses of several pictures? A. Yes.

Q. The figure that is given here (Defendants' Exhibit 18-D5) is $3,630.12. Will you tell us how that figure was arrived at? A. That was arrived at by taking the total

856 Q. Have you also the reproduction value and the sound value of the buildings? A. Yes, sir.

Q. Will you give us those figures? A. The reproductive value of the buildings, was $1,119,324.83, and the sound or depreciated value was $953,301.91.

Q. All as of June, 1925? A. As of the date June 30th, 1925.

Mr. Hilborn: That is all.

Mr. Driscoll: No questions.

(Witness excused.)

Mr. Pollak: Mr. Craig, we might as well continue with your testimony.

857

WILLARD K. CRAIG, having been previously duly sworn, resumed the stand and further testified as follows:

Re-direct examination by Mr. Pollak (resumed):

Q. Mr. Craig, would you explain the item on the amended account of unused continuity—I will withdraw the question. What was your inventory value in the fiscal year 1932 of unused continuity?

858

Special Master Auchincloss: Where is it in this account?

Mr. Driscoll: Page 5 (Defendant's Exhibit 18-D5).

Mr. Pollak: The detail of it is going to be given in New York, your Honor.

The Witness: The inventory of our continuities as carried on our books August 24th, 1932, $1,628,425.04.

Mr. Rubin: Unused continuities.

The Witness: Those were unused continuities.

Willard K. Craig—for Defendants—Recalled—Re-direct.

Examination by Mr. Hilborn: 859

Q. The books were kept on the fiscal year basis, Mr. Craig? A. They were.

Q. Now, have you made an examination of your total records of salaries unassigned to any particular picture? A. We have analyzed the unassigned salaries that are shown in the various departmental accounts to which I have previously testified.

Q. And can you give us any detail as to what the items consist of, Mr. Craig? A. The items of unassigned salaries, include, as I have stated previously, those salaries which could not be charged directly to any production. They 860
result from vacations given to people in the department and to charges for legal holidays, for which they were paid but did not work. That is one of the main items in the unassigned salary account through the various departmental accounts.

Q. Mr. Craig, have you computed the additions to building and equipment from June 30th, 1925, down to the close of the fiscal year ending August 24th, 1932? A. I have the schedule on equipment. I didn't carry it on buildings.

Q. I see. Will you give us the items added to equipment from June 30th, 1925, to the close of the fiscal year ending August 24th, 1932? A. This is subsequent to the appraisal value which was testified to by the American 861
Appraisal expert.

Q. Yes. A. For the period ending August 26th, 1925, that covers the period July 1st, 1925 to August 26th, 1925, additions, $63,102.09. For the fiscal year ending August 25th, 1926, the additions were $147,469.86. For the fiscal year ending August 31, 1927, the additions were $163,051.32. For the fiscal year ending August 29th, 1928, the additions were $100,048.25. For the fiscal year ending August 28th, 1929, the additions were $352,435.58. For the fiscal year ending August 27th, 1930, $110,678.95. For the fiscal year

862 ending August 26th, 1931, $366,090.77. For the fiscal year ending August 24th, 1932, the increase was $155,654.41.

Q. Have you the same figures for the addition of properties during those periods? A. That is included as your equipment.

Q. Included in there, I see, properties and equipment. Now, Mr. Craig, you have prepared and are having typed a statement— A. Yes, sir, go ahead.

Q. —showing the allocation of the studio overhead upon the basis which we discussed this morning. Has that been finished? A. Yes, sir.

863 Special Master Auchincloss: Are you offering this?

Mr. Hilborn: Yes.

(The instrument in question was marked Defendants' Exhibit C-29.)

By Mr. Hilborn:

Q. Mr. Craig, the figures on the first page of Exhibit C-29 down to the total, down to the $2,941,366.48 are identical with the figures which are shown on Schedule A-1 (18-12) of the amended account, the total of $2,963,000 being the total of the debit items and the total of $2,175,908 being the total of the credit items? A. That is correct.

864 Q. Now, the item of $2,153,868 is the overhead charged to the pictures similarly to the charge of "Letty Lynton" of $1559 a day for 33 days? A. That is correct.

Q. And the aggregate charge to all the feature pictures and to the shorts was $2,153,868? A. That is right.

Q. Deducting that from the studio overhead of those accounts, it left an unabsorbed general overhead of $787,498.48, which you carried onto the next page as a debit balance? A. That is right.

Q. Now, the other items on the second page of this

account, are identical with the items which are shown on the second page of Schedule A? A. That is correct. 865

Q. Schedule A of the amended accounting, Schedule A-2 of the amended accounting? (Defendants' Exhibit 18-E2.) A. Yes, sir.

Q. That leaves an unabsorbed studio overhead of $92,925.28? A. That is right.

Q. Which is carried onto the next page of this account with the items of overhead, which were attributable to New York? A. Yes, sir.

Q. Leaving a total overhead of $3,424,809.97 which, as of the close of business in Los Angeles, was not absorbed into picture costs? A. That is right.

Q. I want to ask you one more question. This Schedule A-1 presupposes that there has been added into Exhibit C-29 the cost of "Letty Lynton" as shown on the amended account, that portion of the studio overhead which was charged to the picture at the rate of 33 camera days of $1559? A. That is true. 866

Q. Making a total cost of "Letty Lynton" of $316,139.18 plus its share of the unabsorbed overhead of $3,424,809? A. What is the figure on "Letty Lynton"?

Q. I should say $316,192.23. A. $316,192.23 is correct.

Q. Plus the share of the unabsorbed overhead of $3,424,809.97 as shown on Exhibit C-29. A. That is correct. 867

Special Master Auchincloss: All right, Mr. Driscoll.

Re-cross examination by Mr. Driscoll (resumed):

Q. Mr. Craig, you have given us the items of property and equipment that have been added in the intervening years since July, 1925 down to and including August, 1932. What depreciation have you taken against those items? A. We do not set up a depreciation at the studio. It is set up in New York. I can't tell you.

868 Q. That is all set up in New York? A. Yes, sir.

Q. So you are unable to say what, if any, depreciation has been taken against those items? A. That is correct.

CYRIL PROVO HUBERT, having been first duly sworn, took the stand and testified as follows:

Direct examination by Mr. Schwartz:

Q. Mr. Hubert, what is your position with Metro-Goldwyn-Mayer Corporation at the studio? A. I am the
869 structural engineer and estimator.

Q. And how long have you occupied that position? A. For seven years with the exception of one year that I went away.

Q. And what was your experience before you came to this studio as an estimator? A. Well, I was estimating for large construction companies like the William C. Crowell Co., where it involved a million to two million, making estimates, bidding on competition.

Q. And over what period of your life were you engaged in such estimating for various concerns? A. Oh, for around 12 years.

870 Q. Before you came here to the studio? A. Well, yes, just about, design and appraisals.

Q. Did you make an appraisal of the values, both replacement and sound values of the buildings, which stand upon the property of Metro-Goldwyn-Mayer here at the studio for the years 1931-32? A. Yes, I did.

Q. Will you tell us—have you those appraisals with you? A. Yes, I have.

Q. Will you tell us what the replacement value, arrived at by you of the buildings alone, was for the years involved and give us the time as of which the appraisals were made.

A. All right. The 1931 appraisal is dated January 1st, 871
replacement value was $2,543,241.52.

Q. What was the sound value? A. The sound value was $2,194,777.53. The appraisal on the buildings for the following year, 1932, as of January 1st——

Q. What you gave us before must have been 1931? A. 1931, yes. For the year 1932, the replacement value was $2,717,591.04. The sound value was $2,305,649.87.

Mr. Schwartz: That is all.

Special Master Auchincloss: Just as an explanation, does he mean the permanent buildings out here? He doesn't mean all these property buildings?

Mr. Schwartz: Well, they are all permanent 872
buildings.

Special Master Auchincloss: I mean these buildings that have been put up for particular pictures.

Mr. Schwartz: No, no.

Q. To what buildings do you refer? A. That is the permanent structures, that has nothing to do with motion picture sets or such as that.

Q. Do you happen to know how many buildings there were of that character in 31-32? A. Well, that classification of 1931 was 100 buildings and of 1932 it was 101 buildings, but that does not mean that there is that number 873
of buildings on the lot. We tear down buildings and replace some of these, and some of them are minor structures.

Q. But at the time involved, those were the buildings that were here at the time and the values placed upon them? A. Yes, although I have a miscellaneous construction of some minor buildings that have not been classified, like sheds and such as that. They have been grouped together.

Mr. Schwartz: I see. That is all.

838 By Mr. Pollak:

Q. Do you want the question read?

(The question was read by the reporter.)

A. She was one of the most popular young ladies of the screen at that time.

By Mr. Pollak:

Q. In the very front ranks of stars, would you say? A. Yes, she ranked among the first.

839 Q. And what was the position of Mr. Robert Montgomery? A. Very much the same among the men.

Q. Am I also right in this, Mr. Zukor, that in determining the relative proportion of success ascribable to the original written material and to other factors, the distinction of the producer makes some difference? A. Quite a difference.

Q. And is the same true as to the director? A. Yes.

Q. And what would you say of the distinction of Mr. Stromberg in 1932 as a producer? A. He was an outstanding producer then.

Q. And Mr. Thalberg, the chief producer of Metro Goldwyn Mayer at that time, what was his position? A. Tops.

840 Q. Now, we come to the director. Are you familiar with the position as a director of Mr. Clarence Brown in 1932? A. Yes.

Q. And what was that position? A. An outstanding director.

Q. Now, am I right in this, that the drawing power of the written material, the original story is diminished if the picture does not bear the name of any play or novel or story known to the public? A. Right.

Q. Now, allowing, if you already have allowed for the fact that the ratio of these various factors changes from

picture to picture, would you care to put a percentage 841
estimate, taking the field of motion pictures as a whole, on the contribution that the story makes to the gross receipts of motion pictures? A. The story largely depends on the treatment it receives before it is put on the screen by way of continuity, and story strength develops after it is put into continuity.

Q. Well, now, I am not considering the treatment received in the studio. I am not considering the writing of the continuity or as it is sometimes called in some phase or other the scenario or I believe it is now called the shooting script, I am not considering at all the writing within the studio, but I am considering only—these things are 842
different than I have mentioned, are they not? A. Yes.

Q. I am not considering any of them, do you see? I am considering only the original story before the studio has done anything to it. What proportion of the success of the picture would you say was ascribable to the original story?

Mr. Driscoll: I object to that. It is impossible for anyone to say that, because the original story is not presented to the public. How can you say that it is responsible for any part of the receipts?

Special Master Auchincloss: I think he is right on that. 843

Mr. Pollak: If your Honor please, Mr. Zukor's very point is that the story receives what is very happily called the treatment.

Special Master Auchincloss: Go ahead and let it go in. I don't think it means a great deal.

Mr. Driscoll: It doesn't mean a thing.

By Mr. Pollak:

Q. Well, you may answer, Mr. Zukor. I am asking you now about the original story before treatment of any sort

by the studio writers is given it. A. Well, the gross receipts, what proportion the original story has to the gross receipts?

Q. Yes. A. The best way I can answer that is perhaps by illustration, by saying what does our average story, that is a good story, cost us? That is all I can answer. If that is permissible, I will say that the value of that story would run, say $25,000 and if the picture as you speak of, you say it grossed a million, you can figure out that that would represent 2½%.

Q. Now, Mr. Zukor, taking the written material as finally presented to the public, what do you call it then, the shooting script? A. Yes.

Q. Mr. Zukor, take a picture with Crawford and Montgomery as stars, Stromberg as producer, Brown as director, bearing a name not identified with any well known play or story under conditions existing in 1932, what proportion of the gross receipts would you say was ascribable to the story?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial. The witness has not testified that he was familiar with that story or ever read it. Neither has he even testified that he has seen the picture and he is asked as his expert opinion as to how much of the receipts of the picture were due to the story.

Special Master Auchincloss: I don't think it is very useful, but go ahead.

Mr. Pollak: If it helps you, I will tell you that the picture grossed somewhat in excess of $1,000,000. (Addressing the Special Master.) He is testifying as an expert, and I have purposely made the question hypothetical.

Q. Now, you may answer. A. If the picture grossed a million dollars, with Clarence Brown as director and

Stromberg producing it and the stars appearing in it, I would say that it did at least 65% to 70% on the strength of the producer, director and cast. 847

Q. Of the producer, director and cast? A. Yes.

Q. And how much of a percentage would you ascribe to the original story? A. It is very difficult to describe that as a percentage. I would say that if you paid for the story $25,000, you would pay a good price for it. What relation that has to the gross that you did do or didn't do, is hard for me to mathematically analyze that for you.

Q. Well, let me get at it this way; you may just answer yes or no. Have you, yourself, made contracts with writers on a percentage of the gross receipts? A. We have. 848

Q. And what is the highest percentage in any such contract?

Mr. Driscoll: Objected to as immaterial, irrelevant and incompetent, not within the issues.

Special Master Auchincloss: Go ahead, with the exception.

Mr. Driscoll: Mr. Zukor's firm is not being sued in this case.

Mr. Pollak: You may answer, Mr. Zukor, what was the highest percentage of the gross receipts you have ever given to a writer?

A. As near as I recall, we paid 7%.

Q. And to whom did you make that payment? A. J. M. Barrie. 849

Q. The English playwright? A. Yes.

Q. For what picture was that? A. It was for Peter Pan.

Mr. Pollak: You may cross examine.

Cross examination by Mr. Driscoll:

Q. I just have one question, Mr. Zukor. There isn't any definite test, is there, Mr. Zukor, as to what draws the money into the box office? A. Oh, there is.

850 Q. You mean you can always predict just what causes it to come into the box office? A. You can always tell what comes in, yes. You can tell who draws—the stars—I mean you can differentiate between a picture with and without stars. Therefore, you can differentiate, you can establish the drawing power of the stars.

Q. Isn't it true, Mr. Zukor, that frequently a picture that is a mere program picture in the making, turns out to be a real box office attraction? A. In every instance where that happens, it still doesn't measure up to the receipts that it would have gotten had there been a star, a well-known personality in it.

851 Q. Oh, I agree with you on that, Mr. Zukor, but I am coming down to the fact of what draws the money into the box office. Doesn't it frequently happen that you make a program picture expecting the picture to be merely a program picture and it turns out to be a big hit and draws the money into the box office and you didn't expect it. Doesn't that happen frequently? A. It does not frequently happen. It happens rarely.

Q. It happens at times? A. Yes.

Q. Now, isn't it frequently true that a picture that you don't expect to be popular, proves to be popular with the public? A. That depends entirely on the combination of the ingredients that are in the picture.

852 Q. Well, in the picture business you can always tell then before hand just what you are going to do? A. After you see the picture, you can tell.

Q. You mean after the picture is made? A. After the picture is made, printed, you can tell.

Q. And ready for distribution? A. Right.

Q. Not before? A. No.

Mr. Driscoll: That is all.

(Witness excused.)

THOMAS D. LINDHOLTZ, having been first duly sworn, took the stand and testified as follows: 853

Direct examination by Mr. Hilborn:

Q. State your full name, please. A. Thomas D. Lindholtz.

Q. Where do you live, Mr. Lindholtz? A. Los Angeles.

Q. And what is your official position, please? A. Pacific Coast Manager of the American Appraisal Company.

Q. How long have you been Pacific Coast Manager of the American Appraisal Company? A. Approximately 12 years.

Q. Were you the manager at the time the land, buildings and equipment of the Metro Goldwyn Mayer Studio were 854
appraised by the American Appraisal Company? A. Yes, sir.

Q. I show you a document and ask you what that is. A. This is a carbon copy of our summary volume of the appraisal which we made as of the date June 30th, 1925.

Q. Will you tell us what the value of the equipment was at that date? A. The reproductive or depreciated value?

Q. The depreciated value, the sound value. A. The sound value. The sound value of the equipment was $1,041,546.75, not including props.

Q. What was the sound value of the props? A. The props were not appraised by us but were included in this appraisal with the qualification that it was based on in- 855
formation furnished by our client, Metro Goldwyn Mayer, and the value shown for that item——

Mr. Driscoll: I don't believe that is of any help to us. It is secondary evidence.

Mr. Hilborn: What was the reproduction value of the equipment?

A. The reproduction value of that equipment was $1,888,734.60.

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880 gross receipts of "Letty Lynton" in the United States proper as distinguished from the United States and its possessions. I think in our accounting we have shown that the gross receipts in the United States and its possessions was $733,732.62 and that we find that the receipts from the United States proper was $726,024.83, being approximately $7,000 less than the so-called gross, it would seem, and we have calculated this one-half of one per cent. on the basis of this lesser amount of $726,024.83; one-half per cent. of that equals the $3,630.12.

Mr. Pollak: Mr. Driscoll, I want to ask this before
881 going any further on this line: Do you want further proof of the fact that this payment was made?

Mr. Driscoll: No, I think the proof of the payment being made is sufficient.

Q. Mr. Mills, though I think we all probably have a general opinion of what the Hays organization is, would you explain for the record its general character? A. It is to protect the industry from unwarranted attack, see that the pictures released by the various distributors conform to proper moral and social standards. I think that in the main describes their general function. I might add that
882 I am sure that the amount received and collected on "Letty Lynton" by the Metro-Goldwyn-Mayer Distributing Corporation cannot be secured as a refund from the Hays organization.

Mr. Driscoll: I object to that as the statement of a conclusion.

Q. I will put it this way, Mr. Mills. You have been connected with motion picture accounting altogether for how many years? A. Twenty-four.

Q. How long has the M P P D A been in existence? A.

I was frank to say I don't remember when it started,—a 883
good many years, more than ten, certainly.

Q. Mr. Cohen informs me that it was formed as far back as 1919. I suppose that is subject to check. Have you ever heard of a case, Mr. Mills, of the refunding of payments made to that organization, computed on a percentage of the gross receipts?

Mr. Driscoll: Objected to as immaterial and irrelevant.

The Special Master: Why isn't it perfectly simple to find out on what basis—what are the facts of the case—are they supposed to pay on gross receipts?

884 Mr. Pollak: There is no question of that fact, Mr. Master.

The Special Master: Why don't you bring it out by testimony in some competent way? I should think that would be the simplest way.

Q. Mr. Mills, is there a written contract with M P P D A? A. We have a contract; we haven't it here. I intended to state—I thought I did state in response to an earlier question, that the exact fee was based on the total of the year's gross receipts and that is used as a basis for the payment of the next year.

Q. And the gross receipts of the year are the totals of 885
the gross receipts of the various pictures? A. Yes.

Mr. Driscoll: I accept your testimony that payment has been made, as prima facie proof that payment has been made.

By Mr. Pollak:

Q. Now, Federal income taxes have already been referred to. The item here mentioned is $16,584.18. Will you explain how that was computed, Mr. Mills? A. That

was computed on the amended accounting showing $114,373.63 as the net receipts from "Letty Lynton", based on the rate of Federal income tax of that year of 14½ per cent.

Q. That is the profit net in the United States and its possessions, is that so? A. That is correct, as first amended.

Q. What do you mean, "as first amended"? A. Since this amended statement was filed, in getting into the details supporting a great many of the figures we have found what appear to me to be further items of cost, which I think calls for a further amended statement. Naturally, when those change this amount of $16,000 will change.

Q. On the figures as they now stand in the amended accounting as now presented, that is a correct statement? A. Yes, of the Federal tax.

Mr. Pollak: Mr. Driscoll, do I understand that you accept as to this Federal income tax matter, as prima facie evidence of the fact of payment, the testimony so far given?

Mr. Driscoll: I accept as prima facie evidence the testimony that the tax was 14½ per cent, and that the figure $16,584.18 is 14½ per cent of the figure $114,373.63, the profit that you set forth in the amended accounting of Metro-Goldwyn Pictures Corporation.

Mr. Pollak: And that the income tax was of course paid to the Government?

Mr. Driscoll: I assume it was.

Q. That is correct, is it? A. Yes, that was included in the amount of income tax paid.

Q. On the same page, Mr. Mills, of the amended accounting there appears an item of $179,704.16, page 5 of Exhibit 3 ($186,166.60 in Defendants' Exhibit 18-D 5), that being unabsorbed studio depreciation. Are you familiar with that item? A. I am.

Q. Will you explain that item, Mr. Mills? A. It is an 889
item in connection with another item which was not substantiated at the Coast but was referred back to the New York office for substantiation, "Rental of Studio & Facilities $334,464.61" (Defendants' Exhibit 18-E 1).

Q. Now, to go back to the question about unabsorbed studio depreciation—on page 5 of Exhibit 3 of the amended accounting there appears an item of $179,704.16, unabsorbed studio depreciation ($186,166.60 in Defendants' Exhibit 18-D 5); will you explain that item, Mr. Mills? A. Included with the $179,704.16 which I wish to prove now is another item of $334,464.61——

Q. Appearing on the next page? A. ——appearing on the 890
next page——

Q. ——of the amended accounting under the head of Rental of Studio and Facilities? A. Under the head of Rental of Studio and Facilities, which item was not proven at the Coast. Adding this $334,464.61 together with $179,704.16 gives us a total of $514,168.77, both items entering into this general unabsorbed studio overhead. In addition to those items there should be a further item of $6,462.44, making a grand total of $520,631.21. That item consists of the following: Annual depreciation on buildings and equipment of the studios—and I suggest that since I have a schedule of those amounts of cost and the rates of depreciation used on the various elements I sug- 891
gest that we submit this schedule showing that rather than reading all the figures off.

Mr. Pollak: I think this should be marked in evidence, Mr. Master. I offer this schedule as Defendants' Exhibit 9.

(The schedule just offered was received in evidence and marked Defendants' Exhibit 9, of this date.)

892 Q. That schedule shows the basis on which you computed depreciation of equipment and buildings, is that right? A. At the Western studios, that is right.

Q. It includes, as you have stated, an item called apparently by the Hollywood branch "Rental of Studio and Facilities"?

Q. This is a complete statement of all items of depreciation of buildings and equipment at the Hollywood studios? A. Hollywood and Culver City.

Q. The item of Rental of Studio and Facilities appearing in the amended accounting, Exhibit 3 on next to the last page, does not represent any item of rental paid, is that true? A. That is true.

893 Q. Mr. Mills, do you know why the item was set up as "Rental of Studio and Facilities" and under that title? A. That title is an outgrowth of some years back when Mr. Mayer's contract was on a different basis. His contract at that time, some years ago, specified that there should be charged in lieu of depreciation and other various items a certain amount as rental of studio and facilities. That amount was fixed at that time, and no matter how much our depreciation was from the home office we always charged off to the studio this fixed amount, which has continued on, I am frank to say, to this date, so that our depreciation is split up and that item is charged in New

894 York and is absorbed by it in their overhead and the remainder is charged on our books as direct overhead.

Q. They are both depreciation? A. Yes, they are just split up. The depreciati a charge in that year amounted to five hundred thousand odd dollars.

Q. Mr. Mills, I notice that the depreciation factor is, of course, quite different as between equipment and buildings. A. They are different, of course, because they have different length of life, and based on their expected length of life.

Q. The equipment depreciates and especially becomes

outmoded much more rapidly than buildings, of course? A. Yes. 895

Q. Is the figure of 15 per cent. which you have used for equipment, sound equipment, is that in your view a reasonable figure? A. Yes.

Q. Is that based on your general experience? A. Yes, that is based on my general experience.

Q. Mr. Mills, are you familiar with the general practice of accountants in relation to the depreciation items in regard to equipment? A. I am not familiar with the exact rates; I am certainly familiar with the general practice.

Q. And this 15 per cent factor of yours is based in part upon your acquaintance with the general theory and practice of accounting? A. Yes, and further substantiated by the practice of the Internal Revenue Department in allowing these items as deductible from taxable income, and of course they are always anxious to reduce these wherever there is an element of doubt, if you are taking too high a rate. These rates have been low. 896

Q. The 15 per cent. and the 5 per cent? A. The 15 per cent. and the 5 per cent.

Q. And allowed as to the five per cent in the case of studio buildings? A. That is right.

Q. Now, as to the item of interest paid, $1,559,559.75 which appears on page 5 of Exhibit 3, are you familiar with that item? A. I am. 897

Q. Will you explain that item in your own way to the Master? A. That is six per cent. interest on the amount of loans from Loew's Incorporated, to Metro-Goldwyn for the year ending August 31, 1932. I have the checks, 13 checks, making up the amounts of the payments, if you would like to see them. And I have a schedule showing the amounts of those 13 checks actually paid aggregating the total of $1,559,559.75. This is for money loaned by Loew's, Incorporated, and invested by Metro in their pictures and processes, books and rights, pictures completed

904 Q. This amended accounting so-called is the amended accounting of the Metro-Goldwyn Pictures Corporation; that is an entirely different corporation, is it not, from the Metro-Goldwyn-Mayer Distributing Corporation? A. It is a different corporation.

Q. The Metro-Goldwyn Pictures Corporation did not distribute pictures? A. Not directly.

Q. Metro-Goldwyn Pictures Corporation is a holding corporation, is it not, Mr. Mills? A. It is.

Q. It owns stock in various corporations? A. Right.

Q. And that is the only thing it does? A. No.

Q. What other function does Metro-Goldwyn Pictures
905 Corporation perform? A. It takes over the pictures from the Metro-Goldwyn-Mayer Corporation at the Coast.

Q. Let me see. In this particular instance Metro-Goldwyn Pictures Corporation took over the negatives of "Letty Lynton" from Metro-Goldwyn-Mayer at the cost of production? A. To the Metro-Goldwyn-Mayer Corporation.

Q. What was that cost, as set up on the books? A. The cost on the books of the "Letty Lynton" production was a total of $489,616.78.

Q. When was that put on your books, Mr. Mills? A. The total cost from the studio was put on the books upon the completion of the negative at the Coast, and further items added as expenditures were made.

906 Q. Can you tell me, Mr. Mills, when this picture was released? A. May the 7th, 1932, that was the final release date.

Q. So that you received your negatives from the Coast some time prior to May 7, 1932? A. Yes.

Q. Possibly a month prior to that? A. A month or two months.

Q. Were the prints made by the producing company or were the prints made by some other corporation? A. The prints were made by the Pictures Company, I am quite sure; they were made at the studio.

Q. By the producing corporation? A. By the producing 907
corporation.

Q. So that in addition to the negatives the producing company turned over to the Metro-Goldwyn-Mayer Distributing Corporation the prints? A. The positive prints.

Q. The positive prints in addition to the negatives. And those were taken over at cost; in other words, the producing company is a non-profit making corporation; is that correct? A. That is correct.

Q. It treats the other pictures that it makes in exactly the same way? A. In exactly the same way.

Q. And all of these negatives are turned over to the Pictures Corporation at cost? A. That is correct. 908

Q. Now, what did you estimate the cost to be at the time you took over the negative? A. The total transferred from the Coast in the first instance—I haven't the exact figure because they had other costs that came along after the physical completion of the negative, the physical shipment of the negative, but those items of our first set-up amounted to $319,192.23.

Q. You say, other items of production cost came along later. How much later, after the shipment of the negative? A. There was approximately $34,000 came in afterwards of which approximately $33,000 were for the positive prints.

Q. You say, they came in afterwards? A. After the 909
first charge of the negative.

Q. I want to find out what the first charge was and when the others came in. Do you mean to say that the first charge was $319,192.23? A. That was after adding perhaps a couple of thousand dollars as an aftercharge to the first charge. The first charge might have been in the neighborhood of $314,000. I suggest that if that is important that we telephone up and get these ledger sheets down here where we will have all those dates and amounts available.

910 Q. I am going to examine you quite a lot on it so that I think if it will help you you should get them down. A. We will send for them.

Q. Then we will pass that phase for a moment. Now, Mr. Mills, the Pictures Corporation takes over the picture, that is, the negative and the positives, from the producing company, at cost? A. That is correct.

Q. Now, then, what is the arrangement between the Pictures Corporation and the Distributing Corporation? A. The Distributing Corporation may have some other items to add, a few small items in comparison with the total cost, which the Metro-Goldwyn-Mayer Corporation did not pay for. Then their arrangements with the Dis-
911 tributing company is that the Distributing company distribute throughout the United States on a percentage basis, a percentage of the gross receipts, that runs on a sliding scale up, which averages approximately 18 per cent. to the Distributing company.

Q. In other words, the Distributing company takes the picture from the Pictures Corporation just the same as any other distributory would take a picture from an independent producer, and distributes it? A. That is correct.

Q. Now, then, this accounting that you filed here of Metro-Goldwyn Pictures Corporation does not include any accounting by the Distributing company at all, does it?
912 A. It does not recognize the distinction between the two companies, if that expresses the thought.

Q. No, it does not express the thought? A. It is a combination of the two companies.

Q. It is a combination of the accounts of the two companies? A. That is right.

Q. Not the individual account of either company? A. Right.

Q. What method or means have you, Mr. Mills, to distinguish the figures here that really belong to Metro-Goldwyn Pictures Corporation from the figures that really

belong to the Distributing company? A. Available at this session I don't think I can break those figures down between the two companies. They are combined in our schedules. 913

Mr. Driscoll: This brings a different picture, Mr. Referee. Each of these companies is a separate defendant and the only accounts that have been filed here are the accounts for the Metro-Goldwyn Pictures Corporation and the Culver.

The Special Master: And he states that the account filed for the Metro-Goldwyn Pictures Corporation is really a combination of the accounts of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation. He offers to break that down. 914

Mr. Driscoll: Well, I was wondering if that could not be broken down immediately, that they should not prepare that account immediately. It presents a different picture, a different set-up and a different legal problem.

Mr. Pollak: Mr. Driscoll, my understanding is, subject to correction—Mr. Mills and the others would know—that the Pictures Corporation owns all the stock of the Distributing Corporation; it is just a legal distinction. 915

Mr. Driscoll: No, it might be or it might be more than that. It depends entirely upon whether they made profits or losses and whether or not you have the right to charge the losses of one corporation to the profits of another. Under the decisions, you haven't. We are entitled to know what part each corporation played in this and have an accounting by each corporation.

The Special Master: Do I understand that if you break down these figures and separate these

not yet released and in their inventory of pictures which have been released less the amortization written off against them". In other words, the total of the loan is always comparable with the total inventory of the pictures. Hence we have included this item as a general item of expense in connection with the pictures.

Q. Did it represent moneys actually advanced and on which interest was actually paid? A. Yes.

Mr. Pollak: May I have the schedule, and will you hand a copy to Mr. Driscoll? I offer the schedule in evidence.

(The paper just offered was received in evidence and marked Defendants' Exhibit 10, of this date.)

Mr. Pollak: Do you want any other proof, Mr. Driscoll, of the payment of interest in the amounts set forth in Exhibit 10, or do you accept that exhibit as prima facie proof of the fact of interest payments?

Mr. Driscoll: I understand from Mr. Mills that he has checks showing these payments that are set forth in this schedule, to the order of Loew's Incorporated on the dates set forth here, and that is prima facie proof that those checks were paid to Loew's Incorporated on those particular dates. I do not see how I can ask for any more than that. That does not concede anything as to the propriety of the payments and charges against this picture.

HEARING OF APRIL 21, 1937.

901

JESSE T. MILLS, resumed.

Cross examination by Mr. Driscoll:

Q. Mr. Mills, which company are you employed by? A. The various companies. I am——

Q. Let us make it plainer, then. Which company— A. Directly by Marcus Loew Booking Agency.

Q. You say "directly"; you mean that your salary is paid by Marcus Loew Booking Agency? A. That is correct.

Q. But that you have to do with the affairs of all the various companies? A. That is correct.

902

Q. Which company produces the pictures, or did produce the pictures during the fiscal year 1931-1932 at the Coast or, in other words, ran the studios out there? A. Metro-Goldwyn-Mayer Corporation.

Q. You are fairly familiar with this accounting proceeding that was had out at the Coast? A. Yes.

Q. That is the one that was given out there? A. Yes.

Q. That had to do with the records of expenditures of the Metro-Goldwyn-Mayer Corporation, is that correct? A. That is correct.

Q. And with no other? A. That is correct.

Q. Now, what company distributes the pictures? A. Metro-Goldwyn-Mayer Distributing Corporation.

903

Q. And that was at that time a separate corporation from the Metro-Goldwyn-Mayer Corporation? A. That is correct.

Q. And the sole business of the Metro-Goldwyn-Mayer Distributing Corporation was the distribution of pictures? A. That is correct.

Q. It maintained a home office and it maintained branches or exchanges in the key cities of the country? A. That is right.

Q. It did not own or operate theatres? A. That is correct.

916 accounts, it will show that the Metro-Goldwyn Distributing Company took 18 per cent. of the gross?

Mr. Pollak: That is right.

The Special Master: Is that what he says?

Mr. Driscoll: The account says 20 per cent., but Mr. Mills says 18.

The Special Master: In other words, he takes that as a distributing charge?

Mr. Driscoll: Yes.

The Special Master: I want to have that perfectly clear.

Mr. Pollak: We are going to prove it.

917 Mr. Driscoll: This was my thought. I thought this was simply the account of the Pictures Corporation and that that 18 per cent.—20 per cent. it said in here—was not accounted for at all, and it is my thought that we had to develop the situation and ask for an accounting of that 20 per cent., or 18 as it now appears to be, which would be a separate accounting by the Distributing Company. But now I find that instead of being that, there are figures of the Distributing company in here mixed in with this accounting of the Pictures Company.

The Special Master: I think you ought to clear that up.

918 Mr. Pollak: I think if you want, Mr. Driscoll, you can have a break-down showing which of the expenses of distribution were incurred by the Distributing company and which by the Pictures company. I don't think this is the time, as I have said before, to debate questions of law,—you with your confident assertion about the decisions,—I will say this—I have known of cases before, many of them, in which counsel opposing a corporation or two corporations denounced as a mere fiction the separateness of the wholly owned subsidiary. I

have never known of a case in which counsel in- 919
sisted on the separateness or made any point of it. But if you feel that it would somehow facilitate matters to have the complete breakdown of the distribution expenses, it is an elaborate schedule mentioned to you yesterday, that Mr. Mills is preparing and which we hope to have ready on Friday; but if you also want a separate showing of which expense was incurred by the Distributing company and which by the Pictures company, I suppose that could be done.

Mr. Driscoll: There is nothing like establishing a precedent. I don't mind being the first one who 920
distinguished between two corporations and asked for a separate account by two corporations.

Mr. Pollak: I will be glad to have you be the first one.

Mr. Driscoll: The fact of the matter is, however, as you can readily appreciate, that if the thing is mixed up in this fashion, if there is a distribution charge of 20 per cent. here, we ought to know where the mix-up is and get the record cleared up.

By Mr. Pollak:

Q. The charge of 20 per cent. against the Pictures Cor- 921
poration appearing on that amended accounting as heretofore filed is a charge by the Distributing Company to the Pictures Company? A. No, that is not quite correct.

Q. As here set up? A. Yes.

By Mr. Driscoll:

Q. What are the facts, Mr. Mills? A. The facts are that the 20 per cent. was arrived at as the percentage of the gross for the cost of distribution——

Q. To be put into this account? A. Of the expenditures of both the Pictures Company and the Distributing Company.

Q. For the purposes of this account? A. For the purposes of this account.

Q. Going a little further, your picture is turned over by the Pictures Company to the Distributing Company. Is your Distributing Company a profit-making organization? A. It is.

Q. They distribute and pay the cost of distribution and the cost of distribution is deducted from the gross and in addition to that a certain margin for distribution? A. Except that all expenses of distribution are not paid by the Distributing Company, but some of them by the Pictures Company.

Q. The ordinary distribution of a picture includes the maintenance of a distributing home office in New York City, the maintenance of branches in the key cities of the country, and in each of these there is a manager and a certain number of salesmen? A. Yes.

Q. The salaries of these various employees are paid. Are any of these expenses paid by the Distributing Company or the Pictures Company? A. Distributing Company.

Q. The rent of those offices are paid. By whom are they paid? A. By the Distributing Company; all branch offices by the Distributing Company.

Q. In addition to that there are certain express charges and things of that sort? A. Yes.

Q. Those are paid by the Distributing Company? A. Yes.

Q. And of course you have the ordinary incidental expenses of a branch office, clerk hire, stenographer hire, stationery expense and postage and things of that sort, those are all paid by the Distributing Company, are they not? A. Correct.

Q. In addition to that, from time to time in the distribu-

tion of a picture it is necessary to make certain prints, 925
replacements, whether they are replacements of an entire print or of a part of a print? A. Right.

Q. The charges for those are taken out of the gross receipts? A. They are added to the original cost of the picture.

Q. So they don't reflect this in the gross receipts? A. No.

Q. Who does that work? Is that work done by the Distributing Company or does the Distributing Company call upon the Pictures Company to make these replacements and send them to you? A. The Pictures Company makes the replacements.

Q. Now, other than making replacements, what expenses 926
of distribution are carried by this Pictures Company? A. The main office, the head office, almost the entire expense of that head office is for distribution. There are only two functions of the company, production of pictures and distribution of pictures. The production of pictures is carried on at the Coast. A very small portion of head office expense, salaries and all that, is attributable to the production. The major part of it is a cost of distribution, although paid by the Pictures Company.

By the Special Master:

Q. When you talk about the home office, what do you 927
mean? A. I mean the office here in New York.

Q. Of what company? A. Of both companies.

By Mr. Driscoll:

Q. Of all the companies, as a matter of fact, including Loew's and the Pictures Company and the Distributing Company and the Producing and all the other companies. How many Metro companies were there? A. I think that three would cover the field, the Metro-Goldwyn-Mayer Cor-

928 poration, the producing company; the Metro-Goldwyn-Mayer Distributing Corporation, the distributing company; the Metro-Goldwyn Pictures Corporation which takes over production and is the parent of the other two. That covers, I am quite sure, the corporate set-up for the domestic.

By Mr. Pollak:

Q. In addition to the foreign companies? A. There is another company, if you want to go into the foreign. I understood you were talking of the domestic. There is another company called the Culver Export Company which
929 in turn owns the stock of the companies doing business with various foreign countries.

By the Special Master:

Q. You said the Distributing Company was a profit-making corporation? A. Yes, Sir.

Q. What happens to the profits? A. It is usually paid over as a dividend to the parent, Metro-Goldwyn Pictures Corporation.

By Mr. Driscoll:

930 Q. Taking the Pictures Corporation again, in so far as "Letty Lynton" is concerned, it took over from the Distributing Company the gross receipts of this picture, less that part of the expense that the Distributing Company paid out? A. Retained.

Q. Retained. The Pictures Company took over all of the rest? A. That is correct.

Q. Can you tell us how much money this Pictures Company took over from the Distributing Company? A. I can when I get these ledger sheets down; that will show everything.

Q. Do you know, Mr. Mills, when money stopped coming

in on this picture? A. That also I will be able to tell you from those sheets. I can tell you the majority of the domestic income was received between its release in May and the end of the fiscal year on August 31st. A comparatively small amount was received after that from domestic distribution. 931

Q. We will pass that until we get that further information.

Q. Have you your ledger sheets on these other things we were talking about? A. Yes (producing papers).

Q. I will ask you this question: Mr. Mills, you now have your ledger sheets that you stated a few minutes ago were at the office; they have since been brought to you? A. Yes, that is correct. 932

Q. You have those before you? A. Right.

Q. Are you able to tell me just when this cost of film was set up on your books? A. Yes.

Q. Will you kindly do so? A. There was a total cost transferred, to that date, from the studio.

Q. From what date? A. To May 25th, the total cost ascertained of $311,505.58. On June 4th, 1932, an additional $63.72 was transferred; on June 29th an additional $188.44 was transferred; on July 27th an additional $183.79 was transferred; on August 31st an additional $3,197.95 was transferred; on October 6th an additional $25.70; and on October 29th an additional $27.05. Those additional items, totaling $4,686.65, added to the $311,505.58, makes the total of $316,192.23, being the total negative cost transferred from the Coast. 933

Q. Now, your Pictures Company transferred to the Producing Company a credit for $316,192.23, for the cost of that negative?

The Special Master: What is that?

Q. Your Pictures Company gave to the Producing Company a credit for $316,192.23, that is correct, isn't it, as

934 the cost of the negative? A. That is correct, the cost of the negative.

Q. Now, Mr. Mills, since that time you have added to that figure $173,424.55, to make up what you now say is the cost of the picture of $489,616.78? A. I don't seem to have that figure here.

Q. You gave me, a few minutes ago, before your books came down—I asked you what appeared on your books as the cost of this picture, and you said $489,616.78. A. That included the cost of the foreign items as well. As I understand it now, we are only talking here of the domestic. If we are only talking of the domestic, that

935 $489,616.78 is entirely erroneous.

Q. That is an entirely erroneous figure? A. When we are referring only to the domestic.

Q. Let us get this a little clearer, if we can. Your domestic business is handled by the Culver Export Company? A. No, our foreign business is handled by them.

Q. I made a mistake in using the name. Your foreign business is handled by Culver Export Company? A. That is true.

Q. What is the arrangement under which Culver Export Company takes over the prints from the Pictures Corporation? I suppose it takes them from the Pictures Company, does it not? A. Yes.

936 Q. The Pictures Company having bought it from the Producing Company, then the Pictures Company turns it over to Culver for foreign distribution? A. That is correct.

Q. What is the arrangement under which the Culver Export Company takes the pictures from the Pictures Company for distribution? A. Culver pays the Pictures Company 25 per cent. of the negative cost.

Q. In other words, Culver takes the prints for foreign distribution, upon a payment to the Pictures Corporation of 25 per cent.? A. Of the negative cost.

Q. And then Culver distributes? A. And pays for their own positive prints, for foreign distribution. 937

Q. And if it has profits it handles them as dividends? A. Right.

Q. Over and above whatever it cost it to do business. Now, then, the 25 per cent that Culver pays to the Pictures Company was 25 per cent of this figure, $316,192.23? A. That is correct.

Q. Now, can you tell me from your ledger sheets, when you got the last income on this picture? A. The last item of actual domestic income was on December 20, 1934, being a small amount.

Q. What was the last on foreign? A. The last we have reported is July, 1936. If there were any small items that came in after that this would be subject to an amended return. 938

Q. Mr. Mills, you said the arrangement between the Culver and the Pictures Company was that Culver took over the foreign distribution on a payment to the Pictures Company of 25 per cent of the cost of the negative? A. That is right.

Q. Was that money actually paid to the Pictures Company? A. Through a running account.

Q. It was credited to the Pictures Company? A. Yes.

Q. Now, are you familiar with the Culver amended accounting in this proceeding? A. I would like to look at it again. I have not seen it in so long a time. (Paper handed to the witness.) 939

Q. This accounting of Culver does not show that it paid over to the Pictures Company $79,048.06, which is 25 per cent of the cost of the negative, $316,192.23, does it? A. No.

Q. Nor does the account which has been filed by the Pictures Company show a receipt from Culver of $79,000 odd? A That is true.

Q. Now, let us come to this item of studio depreciation

940 which you stated yesterday is $514,168.77, I think. In so far as these accounts are concerned that are now before the Special Master; they showed two items of studio depreciation, as you explained yesterday, Mr. Mills, did they not, totaling $514,168.77? A. The total depreciation was $520,631.21.

Q. Let us follow my question, please. A. I tried to.

Q. I said that in so far as these accounts that were filed with the Special Master were concerned, they showed two items of depreciation that total $514,168.77, did they not? A. So far as those accounts are concerned.

Q. Since then you say there should be added an item for
941 $6,462.44? A. Right.

Q. Making a total of $520,631.21? A. Correct.

Q. You have presented here a schedule that has been marked Exhibit 9, showing depreciation information, have you not? A. I have.

Q. On the schedule you show depreciation in Culver City of studio buildings at the rate of five per cent. per year, or a life of twenty years; is that correct? A. That is correct.

Q. In making that allowance of five per cent. a year you do not take into consideration the different types of buildings; you just put them all on a flat depreciation of five per cent. per year, or a twenty-year life? A. That is
942 correct.

Q. Now, on the amended accounting of the Metro-Goldwyn Pictures Corporation (Defendants' Exhibit 18-E1) the item of $334,464.61 appears under the heading of Rental of Studio and Facilities; is that correct? A. That is correct.

Q. And that is the way it was carried on the books of the Corporation, was it not? A. At the Coast.

Q. And the excess over that prior to adding this $6,000 item being $179,704.16, was taken into the books at the New York office? A. That is correct.

Q. And charged to profit and loss? A. Correct. 943

Q. So of the item of $514,000 odd, $334,000 odd was classified as rent and $179,000 absorbed into profit and loss? A. Classified by the studio, as rent; not by the corporation.

Q. By which corporation? By the Producing company it was classified as rental of studio and facilities. A. By the Culver City branch of the company, the main books being kept in New York.

Q. Of the Producing company? A. Yes.

Q. And that you say had been customary for a number of years prior to 1932? A. That is right.

Q. Now, what is this additional item of $6,462.44? A. An error in accounting of the total of $520,000, which was written on the books. 944

Q. What do you mean by an error in accounting? That might explain almost anything. A. The $6,462.44 is 1/52nd, I think, or 1/53rd, one or the other, of the total actual which the studio has picked up under so-called Rental of Studio and Facilities. In that year there were 53 weeks, the ordinary weeks, consisting of 52, and the fractional weeks; every four or five years an additional week has to be picked up. The studio accounts were closed at August 24, 1932, and the studio branch books only picked up 52/53rds of the total of $340,000, or $334,000 odd. The other item of $6,462.44 was charged in a suspense account on the home office books in order to balance with the studio report which was closed August 24th, or a week earlier. 945

Q. So that it was carried to the 1931-1932 fiscal year rather than being charged into the 1932-1933 fiscal year? A. It did not belong in the 1932-1933 fiscal year because the $520,000 is the actual amount of depreciation assigned by the studio.

Q. As a matter of fact, there were not 53 full weeks? A. There were not.

946 Q. In any single year? A. No, sir.

Q. And only part of it actually applied— A. When you use the word "applied"——

Q. —in any particular year? A. That is correct.

Q. But you say that you charged the entire week into the 1931-1932 fiscal year? A. No, I only say that I charged the $520,000 total depreciation in that year, irrespective of whether there were 52 weeks or 53 weeks.

Q. But you did charge on the basis of 53 weeks? A. No, I beg your pardon; I can't agree to that.

Q. It was $520,000—53 weeks at $6,462.44 a week? A. No, sir, it is one year; no matter whether it is 52 weeks or
947 53 weeks or 12 months or 13 months, it is five per cent on certain items and fifteen per cent on certain items, for the year, aggregating five hundred twenty odd thousand dollars.

Q. You have an item of $6,462.44? A. Yes.

Q. And you made 53 weekly charges for that year? A. Yes, and the difference went into the profit and loss, whether they charge 53 or 60 it is immaterial; the total of $520,000 is still the amount charged.

Q. I appreciate $520,000 is the amount charged, but I know it was $514,000, which we can't get away from. Now, then, let us come to this item of interest paid, $1,559,559.79. You have introduced here a schedule, which has been
948 marked Exhibit 10, which gives the various payments that go to make up that figure, have you not? A. I have.

Q. And those payments were made from September 30, 1931, to September first, 1932; is that correct? A. That is correct.

Q. Was this for money loaned? A. This was for money loaned.

Q. Loaned by Loew's Incorporated to which company? A. To Metro-Goldwyn Pictures Corporation.

Q. To the Pictures company? And the Pictures company, did they in turn loan it to the producing company? A. They did.

Q. This picture that was released here, "Letty Lynton", was released about the first of May, and within a month thereafter you had back an amount of money in excess of the negative cost, didn't you? A. Within two months the gross receipts from the United States exceeded the total cost. 949

Mr. Pollak: Total cost, or total negative cost?

The Witness: Within two months the domestic gross receipts exceeded the total cost.

Q. As matter of fact, by June 18th your receipts were $437,028.79, weren't they? A. 430 odd thousand.

Q. $437,028.71? A. That is approximately correct. 950

Q. I was assuming that is exactly correct, because that is from your affidavit, Mr. Mills. A. I haven't that before me, and I am refreshing my recollection from the books of account.

Q. Having this before you, perhaps you will concede that that is exactly correct (handing paper to the witness)? A. That is correct.

Q. That was a month and a half after the picture was released, and that was money actually in the till? A. It is not necessarily actually in the till.

Q. You state here "gross receipts". A. You might assume that some of that might not have been collected, that is different from money in the till. 951

Q. As a matter of fact, you did not say it was money that was not yet collected? A. I did not say it was money in the till, did I?

Q. You said it was gross receipts (handing paper to the witness). A. I will stand on the gross receipts.

Q. Since there is a distinction, will you kindly tell us how much money was in the till by June 18th? A. I couldn't, offhand; I would have to check on individual accounts receivable to determine what was outstanding on that date.

952 Q. This was domestic, too, wasn't it, exclusive of foreign distribution? A. Yes.

Q. Was it being distributed at that time? A. Not abroad.

Q. By the 18th of June? A. By the 18th of June the first item came in on Canadian, which was only 200 odd dollars.

Q. Can you tell us from your records when the first moneys were put into "Letty Lynton"? A. No, that would be at the Coast.

Q. You do know, do you not, Mr. Mills, that the picture was shot in the year 1932, after the expiration of the year 1931, speaking of the calendar year? A. Yes, from
953 my records.

Q. As a matter of fact, it was shot beginning either the 24th or 28th of February and finished either the 24th or 28th of March? A. I don't know the dates but I know it was in the calendar year 1932.

Q. It is a fact that most of the moneys put into the making of the negative, the outlay, is particularly during the shooting period? A. There is a great deal of preparatory work.

Q. I am talking about most of the money. A. I would say that most of the money is put in during the shooting period.

954 Q. Is it fair to say in this case that in less than six months all of the moneys that were put into the production of this negative were gotten back in cash? Does that give you margin enough? A. I think that is a fair statement.

Q. Within a period of six months all of the moneys put into the production of this negative were gotten back in cash. The moneys are not put in all at once, are they, Mr. Mills? A. No, sir.

Q. Nor are they gotten back all at once? A. No, sir.

Q. It is stepped up day by day on both ends? A. That is correct.

Q. Coming back to this item of Interest Paid, $1,559,559.79, you said that was money that was advanced or loaned by Loew's Incorporated to the Pictures company. When were the loans made? A. At various times; it is a running account, prior to 1932 and during 1932. 955

Q. Will you kindly tell us when the loans were made? It is rather important to us; since we are paying a million and a half interest, I think it is rather important. A. I haven't with me the details of the account; I can say from memory, however, that the indebtedness of the Pictures company to Loew's Incorporated at the beginning of the fiscal year 1932 was 29 million odd dollars. The indebtedness to Loew's Incorporated at the end of the fiscal year 1932 was 22 million odd dollars. 956

Q. So that the Pictures company paid back to Loew's that year $7,000,000 in addition to paying them interest of a million and a half, is that correct? A. That is correct.

Q. Was any of that money used for the production of "Letty Lynton"? A. It was.

Q. When was that advanced? A. No specific advance was made for "Letty Lynton". This is a running account wherein Loew's Incorporated advanced money as required by Metro. When Metro has surplus money they repay the advances.

Q. And it is solely on that basis that this payment of $1,559,000 plus of interest was paid to Loew's? A. On the basis of actual moneys owed to them during that period, for moneys advanced. 957

Q. What was the rate of interest? A. Six per cent.

Q. Are these loans represented by notes? A. They are not, to my knowledge.

Q. They are just intercompany accounts? A. Yes.

Q. Added to and subtracted from as occasion requires, from week to week, let us say, from time to time. All of these loans were in existence prior to this fiscal year 1932, that we are discussing? A. Yes, and for many years back.

Q. For many years back? A. From the inception of the company.

958 Q. You say, from the inception of the company; roughly, how far back would that take it? A. Roughly, 1920.

Q. That would take it back at least twelve years? A. At least twelve years, or prior to that.

Q. Now, as these moneys came in on the distribution of "Letty Lynton", did they remain in the possession of the Distributing company or were they turned over immediately to the Pictures Corporation? A. There was also a running account between the Distributing company and Pictures; the Distributing company turned over any surplus moneys they might have to the Pictures company.

Q. Periodically? A. I should say weekly.

959 Q. So that frequently, weekly, the surplus moneys in the hands of the Distributing company went back to the Pictures company? A. Correct.

Q. And did the Pictures company allow the "Letty Lynton" account any interest on these moneys that accumulated in its hands? A. They did not.

Q. They still have these moneys, haven't they? A. Which company?

Q. I suppose, the Pictures company; or have they disposed of them? A. I couldn't say that they have the moneys of "Letty Lynton" as a specific item in one account.

Q. But these moneys came in in 1932 and this is 1937, 960 and they have not allowed any interest to "Letty Lynton", is that correct? A. That is correct.

Mr. Driscoll: I think that is all I want to ask Mr. Mills.

HEARING OF APRIL 23, 1937.

JESSE T. MILLS, recalled: 961

Direct examination by Mr. Pollak:

* * *

Cross-examination by Mr. Driscoll:

Q. The Culver Export Corporation takes the finished foreign versions, sends them abroad, has prints made abroad by the local exchanges, and then distributes them abroad through its local offices, is that right? A. That is only true in part.

Q. What is the other part? A. We only have four countries, or had four countries where we make, strictly speaking, foreign versions. The others are all distributed 962
from prints made from the negative made in Culver City, so-called "dubbed" versions, where we endeavor to meet the requirements of the local countries over there as well as we can without putting them entirely into their language, using sub-titles rather than oral dialogue. So that in most cases, in the bulk of the countries, the foreign version is a matter completely apart or an added item to the version so-called made in Culver City. That is why you will find in the accounting the receipts from certain specific foreign versions as distinguished from the general picture.

Q. Now, Culver's business is carried on through these foreign branches or subsidiaries? A. It is carried on— 963
I think that is right.

Q. It maintains this office in New York City, in the Loew Building? A. That is true.

Q. In conjunction with the other Metro offices? A. Yes.

Q. Has Culver a separate floor or separate department? A. Separate floor or more than one floor; separate department.

Q. Have they more than one floor? A. I am not sure; I think in 1932 they were somewhat scattered. They did not have an entire floor, but what was equivalent to a floor.

CHARLES E. DEESEN, called as a witness on behalf of the
964 defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Mr. Cohen: This interrogation has nothing to do with the Culver accounting. It is a general interrogation as to the picture "Letty Lynton".

Q. Mr. Deesen, how long have you been with Metro companies? A. Sixteen years.

Q. What is your position? A. Manager of contract department.

965 Q. You have had that office for several years? A. Since 1931.

Q. With reference to the picture "Letty Lynton", can you tell us please how that picture was sold, under what title it was sold to the exhibitors? A. It was not sold under a title; it was sold as a star, Joan Crawford No. 2.

Q. What Production number? A. 208.

Q. So that "Letty Lynton" was sold to the trade as Production No. 208, Joan Crawford No. 2? A. Right.

Q. I show you a form of contract and ask you if the picture "Letty Lynton" was sold under that form of contract (handing paper to the witness)? A. The old production, that was later released as "Letty Lynton" on this
966 contract under 208.

Q. Under Production 208, Joan Crawford No. 2, eighth line from the top of the schedule, is that right? A. That is right.

Q. And all contracts for Production No. 208, Joan Crawford No. 2, which later came to be known as "Letty Lynton", were sold under that contract?

Mr. Driscoll: What do you mean by "later came to be known as 'Letty Lynton'"?

Q. At the time this picture was sold it was not known as "Letty Lynton"; it was known as Production No. 208. 967

Mr. Driscoll: You mean, on contracts taken prior to release you used the title Crawford No. 2, but on the contracts after release it was known as "Letty Lynton". Is that the fact?

Mr. Cohen: No.

Q. When were the first contracts obtained for Production No. 208, Joan Crawford No. 2? A. May, 1931.

Q. And Joan Crawford No. 2, Production No. 208, was sold until what time? A. All the time.

Q. Until the end of the 1931-1932 fiscal year? A. Yes. 968

Q. Can you tell us how many contracts were entered into for that Production No. 208, Joan Crawford No. 2? A. 7,666.

Q. Can you give us the dates upon which these contracts were entered into? A. Do you want every date?

Mr. Cohen: Starting from the first of May, 1931, up to 1934 and 1935 somewhere; do you want all those dates we have for the season 1931-1932?

The Witness: There were odds and ends we received after that.

Q. Have you a schedule prepared showing the dates upon which these various contracts were entered into? 969

Mr. Driscoll: Objected to as immaterial. I can't see what that has to do with it.

Q. Have you the schedule here? A. You have a copy.

Q. I show you this schedule and ask you whether this correctly shows the dates upon which contracts were entered into for Joan Crawford No. 2, Production No. 208 (handing paper to the witness). A. It does not represent

970 the dates they were entered into; the week-endings they were received at the home office.

Q. So that the dates shown on this schedule is the week ending that particular date? A. At which they were received and approved at the home office.

Mr. Cohen: I offer it in evidence.

Mr. Driscoll: I object to it as immaterial and having nothing to do with the issues.

The Special Master: I do not know exactly what it has to do, but we will receive it.

971 (The paper just offered was received in evidence and marked Defendants' Exhibit 15, of this date.)

Mr. Cohen: I also offer in evidence exhibition contract for the year 1931-1932, feature productions, that being the contract upon which was sold Production No. 208, Joan Crawford No. 2.

Mr. Driscoll: Objected to as immaterial and irrelevant to the issue.

(The paper just offered was received in evidence and marked Defendants' Exhibit 16, of this date.)

972 Q. Mr. Dessen, can you tell us the date when the Production No. 208, Joan Crawford No. 2, which came to be known later on as "Letty Lynton"—let us have the release date on that, please? A. The exact release date I could not tell you. It was May, 1932.

Q. I believe somebody swore to May 7, 1932. Prior to the release, to May 7, 1932, was this picture known under the title "Letty Lynton"? A. Yes.

Q. Was the name made public? A. Prior to release date?

Q. Yes. A. Yes, it is put on the release prior to the date of release.

Q. Approximately how long before? A. Probably four 973
weeks or three weeks.

Q. Three weeks before release? A. Yes.

Q. So that prior to, say, the middle of April, 1932, this picture was not known as "Letty Lynton", is that right? A. Not to the public.

Q. And certainly not to exhibitors? A. Not to exhibitors, no. I want to qualify that. I don't know just how it was handled at the studio. Just what title it had on the release schedule, I don't know.

By Mr. Pollak:

Q. You mean, so far as being made known to the public? 974
A. So far as being known to the public, it was not known.

Q. Including exhibitors? A. That is right.

Q. And including those persons with whom exhibition contracts were made? A. That is right.

By Mr. Cohen:

Q. I notice the schedule just introduced in evidence, 4th line from the bottom, you have the word "red" in parentheses. What does that mean? A. At that time we found out that quite a few cotnracts had been returned unapproved and they were not taken off on that week ending, 975
and later they were approved, so to make the figures just right we took off those contracts.

Q. In other words, you gave somebody credit for the contracts returned? A. Yes, we gave it to them twice, each time the contract came in, and it was not deducted from the figures up above.

By Mr. Pollak:

Q. And then it was written off by 108 contracts? A. That is the net figure for that week.

976 Q. Can you tell by looking at the schedule how many contracts were entered into prior to the release date of this picture? A. 7,315.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. You say the first contract for the sale of this picture was entered into in May, 1934? A. It was received by us and approved then.

Q. The book "Letty Lynton" was bought in December, 1931? A. That I really couldn't tell you.

977

The Special Master: Are those years right?

Q. The picture was made in 1932? A. It is our 1931-1932 season.

Q. They were selling a year before it released the picture? A. Year and a half.

Mr. Driscoll: That is all.

Mr. Pollak: That is all.

(Hearing adjourned to May 5, 1937, at ten o'clock A. M.)

978

HEARING OF MAY 5, 1937.

JESSE T. MILLS, recalled:

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, I show you a document in two sheets, marked on the first sheet "Corporation Organization Chart.

August 31, 1932", and on the second sheet "Subsidiaries of Culver Export Corporation Distributing in Foreign Countries—August 31, 1932". Was the whole of this document, including certain notes thereon, prepared under your supervision (handing paper to the witness)? A. It was. 979

Q. And it was correct? A. Absolutely.

Mr. Pollak: I offer it in evidence.

(The document just offered was received in evidence and marked Defendants' Exhibit 17, of this date.)

980

Mr. Pollak: Mr. Master, with this list and chart of the corporations and corporate organization we want to explain that it is our purpose now to give a separate accounting for each corporation in this list. That does not affect, if your Honor pleases, the accounting of negative cost which was made out in Culver City. The same figures there obtained will reappear in the accounting to be presented in a moment for Metro-Goldwyn Pictures.

The Special Master: You are going to submit a separate accounting for each of the defendants?

Mr. Pollak: For a great many that are not defendants, including these foreign corporations. 981

Q. I show you a document, Metro-Goldwyn Pictures Corporation, Net Income from "Letty Lynton", and ask you if you had that document prepared under your supervision (handing papers to the witness)? A. I did.

Q. Have you a copy of that for Mr. Driscoll? A. Yes, with the supporting schedules. The top sheet is supported by the various sheets underneath (handing papers to Mr. Driscoll).

Colloquy of Counsel.

Mr. Pollak: I think, Mr. Master, it would be most convenient if we mark these present schedules as one document. The sheet on top is a complete, compendious statement of "Letty Lynton" by the Pictures Corporation. It is made intelligible by the schedules. It re-embodies in the photostat at the end the itemization of negative cost.

The Special Master: You are offering this as an exhibit?

Mr. Pollak: Yes.

(The document and supporting schedules just offered were received in evidence and marked as follows:

Defendants' Exhibit No.	Description
18	Net Income from "Letty Lynton"
18-A	Total Distributing Expense Ratio to Film Rental Income—Year ended August 31, 1932
18-B	Home Office Expenses of Metro-Goldwyn Pictures Corp. & Metro-Goldwyn-Mayer Dist. Corp.—Year ended August 31, 1932
18-C-1	(Salaries—Year ended August 31, 1932
18-C-2	(
18-C-3	(
18-D-1	Completed Negative Cost "Letty Lynton"
18-D-2	
18-D-3	
18-D-4	
18-D-5	
18-E-1	Schedule A—Studio Overhead
18-E-2	
18-F	Interest on Investment in Studio Plant and Equipment—Year ended August 31, 1932)

Mr. Driscoll: This is a substitute for the amended accounting of Metro-Goldwyn Pictures Corporation which was admitted into evidence? 985

Mr. Pollak: It largely embodies it. It supersedes it and is a complete statement of the net income from "Letty Lynton" of the Pictures Corporation.

Mr. Driscoll: Can we rely upon the completeness?

Mr. Pollak: Yes.

Mr. Pollak: I want to say this, since you put this question, that I take it that if one or two items of expense here are disallowed, but disallowed on a view which suggests that some other, perhaps lesser, allowance might be made, I assume we will have a chance to present figures on that basis as to specific items that may be disallowed, if they are. But this is a complete statement of our position with regard to this Metro-Goldwyn Pictures Corporation. 986

The Special Master: From now on we disregard this Defendants' Exhibit 3; is that what I understand?

Mr. Pollak: Yes, I think you simply disregard it.

Mr. Driscoll: That is, the amended accounting of Metro-Goldwyn Pictures was Exhibit 3, was it? 987

The Special Master: Yes.

Mr. Driscoll: And the amended accounting of Culver was Exhibit 4, was it?

Mr. Pollak: I may state that this is now being done on an entirely different theory.

The Special Master: I mean, we do not have to bother with these old exhibits at all?

Mr. Pollak: No. There is a very small explanation, while we are at it. If you will turn to Defendants' Exhibit 18-D-3 you will find that a certain figure of Miscellaneous Unclassified Expense which

988 is there photostated as $3,784.61 has been changed in ink or pencil to $1,722.07. That is because, is it not, Mr. Mills, in that item of Culver City accounting we conceded out at Culver City that the larger figure was wrong and should be $1,722.07?

Mr. Mills: That is what I understand.

By Mr. Pollak:

Q. The photostat from which this photostat was taken contains certain crosses, is that right? A. Yes.

Q. They have absolutely no significance for any purpose? A. They have no significance to me.

989 Q. They have none. Turning to the first sheet, simply marked Defendants' Exhibit 18, the item Film Rental Income represents the entire film rental income from the United States, is that correct? A. That is correct.

Q. Of that film rental income there was actually retained by M G M Distributing Corporation 20 per cent; is that correct? A. That is correct.

Q. That was its compensation for distributing the film, is that right? A. Right.

Q. There has been some mention, I believe, at some stage of these proceedings, of a figure of 18 per cent, but the figure actually retained was 20 per cent, is that right? A.

990 In that year, yes.

Q. In the year 1932. Of course this leaves the net film rental income of $581,643.07, by a mere process of subtraction? A. That is right.

Q. The next item is Distributing Expense, 2.15 per cent of the net film rental income of Metro-Goldwyn Pictures Corporation, is that right? A. Right.

Q. Mr. Mills, how did you obtain the figure of distributing expense, 2.15 per cent.? A. If you will refer to the next sheet marked 18-A you will find in the first line, Film Rental Income, excluding Canada, which is accounted for simply as $30,020,526.08.

Q. Being the total rental income? A. Being the total 991
rental income.

Q. Of all pictures? A. Of all pictures, in the United States, including "Letty Lynton", for the year ended August 31, 1932, as it is headed. The Distributing Corporation retained 20 per cent. of that gross income, leaving as the Pictures Corporation's net film rental income $24,016,420.86. In the rest of that exhibit are details, with supporting schedules, of the total distributing cost of the Pictures Corporation necessary to obtain that $24,000,000, and that expense amounts to $516,031.63.

Q. After deducting certain items of income? A. Yes, that was net expense, after deducting certain items of in- 992
come from the gross expenses, and that $516,031.63 is 2.15 per cent. of the 24 million odd dollars net film rental to the Metro-Goldwyn Pictures Corporation. Then, since the income from "Letty Lynton" to the Pictures Corporation was $581,643.07 compared with $24,016,420.86 of all pictures in the year 1932, we applied the same percentage of 2.15 per cent. to "Letty Lynton" to obtain the pro rata distributing expense to the Pictures Corporation on "Letty Lynton",—that 2.15 per cent. of $581,643.07 being equal to $12,505.33. That amount is deducted from the net film rental, and we arrive at $569,137.74 as net income to the Pictures Corporation on "Letty Lynton" after deducting the distributing expense applicable to that picture. 993

Q. The distributing expense of the Pictures Corporation, is that itself shown in a schedule here appearing? A. The distributing expense of the Pictures Corporation is shown on Schedule 18-A, consisting of two items of expense, less two items of income deducted from those expenses.

Q. The Home Office Expense of $567,617.36, being a distributing expense, is itself shown on a schedule immediately thereafter, is it not? A. That is right, numbered 18-B.

Q. The items of salaries on that document, 18-B, marked Salaries—General, is shown by a sub-schedule, is it not? A. Yes, marked 18-C-1, 18-C-2 and 18-C-3.

994 Q. Turning then to Defendants' Exhibit 18-C-1, the salaries schedule, what was Mr. Feist's activity in connection with the Corporation? A. He was the general sales manager.

Q. Was he concerned with distribution of pictures? A. He was.

By Mr. Driscoll:

Q. General sales manager for the Pictures Corporation? A. And the Distributing Corporation.

By Mr. Pollak:

995 Q. And Mr. Bernstein, what was his function? A. Mr. Bernstein was the Treasurer.

Q. Concerned with distribution? A. Right—for this amount of salary.

Mr. Driscoll: I thought the distribution was done by the Distributing Corporation and that this was an accounting of the Pictures Corporation.

The Witness: Perhaps I could clear that, Mr. Driscoll. If you will look at the bottom of 18-B you will find that these total expenses amounting to $1,872,601.74—I show that of that amount $1,304,984.38 was reimbursed by the Distributing Corporation, leaving for the Pictures Corporation the sum of $567,617.36, so that this list is really a combination of expenses at the home office pertaining to the Pictures Corporation and the Distributing Corporation, which total was split roughly on a 30-70 basis.

996

By Mr. Driscoll:

Q. Is this $1,304,984.38 reimbursed out of the 20 per cent? A. Is this $1,304,984.38 reimbursed out of the 20

per cent.? The Distributing Corporation bears that 70 per cent, against their 20 per cent. of the income; I think that is right. 997

Q. The only income the Distributing Corporation has is the 20 per cent. of the gross rentals? A. That is correct.

Q. Out of that they paid to the Pictures Corporation $1,304,984.38? A. That is correct, and that will be accounted for in the Distributing Corporation accounting of profits on "Letty Lynton".

The Special Master: You are trying to justify now this figure of $567,617.36; that is a net figure, isn't it, that you are trying to justify now? 998

Mr. Pollak: Yes.

The Special Master: Then you take up what you call distribution expense, but it is expenses of the Metro-Goldwyn Pictures Corporation, and the total of that is $1,872,601.74.

Mr. Pollak: It becomes net $567,617.36.

The Special Master: You say it is reimbursed by the Metro-Goldwyn-Mayer Distributing Corporation, $1,304,984.38, so that the net is $567,000?

Mr. Pollak: That is right.

The Special Master: Then you begin to go into these salaries. In the Corporate Organization Chart that you have given me, you do not give the officers 999 of these various companies, and I see these names come up time after time, and I can't figure out exactly what companies they are for. They are being paid salaries by the Metro-Goldwyn Pictures Corporation; is that the only company they are in? We know they are in some others. I think you should file a statement showing the officers of the various companies.

Mr. Pollak: Have you this in mind, Mr. Master? That we are claiming and proving, as we think, a

1000 share of the distribution expense, though not a large share, applicable to the Pictures Corporation, applicable really as a result of this system of dividing home office expenses between the two corporations, the one being wholly owned by the other, on this 70-30 basis. The fact simply was that the Pictures Corporation bore——

Mr. Driscoll: What is the 70 and 30?

Mr. Pollak: That is represented by the ratio.

Mr. Driscoll: I thought it was 80 and 20?

Mr. Pollak: That is different. 80 and 20 is the division of rentals between the two, but the expenses are borne 70-30, 70 per cent. by the Distributing
1001 Corporation and 30 per cent. by the Pictures Corporation. The 70-30 ratio is represented roughly by the ratio between $1,304,984.38 and $567,617.36. We are now concerned with the ratio of expense.

By Mr. Pollak:

Q. Is this correct, Mr. Mills, that Exhibit 18-C-1 totals the salaries paid to those persons; it does not represent merely the 30 per cent. of salaries, as to Mr. Feist for instance, by the Pictures Corporation, but represents the payment to him? A. That is right.

1002 Q. In other words, these schedules total the $1,872,601.71 appearing on Exhibit 18-B, do they not? A. I don't get that question.

Q. The schedules supply the details of the $1,872,601.71 item appearing on Defendants' Exhibit 18-B, of which item there was reimbursement as to 70 per cent. leaving $567,617.36 as the net expense? A. That is right.

Mr. Pollak: We can, of course, supply your Honor with a chart showing the corporate officers and it will show that some were officers of several corpora-

tions. You have in mind, of course, that these two corporations now in question, one is a wholly-owned subsidiary of the other. 1003

Q. Mr. Feist you have testified, I think, was the general manager? A. General sales manager.

Q. Mr. Bernstein was Treasurer? A. Yes.

Q. Mr. N. M. Schenck? A. President.

Q. All of those persons were concerned with the distribution of pictures? A. Right.

Q. Mr. J. Robert Rubin? A. Head of the legal department of the Pictures Corporation and Distributing Corporation.

Q. And concerned with distribution? A. Yes. 1004

Q. Mr. William F. Rodgers? A. First assistant to Mr. Feist.

Q. Mr. Howard Dietz? A. Publicity.

Q. Mr. Cohen says that Mr. Rodgers was an eastern sales manager in 1932. A. He was a distribution manager. I said, first assistant to Mr. Feist. I merely put him at the top of the list. There were four of them, district sales managers.

Q. Did he have charge of the eastern territory, if you know? A. He did.

Q. What was Mr. Connors? A. Mr. Connors was another supervisor; he was in southern territory. 1005

Q. Mr. Saunders? A. In charge of the western territory.

Q. Mr. Quimby? A. In general charge of short subjects.

Q. Mr. Bowes? A. In charge of exploitation, and dealing with music especially.

Q. And concerned with distribution? A. Yes.

Q. Mr. Bloch? A. He was in Mr. Rubin's office; I don't know his exact occupation.

Q. Wasn't he concerned with the eastern story department of scenarios? A. Yes.

1006 Mr. Driscoll: I thought this was distribution.

Q. And he was assistant to Mr. Rubin? A. Yes.

Q. Mr. D. O. Decker? A. Also an assistant to Mr. Rubin, legal department; he was a lawyer.

Q. Mr. Gove? A. He was sales exploitation.

Q. Mr. Cummings? A. Sales statistics; branch accountant.

Q. Mr. Sonin? A. Purchasing department for the branches.

Q. Mr. Ferguson? A. Exploitation.

1007 Mr. Pollak: Mr. Driscoll, do you want the rest of these read off?

Mr. Driscoll: I have no desire in the matter one way or the other.

Mr. Pollak: Do you admit Exhibit 18-C-1, prima facie, subject to any correction, if you ask for it, or amplification, shows the expense of salaries of persons therein listed, concerned with distribution?

Mr. Driscoll: I will agree that prima facie it shows the salaries of some persons there listed. Whether they are concerned with distribution or not I don't know; I will not concede that. For instance, you take Bloch; what has he to do with distribution?

1008 You take Ed Bowes; he had charge of the Capitol Theatre at that time; what has he got to do with the general expense of distribution?

I will stipulate this, that it is prima facie evidence that these are salaries paid by the New York office. What I am anxious to know is this—that you are not doubling up on us.

Mr. Pollak: You can be sure of that. This is a schedule of distribution expense. If you want us to go on and testify to each one of these stenographers we will do it.

By the Special Master: 1009

Q. May I ask a question? These purport to be salaries paid by the Metro-Goldwyn Pictures Corporation; that is correct, isn't it?

Mr. Pollak: That is right, the Corporation paid them.

A. Either the Pictures Corporation or the Distributing Corporation.

By Mr. Pollak: 1010

Q. Isn't this the fact, that the Pictures Corporation made the payments and then was reimbursed by the Distributing Corporation? A. In some instances some of these salaries may have been paid by the Distributing Corporation direct, Mr. Pollak.

Q. If so, were they adjusted on that basis? A. They were adjusted.

Q. And these expenses were borne on the basis of 70 and 30?

The Special Master: What I am trying to get through my head is, this Defendants' Exhibit 18-C-1 purports to represent salaries paid by Metro-Goldwyn Pictures Corporation for the year ended August 31, 1932; does it represent that? 1011

The Witness: In some instances.

Q. Is it correct, Mr. Mills, that these payments there listed were in all cases made by the Pictures Corporation, yes or no? A. That is correct.

Q. These payments were themselves within the arrangement whereby as to 70 per cent. approximately of all expenses paid by the Pictures Corporation there was reim-

1012 bursement from the Distributing Corporation; is that right? A. That is true.

Q. That reimbursement, I take it, was not made as to each individual payment separately, but by a statement of accounts between the two corporations, is that right? A. That is correct.

Q. Now, returning to Defendants' Exhibit 18-C-1, representing payments in all cases made by the Pictures Corporation, I ask you who Mr. William R. Ferguson was and what his function was? A. He was an exploitation man.

Q. And Mr. S. S. Braunberg? A. Legal department.

Q. I omitted H. L. Burrows; who was he? A. Publicity.

1013 Q. Mr. William D. Kelly? A. Positive prints a specialty.

Q. Used in distribution? A. Used in distribution.

Q. Mr. J. S. MacLeod? A. General supervisor of branch properties.

Q. Miss Nina Lewton? A. She was an employee in Mr. Rubin's department.

Q. Also engaged in scenario and reading of plays? A. Right.

Q. Mr. Charles E. Quick we know of but we would like to have it on the record. A. In charge of the accounts at the home office.

Q. And is he in this room at this hearing? A. Yes.

Q. And Mr. William G. Crawford? A. Publicity de-

1014 partment.

Q. Mr. Thomas Gerety? A. Also publicity.

Q. Mr. E. W. Aaron? A. Sales statistics.

Q. And an assistant to Mr. William F. Rodgers at that time, Mr. Cohen tells me; is that right? A. I didn't know that he was assistant to him; I know that his function is on statistics of sales.

Q. A. M. Holah? A. Assistant to Kelly, especially in the distribution of positive prints.

Q. Mr. James Englander? A. Publicity.

Q. William O'Brien? A. Publicity.

Q. All concerned with distribution? A. Entirely. 1015

Q. E. H. Brauer? A. General sales.

Q. F. E. McRoy? A. Sales statistics and collections.

Q. George W. Berry? A. He is right here. General accounting.

Q. Including, of course, accounting of receipts from distribution? A. Almost exclusively; I don't think he does much else.

Q. Mr. Joseph Flynn? A. Publicity.

Q. Mr. T. Halsey Raines? A. Publicity.

Q. Mr. William Marsh? A. Traveling auditor.

Q. William L. Engelhardt? A. Accountant.

Q. In all these cases these gentlemen are concerned with distribution? A. In all cases. 1016

Q. Pat E. Reis? A. Secretary to publicity manager.

Q. Charles F. Deesen? A. Exhibitors' contract department.

Q. William B. Jones? A. Assistant to Kelly on prints.

Q. For distribution? A. For distribution.

Q. Albert Druaux? A. Also assistant to Kelly on prints.

Q. James Pagliaro? A. Also assistant to Kelly.

Q. In like work? A. Entirely in connection with the distribution.

Q. Morris Alin? A. We will have to get information on him as to what his exact status was; I can't say from memory. 1017

Mr. Pollak: Do you want anything more specific on that?

Mr. Driscoll: No.

Q. J. H. Zimmerman? A. Traveling auditor.

Q. J. M. Cummings? A. Traveling auditor.

Q. J. R. Connacher? A. Publicity.

Mr. Pollak: Will you now stipulate, Mr. Driscoll,

1018 that this is prima facie proof of expenditures for distribution by the home office of Metro-Goldwyn Pictures Corporation, as appearing from our schedules, Exhibits 18-C-1, C-2 and C-3, being a list of salary payments?

Mr. Driscoll: I will stipulate that this is prima facie evidence of a list of salary payments made by the home office of Metro-Goldwyn Pictures Corporation.

Mr. Polak: For the purpose of distribution?

Mr. Driscoll: Your witness will have to testify to the fact—not as to each name.

1019 Q. Can you testify, Mr. Mills, as to the whole list prepared under your supervision, being Defendants' Exhibit 18-C-1, C-2 and C-3, as to all names below the name of Mr. J. R. Connacher, that these persons were engaged upon the work of distribution and received the salaries set forth in Defendants' Exhibit 18-C-1, C-2 and C-3? Take your time and look over the lists. A. Yes, they were.

Q. Mr. Mills, it has been suggested that one or two of these persons, notably Mr. Bloch, were engaged in work that might be classified as work of production. I ask you whether all these persons whose names appear on Exhibit 18-C-1, C-2 and C-3, whether all of those persons were

1020 paid the salaries above stated by Pictures Corporation, subject to reimbursement, in the manner already testified to, by the Distributing Corporation as to 70 per cent. thereof? A. They were.

Q. $1,872,601.74 represents the cost of these expenses above listed in regard to which you have testified? A. Yes.

Q. As to which you were reimbursed by the Distributing Corporation to the extent of $1,304,984.38, as there appears? A. Yes.

Q. Leaving the total expenses of home office of Metro-Goldwyn Pictures Corporation of $567,617.36, in addition to the expenses already ascribed to production? A. Right.

1021 Q. Returning to Defendants' Exhibit 18-A, which is an explanation of the 2.15 per cent. ratio, one item is Depreciation of Equipment, Home Office, $14,927.54. How did you obtain that figure, Mr. Mills? A. That is 10 per cent. depreciation per annum on home office equipment costing $149,000 odd.

Q. In your judgment is that a reasonable depreciation of home office equipment? A. Yes.

Q. And it is based on your experience as an accountant? A. Yes.

Q. And specifically accounting in the motion picture industry? A. Accounting of this particular corporation.

1022 Q. Those two show the entire expense borne by the home office in addition to the production expense; the total of $567,617.36 and $14,927.54 is the gross expense? A. Yes.

Q. Or $582,544.90? A. Right.

Q. From that you deduct certain income which the home office received? A. Right.

Q. I don't think Mr. Driscoll will growl about the income, but will you explain the item Trailer Income, $50,000.08, appearing on Defendants' Exhibit 18-A? A. That is income from the National Screen Service for trailers, the use of certain parts of the pictures in trailers, which they in turn get an income on, this not being directly attributable to any one picture and, therefore, to "Letty Lynton" in itself, we have deducted it from the total ex- 1023 pense to arrive at a lesser expense and thereby bring in a corrected figure of the total expense applicable to "Letty Lynton".

Q. In other words, there was no specific income from trailers of "Letty Lynton"? A. Correct.

Q. I don't know whether the Special Master knows what a trailer is. Suppose you explain that. A. The trailer so-called is part of a picture that is to come, which you see when you go to a motion picture theatre to see a picture that you want to see and you then have to look at maybe

1024 two or three minutes of shots and advertising matter of the picture that is coming next week. Probably everybody has seen them. That is a trailer.

Q. In the motion picture business, when coming events cast their shadows before them, that is a trailer? A. That is right.

Q. Miscellaneous Income, $16,513.19, is that income not specific to an individual picture? A. It is.

Q. What makes up that item? A. I have two items making up $13,000 of the $16,000.

Q. What are they? A. One was $4,000 income from Canada, from the Canadian distributor, Regal Film.

1025 Q. For trailers? A. For trailers, and $9,000 was rent received for a part of the Los Angeles branch building, whose expenses are included in the items above. That makes $13,000 out of the $16,000 odd. The others were comparatively minor items.

Mr. Pollak: Do you want itemization of the Miscellaneous Income of $3,000 odd, Mr. Driscoll?

Mr. Driscoll: I am willing to accept your admission that you did get $16,000 additional income.

Mr. Pollak: No part of which was directly ascribable to "Letty Lynton".

Mr. Driscoll: That is your testimony.

1026

Q. And, of course, by taking the $66,513.27 from the gross expenses you get the total distributing expense of $516,031.68? A. Which accounts for the 2.15 per cent. cost of distribution taken on the main exhibit, 18.

Q. And your "Letty Lynton", I take it, being one of the featured pictures of that year, had, in your judgment, the same proportion of distribution expense on the part of the Pictures Corporation as the other featured pictures of that year? A. Yes, it did.

Mr. Pollak: We have gone over Exhibits 18-C-1, 2 and 3; Exhibits 18-D-1, 2, 3 and 4 are simply embodied from the accounting already rendered, with the change already noted on Exhibit 18-D-3 of the figure $3,784.61 by substituting $1,722.07 as the miscellaneous unclassified expense of production. I should explain that the testimony in regard to Exhibit 18-D-1, 2, 3 and 4 was given out at Culver City, and not given by Mr. 1027
Mills.

Turning now to Exhibit 18-D-5, that is a new page. It did not appear in Exhibit 3, a prior accounting Metro-Goldwyn Pictures, which accounting is now completely superseded by these documents, Exhibits 18, 18-A, B, C, D and E. 1028

The statement of Studio Overhead appearing on the first line of Exhibit 18-D-5 is detailed in Schedule A thereto attached, which is now marked Exhibit 18-E-1 and was the subject of testimony, the Master will recall, in Culver City, being studio overhead.

The item of Addition to Reserve for Continuities,—I expect to produce testimony, another accountant, from Miller, Donaldson, who is particularly expert.

The item of Income from Royalties from Music Publishers on Songs Used in Productions has already been testified to in Culver City.

1029

Q. As to salaries paid by New York, the figure for Thalberg now appears $151,650. That is the correct sum paid in the year 1932? A. $151,650, that is right; that has already been testified to.

Mr. Pollak: Compensation paid to Louis B. Mayer Pictures has already been testified to.

Q. That sum was actually paid? A. Yes.

Q. Paid by what corporation? A. Metro-Goldwyn Pictures Corporation.

1030 By Mr. Driscoll:

Q. Isn't it a fact that it was paid by Loew's? A. No.

Q. It is fixed in part by Loew's earnings. You will have to produce that contract.

Mr. Pollak: It will be testified to in detail.

By Mr. Pollak:

Q. Depreciation, Los Angeles Studio, was the subject of your Exhibit 9. Now, Mr. Mills, addressing myself to the questions put to you by Mr. Driscoll—this is for the mo-
1031 ment in the nature of re-direct examination—your figure for depreciation of the studio buildings was what figure? A. Buildings and equipment?

Q. What was the percentage you took? A. It is in Exhibit 9.

Q. Get out Exhibit 9. A. Buildings and equipment, $520,631.21.

Q. That was based on a depreciation factor for the buildings and equipment of what percentage per year? A. 15 per cent per annum on the equipment, and five per cent per annum on the buildings.

Q. Is that depreciation item, taking it first for the
1032 buildings, based on your estimate of the actual physical decomposition of the buildings, or their obsolescence in the motion picture business?

Mr. Driscoll: I object to that. I don't believe this witness has qualified himself to say what the actual decomposition of a building is in the course of a year. He is not a builder; he is an accountant.

Q. It is based on your estimate of the rate at which motion picture buildings become obsolete for the purposes of the motion picture business in a year? A. It is.

Q. It is not concerned, as Mr. Driscoll has already suggested, with any estimate of the rate at which a building becomes destroyed physically by time, is that correct? A. That is right. 1033

Q. I think you have already testified that it is a rate of depreciation on which you based your tax returns for the corporation, is that right?

Mr. Driscoll: That does not make any difference. I object to that. There are lots of things claimed in tax returns which we do not concede form proper deductions here. We have a benevolent government.

The Special Master: He has testified about all this. 1034

Mr. Pollak: I know that, but on cross examination Mr. Driscoll brought out that there was a different ratio of depreciation, as Mr. Driscoll thought, testified to out at Culver City.

Mr. Driscoll: What I did was to direct the Special Master's attention to the testimony that was given out there.

The Special Master: What do you want to show now?

Mr. Pollak: I want to show that what Mr. Driscoll thought was a discrepancy between the testimony of this witness and the testimony of the witness at Culver City was no discrepancy at all. The testimony of this witness is based on obsolescence for the purpose of the motion picture business. It is based on the point that buildings in the motion picture business become obsolete with new inventions and improvements. The other witness is a real estate man out in Culver City. 1035

The Special Master: He gave testimony to justify that $334,000, didn't he?

Mr. Pollak: I don't know that the witness out in Culver City dealt with that figure at all. The

1036 item of Rental of Studio and Facilities, if you recall, was an item that was carried out there in accordance with some settlement or other, and it did not absorb all the studio depreciation.

The Special Master: Wasn't the testimony out in Culver City of this man Hubert, wasn't it directed to substantiate the charge of $334,000 as depreciation rather than as rental of studio and facilities?

Mr. Pollak: It was explained, I know, that it should be depreciation.

The Special Master: Didn't he justify it by saying that you charged 1½ per cent?

1037 Mr. Driscoll: He was talking about depreciation.

Mr. Pollak: I don't think he was addressing himself to any figure.

The Special Master: He was called for some purpose.

Mr. Pollak: He was called for this purpose, somewhat in line with what Mr. Mills is now testifying. We asked him in regard to the depreciation of buildings. Mr. Mills has given a much larger depreciation of buildings year by year; he gives a five per cent depreciation for the motion picture business. The witness out there, who was not an accountant or connected with the motion picture business at all

1038 but simply a real estate appraiser, testified that he thought that the buildings would last 66 years and gave a factor of 1½. I think. I don't think his testimony was specific on that item or any item.

Mr. Driscoll: My impression of how that testimony out there came about was that it was approached at a different angle. At that time they were trying to show by that witness the value of the property. He had no object to make it a large percentage; his object was to make it small, and he assigned it a life of 66 years. Now they come

here with Mr. Mills and Mr. Mills being an accountant at this end wants to make a different percentage. 1039

Mr. Pollak: He was not an accountant at all.

Mr. Driscoll: He was an employee of the company and you put him on as an expert and qualified him as an expert. You built up a life of 66 years and now you want to knock it down.

The Special Master: Go ahead and introduce your testimony. You have got your testimony in that the buildings were worth so much and subject to a certain depreciation; now you want to show something else. Go ahead.

By Mr. Pollak: 1040

Q. Mr. Mills, is it a fact that in the motion picture business new inventions may render a building substantially useless for motion picture purposes within a relatively short time? A. It is. That was demonstrated by sound.

Q. Is it a fair estimate in the motion picture business that a building will have an average life for motion picture purposes of not more than twenty years? A. That is correct.

Q. Is it true that new inventions in the motion picture business, including installation of new equipment, will render available buildings unavailable in a short time? A. It will. 1041

Q. Now as to the 15 per cent factor of depreciation for equipment, on what is that based? A. On the actual wearing out of equipment and its obsolescence.

Q. Is the obsolescence factor an important factor in connection with the equipment? A. Very important.

Q. For reasons already stated in regard to buildings? A. Yes.

Q. But more directly applicable? A. Even more so on equipment.

1042 Q. Is it a fact that the coming of sound may render great masses of equipment unavailable? A. It did.

Q. Is it a fact that that has happened in your knowledge of the motion picture business? A. It is.

Q. Is it your estimate, based on your acquaintance with the motion picture business, that within a period of roughly seven years equipment uses itself up in the motion picture business? A. There is no question in my mind.

Q. Is it a standard principle of motion picture accounting, if you know, to depreciate buildings used for motion picture purposes at the percentage of five per cent a year? A. I can't say it is a standard practice, but I know of other instances where five per cent is used.

1043 Q. In the motion picture business? A. In the motion picture business.

Q. Is there any standard as to equipment? A. I think that the standard is more than apt to be a multiple rate which will average more than fifteen per cent.

Q. That is, fifteen per cent is below rather than above? A. The average.

Q. Now, Mr. Mills, going on with Defendants' Exhibit 18-D-5 and passing on from depreciation items as to which you have testified now—as to interest paid you have already presented an exhibit on that and given your testimony concerning it, Exhibit 10? A. That is right.

1044 Q. Now, as to interest on investment in studio plant and equipment, that is marked "per schedule". That schedule is in fact Defendants' Exhibit 18-F, and I think it would be convenient, Mr. Master, if you would mark on Exhibit 18-D-5 where you see "per schedule", that it might be helpful if you would simply mark it or change it to read "per Defendants' Exhibit 18-F". (The item was amended as indicated.) Will you turn, Mr. Mills, to Defendants' Exhibit 18-F? I find on that exhibit, as the first figure, Land, $969,210.00. What does that figure represent? A.

That represents the appraised value of the land as testified 1045
in Culver City.

Q. By Mr. Metcalf? A. Yes.

Q. The land being land at the Culver City studio? A. That is right.

Q. Now, as to the figure, Buildings, $3,528,251.97; what does that represent? A. That represents the actual cost of the buildings.

Q. As shown by what? A. As shown by our books and records down through the years.

Q. You have then depreciated those buildings at what rate? A. At the rate of five per cent.

Q. In accordance with the testimony you have given. 1046
Leaving a value as of August 31, 1931, for the buildings of $2,690,097.43; is that right? A. Right.

Q. Now, then, the equipment item of $3,846,240.07, what does that figure represent? A. That represents the cost of the equipment at the Culver City studio.

Q. As shown by what? A. As shown by the books, which has not been fully depreciated.

Q. Does the $3,846,240.07 represent money actually paid for equipment? A. It does.

Q. In all instances? A. In all instances.

Q. Whether it had been sufficiently depreciated or not you set up a reserve for depreciation of how much? A. $2,166,959.25. 1047

Q. And that represents depreciation at what rate? A. At the rate of fifteen per cent. per annum.

Q. You then get a net figure of equipment of $1,679,250.82? A. Right.

Q. Adding together the land value as testified to out there, and the buildings depreciated and the equipment depreciated, you get a grand total of investment in studio plant and equipment as of August 31, 1931, of $5,338,558.25; is that right? A. Right.

Q. Now, then, you make exactly identical computations for August 31, 1932? A. Right.

1048 Q. Of course, carrying on your depreciation computations at the same rate for another year? A. That is true.

Q. And also representing a slightly larger investment in buildings and in equipment? A. For actual expenditures made during the year.

Q. Those expenditures were made during the year? A. Yes.

Q. Then you show an investment figure in studio plant and equipment for the year ended August 31, 1932, of $5,014,246.95; is that right? A. Right.

Q. You find that the average investment is obtained, of course, by adding the two figures together and dividing by two? A. Yes.

1049 Q. That gives a figure of $5,176,402.60? A. The average investment.

Q. And interest at six per cent. thereon is $310,584.16, with which the Exhibit 18-F concludes? A. Yes.

Q. And is, of course, the figure carried on Exhibit 18-D-5? A. Yes.

Q. On Exhibit 18-D-5, that being the last of the items of expense to which you have just testified, the interest on investment in studio plant and equipment, the grand total of all these items of overhead both general studio overhead and New York salaries and other overhead at the New York office, represents your figure of $5,891,374.57? A.

1050 That is right.

Q. You allocated 1/36th thereof to "Letty Lynton", on the basis of 36 pictures produced during the year? A. Right.

Q. You have already testified, I think, that the general overhead expense of the motion picture business is incapable of being individually ascribed to special motion pictures? A. That is right.

Q. And is distributed as nearly as may be evenly among them? A. That is right.

Q. In your opinion is it possible to ascribe individual overhead to individual pictures, as distinguished from dividing it among the pictures? A. That is the only method by which the general overhead can be attributed to the productions produced in each year. 1051

Q. The figure of $426,331.98 represents the total negative cost appearing in——

The Special Master: According to the computation made, is about as far as you can go. According to the computations made on this sheet, that is the total negative cost; isn't that right?

Q. Of course, as the Master put it, it is on the basis of these computations, and is the sum, of course, of the $262,682.69 carried over from page 4 and these items appearing on Exhibit 18-D-5; is that right? 1052

Mr. Driscoll: We will concede that that is a mathematical fact.

Q. Now, Mr. Mills, I find a deduction from the negative cost of $426,331.98, of 25 per cent. charged to Culver Export Corporation. Will you kindly explain that 25 per cent. deduction? A. The total negative cost to the Pictures Corporation is divided, 75 per cent. to itself and 25 per cent. is charged to the Culver Export Corporation who will account for their cost separately. 1053

By Mr. Driscoll:

Q. You say, "is divided"; do you mean in this account? A. Yes, and on our books we do charge Culver Export Corporation with 25 per cent. of the negative cost.

Q. That was done in 1932? A. It was, leaving the net cost of the negative to the Pictures Corporation of $319,748.99.

054 By the Special Master:

Q. Let me get this straight. Who did that charging? A. Metro-Goldwyn Pictures Corporation.

Q. Metro-Goldwyn Pictures Corporation? A. Yes.

Q. Did their books show a charge to Culver Export Corporation of $106,582.99? A. Their books will not show that exact amount charged, because some of these items are charged directly to profit and loss as distinguished from charging it to the general overhead deferred—answering your question specifically as to whether the books will show that item.

055 By Mr. Pollak:

Q. As to these overhead items, there would be no specific charge to "Letty Lynton" as between these two corporations, naming an individual picture? A. No, that is right.

The Special Master: What amount is shown on your books as a charge to Culver Export Corporation for this picture "Letty Lynton"; has that come out in the testimony yet?

Mr. Pollak: I don't think so.

The Witness: The total charge actually made
056 on the books to Culver Export Corporation for the negative cost of "Letty Lynton" was $81,493.08.

Q. Mr. Mills, explain in your own way why the charge here to Culver Export Corporation is given as $106,582.99, while the item on your books is an item of $81,493.08. A. Because some of these items which we are including for this purpose as a general overhead and substantiating them as such, include certain items which were not charged on our books to picture cost and charged 25 per cent. to Culver. The interest item, among other items, was not

charged to negative cost and 25 per cent. charged to Culver, bat was charged to general profit and loss. 1057

Q. Of course, Mr. Mills, the effect of making the charge to Culver $106,000 instead of $81,000 is to increase the profits of Pictures Corporation, is it not? A. That is true.

Q. And, I suppose, to diminish the profits of Culver in exactly the same amount? A. Right.

Q. Culver is a wholly owned subsidiary of Pictures Corporation? A. Yes.

Q. That gives us a total production cost of Metro-Goldwyn Pictures Corporation, including Canada, of $391,542.24? I think you said that includes Canada? A. That excludes Canada.

Q. That item would be $25,000 larger if instead of $106,582.99 you charged only $81,000 to Culver Export Corporation? A. That is correct. 1058

Q. Now, turning to Exhibit 18, you show a net income, excluding Canada, of $177,395.50; is that correct? A. That is correct.

Q. For the United States? A. Right.

Q. It seems to me the Canadian items explain themselves. $11,432.29 was retained by Regal Films, I think it has already been stated, by reason of a contract. That is right, is it? A. That is right.

Q. The $12,778.34 represents the net income of Pictures Corporation in Canada, after bearing those items of expense which it bore for Canada? A. Right. 1059

Q. In relation to "Letty Lynton"? The 14¼ per cent., I think, has already been testified as representing the income tax at the rate paid in 1932, giving you a final figure for the Pictures Corporation profits from "Letty Lynton" of $160,769.63? A. Right.

Mr. Driscoll: There is just one thing I would like to ask a question or two on before we adjourn today, if I may.

Jesse T. Mills—for Defendants—Recalled—Cross.

960 Cross examination by Mr. Driscoll:

(Hearing adjourned to Thursday, May 6, 1937, at 10 o'clock A. M.)

HEARING OF MAY 6, 1937.

JESSE T. MILLS, resumed:

Cross examination by Mr. Driscoll (continued):

Q. Mr. Mills, yesterday you offered in evidence Exhibit 18, which is a second amended accounting of the Pictures
961 Corporation; that is correct, isn't it? A. That is correct.

Q. Now, this was prepared by you, this accounting? A. It was.

Q. And all of these figures that appear on this accounting are they on the books of the Corporation or are they what we might say synthetic figures prepared for the purpose of this accounting? A. With a few exceptions, they are on the books.

Q. Let us see if we can find some of the exceptions. Let us turn to Exhibit 18-F, if you will. You have here as of August 31, 1931, a valuation of buildings of $3,528,251.97. Is that on the books? A. That is on the books.

962 Q. That is on the books? A. Yes. We have the ledger here, if you would like to see that.

Q. How did you arrive at that figure? A. Actual cost, built up over a term of years.

Q. The next item is Depreciation, $838,154.54? A. Yes.

Q. And you arrive at that net figure, $2,690,097.43? A. That is the depreciated figure.

Q. Does that represent a five per cent. depreciation during a period of years? A. Yes.

Q. You also put in some days ago Exhibit 9, did you not, depreciation on the Los Angeles studio? A. That is correct.

Q. And this 18-F that you speak of, that is the studio 1063
plant and equipment, that has to do with the same property? A. Yes.

Q. On this Exhibit 9 you have studio building valuation of $2,971,870.05, and studio building $528,970.53 in Hollywood? A. Yes.

Q. And those come to what figure? A. Those come to a total of $3,500,840.58.

Q. Three and a half million? A. That is correct.

Q. And that figure there is supposed to be as of what date? A. August 31, 1931.

Q. Now, I suppose you are familiar with the testimony that was taken out at the Coast; you have read the record, 1064
haven't you? A. I have read the record, part of the testimony.

Q. The defendants put on the witness Metcalf out there, who testified as their expert on the valuations of lands and buildings. Do you know about that? A. No, I didn't go into that part of the testimony.

Q. Metcalf testified that the value of the land, fair market value, page 428, the fair market value of the land in 1931-1932 was $969,210, and that is the figure you took into 18-F and also into Exhibit 9, isn't it;—or is it in Exhibit 9? No, it is not. A. No, it is not.

Q. You took that into Exhibit 18-F? A. Yes.

Q. You took his appraised value? A. Yes. 1065

Q. In fixing the value that you put on the land in Exhibit 18-F? A. That is right.

Q. Now, Lindkoltz testified as to the value of equipment and buildings. He was also produced by the defendants, qualified as an expert to tell us all about it. Let us look at the equipment for a moment, this figure in 18-F that you have for equipment—no, you have buildings on this, haven't you?

1066 Q. Now, you have a figure there for August 31, 1931, a basic figure of $3,846,210.07, depreciation of $2,166,959.25, leaving net $1,679,250.82. A. That is correct.

Q. Is that depreciation of $2,166,000 arrived at by deducting 15 per cent a year depreciation? A. That was 15 per cent certainly from 1931 on and probably prior to that date, within reason, at least 15 per cent; it varied slightly, if any.

Q. 18-F gives the value of your equipment as of August 31, 1931, as $1,679,000? A. Right.

Q. Now, turn again to Exhibit 9; there you give the value of your equipment, do you not, as of August 31, 1931, as $3,224,000; is that correct? A. I do not get the
1067 $3,224,000.

Q. You have got Culver City equipment, $2,440,000 and studio sound equipment, $784,000, which together make $3,224,000? A. As gross cost.

Q. At August 31, 1931, that is the figure you have on it? A. That is the figure.

Q. $3,224,000 as against $1,679,000? A. No; as against $3,846,000.

Q. I don't care which. There is a difference there, too. Your net figure for 1931-1932 on Exhibit 18-F is $1,679,000 for equipment; on Exhibit 9 you have got $3,224,000. Now, Mr. Mills, let us look at 1932. You have got your equip-
1068 ment there, less depreciation, $1,479,000, have you not? A. $1,479,000 net value.

Q. And on Exhibit 9 what have you got after you allow your depreciation, 1932; you have got $2,303,000, haven't you? A. I think that you have the wrong idea of what the comparative figures represent.

Q. I know what they represent. A. On Exhibit 9 you will notice that the figures used under the heading Balance in the third column, that represents the cost of the asset which is being depreciated. It does not represent the net undepreciated value with which you are comparing it when you are comparing it with the $1,679,000.

Q. This figure on Exhibit 9 unter column Balance repre- 1069
sents the cost of the assets, that is after the depreciation is taken off? A. No.

Q. Before the depreciation is taken off? A. On which the depreciation is to be based. That is why we take the 5 and 15 per cent figures.

Q. So that if you take $345,000 from that $2,303,000 you ought to get $1,679,000? You have two items, $227,923.31 and $117,665.87, which together are $345,589.18? A. I am sorry; I don't see those figures.

Q. Those figures are in the column headed Depreciation. A. That is depreciation for that year.

Q. You take those off of this $2,303,000 and it still does not synchronize with the figures in your Exhibit 18-F? 1070
A. May I take a little time off to consult with the accountants who made this statement up under my supervision?

Q. Let us go a little further before you take time off. When you are depreciating an asset at 15 per cent a year you depreciate it out entirely at the end of six and a half years? A. Six and two-thirds.

Q. So that an asset that has a value of $2,000,000 at the end of August, 1925, would be entirely off the books in 1932? A. It would be entirely depreciated.

Q. It would not make any difference whether that asset had a million dollars or ten million dollars value in that 1071
respect, as to the remaining value in August 1932? A. That is right.

Q. It would be entirely exhausted? A. That is right.

Q. So that on the question of depreciation it does not make very much difference what figure we start with as of August, 1925, to arrive at the value in 1932; isn't that true? A. All expenditures up to 1925 had been depreciated and nothing would be depreciated in that year.

Q. Let us look now at Mr. Lindholtz's testimony. He says that as for the value on the equipment, page 607, this figure was given by him as of June 30, 1925, the sound

1072 value was $1,041,000 and he gave a reproduction value of $1,888,000, for equipment. Now, then, your Mr. Craig, page 619, gave us year by year additions to equipment, and I am sure he calculated props as well, although there is no salvage in props. I would like to have you take these figures down, Mr. Mills, and see if you can reconcile these figures either with your Exhibit 9 or Exhibit 18-F.

Mr. Pollak: Mr. Master, it is a perfectly settled rule, as I understand it, that you cannot cross examine one witness by references to the testimony of another witness. I do not object, if Mr. Driscoll
1073 will give Mr. Mills the time that Mr. Mills requested to make the comparison that he wanted in order to explain the relation of Exhibit 18-F and Exhibit 9. Unless that time is allowed, I do object on the ground that it is not proper cross examination.

The Special Master: He can't answer the question unless he takes the time.

Mr. Driscoll: I have a perfect right to frame a question on any premises I want for the purposes of cross examination. I am not asking him as to the accuracy or inaccuracy of the expert's testimony. I am simply asking him to compare the result set forth here with these results. I have a perfect right
1074 to do that.

The Special Master: I think it is a perfectly proper question on cross examination. Of course, he should have time.

Mr. Pollak: The question of reconciling this testimony is a matter of argumentation.

Mr. Driscoll: There are some facts back of the argument that must be developed.

Q. Assume for the purpose of this question, Mr. Mills, that the sound value of the equipment as of June 30, 1925,

was $1,041,000, and assume that the reproduction value was $1,888,000— A. In 1925? 1075

Q. June 30, 1925. I am going to ask you a question based on each of those figures. You can take either one first. Assume also that between June 30, 1925, to the end of August there was added by way of new equipment new equipment, $63,102.09; that is, 1925; and that there was added in 1926, $147,469.86; 1927, $163,051.32; 1928; $100,048.25; 1929, $352,435.58; 1930, $310,678.95; 1931, $366,690.77; 1932, $155,654.41. Now, then, with that assumption, will you kindly depreciate that value at the rate of 15 per cent per year and tell me and tell the Court here whether or not the result coincides with 18-F or Exhibit 9? 1076

Mr. Pollak: The first question should be, what the result is.

Mr. Driscoll: What is the result after depreciating it at 15 per cent a year; what is the result at the end of August, 1931, and what is the result at the end of August, 1932?

A. That will take, I should say, fifteen or twenty minutes. Assuming the two bases, first of $1,041,000 to start off, and another value is $1,888,000, you want to get the residual value of that equipment as of the end of August, 1932.

Q. August 1931, first, and then August, 1932. This $1,888,000 and $1,041,000, you can disregard that for brevity and consider only your additions; then you can do it very quickly. If you figure it as of 1931 you still have a slight amount to depreciate on whichever figure you take as a base. Take it home with you and see if you can reconcile it with either of those figures. A. You can't reconcile it because it is on an entirely different base. 1077

Mr. Pollak: I would like to have an answer. You have asked him a question.

1078 The Witness: Do you want me to figure them out?
The Special Master: Yes.
(The witness makes computations.)

Q. Mr. Mills, I understand that you found the depreciation for the years beginning August 31, 1925, and down to August 31, 1932, to be $1,043,673.51? A. No, sir. I found that that was the residual value of the assets put in there.

Mr. Pollak: Starting from those bases.

Q. That is the residual value of the equipment. A. That is, residual value of—

1079 Q. Depreciated value? A. —of the figures called off to me as having been stated to have been expended in these years respectively, as depreciated on a basis of 15 per cent, without taking into account anything that may have gone into it from the home office.

Q. So that the residual value on August 31, 1932, according to those figures and basing it on those figures, is $1,043,673.51; August 31, 1932? A. Yes.

Q. And your residual value on Exhibit 9 is approximately $2,000,000, isn't it, of equipment? A. The residual value of the equipment is $1,679,250.82, on Exhibit 18-F.

Q. I am asking you about Exhibit 9. We will come to

1080 18-F. It is approximately $2,000,000? A. No, sir, that is not the residual value, but is the basic cost.

Q. You have got the figures here under the heading of Balance, you have two items that total $2,303,000; is that right? A. $2,300,000 odd, under two items.

Q. You have depreciation on two items? A. For the year 1932.

Q. $345,000? A. That is for the year.

Q. So that if you take that depreciation off that balance of $2,303,000, you have a residue of approximately $2,000,000? A. No, sir.

Q. What have you? A. You have the total cost of that equipment less one year's depreciation, ignoring the prior years' depreciation. 1081

Q. So that when you made up Exhibit 9 to show the depreciation you showed not the residual value but just the total cost? A. That is right; I must have.

Q. Let us come to Exhibit 18. What is your residual value shown there? A. On Exhibit 18, the residual value at the end of 1931—

Q. Of the equipment? A.—was $1,679,250.82.

Q. On these figures that I gave you it is only $1,043,000, or a difference of $600,000? A. The $1,043,000 was at the end of 1932.

Q. From Exhibit 18-F the residual value on August 31, 1932, is $1,479,694.95? A. That is right. 1082

Q. On the figures I gave you it is $1,043,000? A. That is correct.

Q. A difference of $476,000? A. $436,000, roughly.

Q. Let us pass from there to the buildings and see what the story is in regard to the buildings. Now, on Exhibit 18-F you give what purports to be the value of the buildings at the end of August, 1931, and at the end of August, 1932. Is that correct? A. That is correct.

Q. And there it is a residual, that is, a depreciated, value; it is what is left after depreciation? A. Yes.

Q. For 1931 it is $2,690,000; is that correct? A. That is correct. 1083

Q. For 1932 it is $2,565,000? A. That is correct.

Q. Those are your two figures? A. Yes.

Q. Now, then, Mr. Lindholtz testified—called as an expert by the defendants and he was examined by Mr. Hilborn, and he was asked the reproduction or depreciated value of the buildings as of June 30, 1925, I think—wait a minute; let me get my figures. First, what is the difference between reproduction value and depreciated value? A. The difference? I don't know what the ideas in the

1084 minds of the men who testified out there were, therefore I assume you want my opinion.

Q. Yes, I want your opinion. A. I would say that the reproduction value would be what it would cost to reproduce the equipment or building, whichever one is in question, at the current prices as to labor, material and so forth. What do you call the other?

Q. Depreciated value.

Mr. Pollak: Depreciated cost value.

Mr. Driscoll: I am using the term here, depreciated value.

1085 A. The depreciated value, in my opinion, would be the total cost based on the price of material and labor at the time it was put into the asset, less the amount of depreciation taken over its life.

Q. Depreciated year by year? A. Depreciated year by year.

Q. When you speak of sound value, to which do you refer; reproduction value or depreciated value? A. I am afraid I can't say much about that. I don't know what a man means by sound value. Different men might mean different things, I think.

Q. Mr. Lindholtz was asked to give the value. He said, 1086 on June 30, 1925, the sound or depreciated value was $953,000, so there he used the term "sound" as synonymous with depreciated value. Mr. Hubert was called, another expert that the defendants had on tap. Before we come to Mr. Hubert, in these figures that we have on Exhibit 18-F and on Exhibit 9, we are dealing entirely with depreciated value; we are not dealing with reproduction value? A. We are dealing entirely with depreciated cost.

Q. Depreciated cost, and they do not purport to reflect reproduction cost at all? A. Absolutely not.

Q. So that we can disregard reproduction cost here?

Now, Mr. Hubert testified. He was asked what the sound value was in the fiscal year 1931-1932. I am referring to page 628 of the testimony. He said that the sound value was $2,194,000 in the fiscal year, $2,194,000 of the buildings. You have it on Exhibit 18-F at the end of August, 1931, as $2,690,000, which is approximately $500,000 more, and you have it at the end of August, 1932, as $2,565,000, which is over $300,000 more. Is there any way that you know of that those figures can be reconciled? A. No, sir, I don't know what his figures—how he arrived at such an estimate. I know my figures are actual cost less depreciation over the years. 1087

Q. When he was asked to give the sound or depreciated value he must have had some cost figures before him, isn't that true, Mr. Mills? A. I can't say. 1088

Mr. Pollak: I object to that.

Q. Could he arrive at the depreciated value as an expert without having the cost figures before him? A. He might have estimated the cost based on his experience as an expert.

Q. You don't think Mr. Pollak would put on an expert, asking him to guess at the cost as an expert?

Mr. Pollak: I object to that question. 1089

Q. Assuming that he did have the cost figures before him, Mr. Mills, and depreciated it, and if he used the same rate of depreciation that you used he should have arrived at the same depreciated value? A. If we were both good mathematicians.

Q. And when he arrived at a less value by half a million dollars or $300,000 he must have used a greater rate of depreciation than you used or a less cost? A. Or made a mistake.

990 Q. Or made a mistake. I wouldn't want to accuse him of that because you qualified him as an expert. So that the expert's testimony in regard to building cost as well as the equipment cost does not synchronize either with Exhibit 18-F or Exhibit 9? A. It does not.

Q. Do you know the figures from your books as to additions to equipment during those intervening years from 1925 to 1932? A. I haven't those here for the back years.

Q. Do you know whether or not props are included in the same account as equipment figures? A. They were.

Q. They were included? A. Props are included.

Q. So that this figure that I gave you, assuming that they are in conformity with the books of the company, include props as well as equipment? A. That is my understanding. Just a minute. I want to take a minute to check up on the props again. I am taking the word of the auditors and I want to be sure.

Mr. Pollak: You may check up on it.

A. (continued) I would like to withdraw or correct my answer. I will look up the handling of props.

Q. Mr. Mills, will you kindly check the figures I gave you from your books for additions to equipment for the years between 1925 and 1932, and for your guidance I will say that you will find it in Mr. Craig's testimony at page 619, and definitely check whether it includes props, and if it does include props give us the figures for props separate from equipment? A. For each year?

Q. For each year. A. Right.

Q. As to Exhibit 18-F and Exhibit 9, is the value of props included there in the equipment charge? A. I am quite sure they are not. But I will answer that at the same time.

Q. Will you check on that and see if they are included there? A. Yes.

Q. Let me ask you this. The equipment in the home office, what does that include, Mr. Mills? A. There is no home office equipment in either of these schedules. 1093

Q. What does home office equipment include? A. The usual equipment in an office of desks and chairs and rugs and fixtures.

Q. Have you projection rooms? A. One of the rooms has projection equipment.

Q. Are there any cameras included?

The Special Master: What schedule is that on? 18-A?

Mr. Driscoll: There is home office equipment depreciated at the rate of ten per cent. a year. 1094

Mr. Pollak: He testified yesterday that the figure of $149,000 referred to a schedule of equipment, Mr. Driscoll. The exhibit perfectly clearly shows and the testimony confirms that that item of $14,927.54 on Exhibit 18-A is ten per cent. of the equipment in the home office, which was $149,000. It was 10 per cent. depreciation.

The Witness: When I said it was not included in any schedule I was referring to the two schedules under discussion.

Q. The purpose of my inquiry was to find out why the difference between ten per cent. and fifteen per cent. depreciation. Mr. Mills, you use ten per cent. for depreciation for home office equipment and fifteen per cent. depreciation for studio equipment. Will you kindly tell us the basis of the distinction? A. On the average life base, which rate is based on the average expected life of each class of equipment. In the office equipment you have various items. Lots of desks will last longer than ten years and some rugs may wear out in seven years; chairs for heavy men may have to be replaced twice in ten years. We have taken 1095

996 an average of ten per cent. on the various items, being comparatively small, a total of $150,000, as a fair measure of depreciation on office equipment. When we come to the studio equipment there are a great many varied classes of items with varied life and we have estimated 15 per cent. as being a fair average to write off the cost of all classes of the equipment.

The distinction between the ten per cent. rate and the fifteen per cent. rate I would say was due entirely to the difference in class of the assets involved, which would be much more perishable in studio equipment than in an office; it would be much more specialized.

997 Mr. Driscoll: Suppose I suspend, then, on the direction of the Special Master, and you go ahead with your direct examination.

Direct examination by Mr. Pollak:

Q. You can tell us this, Mr. Mills. Both Exhibit 18-F and Exhibit 9, as to both buildings and equipment, are based on a depreciation of actual investment; is that right? A. That is right.

Q. And they rest upon the figures of cost of buildings and equipment? A. Less depreciation.

998 Q. Less depreciation? A. That is correct. And, those two statements will be reconciled at the next hearing.

Q. They do not represent any estimate of the value of the buildings as at any given time? A. That is right.

Q. Or of the value of the equipment at any given time? A. Correct.

Q. By value of course I mean market value. A. They are cost less depreciation.

Mr. Pollak: I offer in evidence accounting of Metro-Goldwyn-Mayer Distributing Corporation, Net

Income from "Letty Lynton", consisting of six pages. 1099
The Special Master: Received as Defendants' Exhibits 19, 19-A, 19-B, 19-C, 19-D, 19-E.

Q. You have a copy of Exhibit 19 before you with its supporting schedules? A. Yes.

Q. As the first item I find the figure $727,053.84. That is the figure as to which testimony has already been given in connection with the Pictures Corporation as being the total domestic rental income, is that right? A. That is right.

Q. Domestic, excluding all strictly foreign business and also all business not in the continental United States? A. That is right. 1100

Q. You have already testified that the income was divided 80 per cent. to Pictures Corporation and 20 per cent. to the Distributing Corporation, and that explains, of course, the deduction from the $727,000 of the figure of $581,643.07, which we have had in the other accounting? A. That is right.

Q. Leaving as the Distributing Corporation's 20 per cent. shares, $145,410.77. We now come to the expenses. The distributing expense is the subject—you can just answer this in a general way, yes or no—of schedules that appear attached? A. Yes.

Q. Turning to Schedule 19-A, that refers under the heading Distributing Expense to Home Office Expense, per 1101
Schedule. I will turn to that schedule, which is Exhibit 19-B. These are the same expenses that have already been testified to in relation to the Pictures Corporation? A. They are.

Q. Where you say there on Exhibit 19-B, Salaries, General, per Schedule, I think we ought to put in there Exhibit so-and-so. It is part of Exhibit 18. A. I have it right here; Exhibits 18-C-1, 2 and 3.

Q. It is those three pages of salaries? A. Yes.

(The Exhibit 19-B was marked as indicated.)

MICRO CARD
TRADE MARK ®
22
39
14111 2
MATTHEW BENDER & COMPANY
MB
656
microcard

1102 Q. All the items on 19-B are items which appear in connection with the Pictures Corporation and as to which you have already given testimony? A. They are.

Q. When you say, "Absorbed by Metro Goldwyn Pictures Corporation, $567,617.36," you refer, do you not, to the fact that the Pictures Corporation bore 30 per cent of the expenses? A. Roughly; that is the exact amount.

Q. That is the exact amount that it did bear? A. Yes.

Q. I now come to Exhibit 19-C. Will you tell us what this represents? A. 19-C is an analysis by branches and by classification of expenses of the various items of expense in all of the branches.

1103 Q. Of these expenses of the branches of the Distributing Corporation did the Pictures Corporation bear any share? A. They did not.

Q. These items of expense are drawn from your books, are they, appearing on 19-C? A. They are the result of the books.

Q. In all cases? A. In all cases.

Q. Taking as an illustration Albany, the total is $76,293.71. Does the $6,708 represent the salary paid to the manager in that city? A. It does.

Q. The manager being of course the manager of the distributing? A. That is right.

Q. The Salesman total is their salaries, is that right?

1104 A. That is correct.

Q. The item heading "Others"— A. Under "Salaries"?

Q. Under "Salaries". A. Other salaries: salaries other than managers or salesmen.

Q. Salaries of other employees at the branch? A. Yes.

Q. What does the item Exploitation represent, $1,070.69? A. Expenses by the Branch in the exploitation of pictures in general.

Q. They reported their expenses to you? A. Oh, yes, and they are reimbursed by the home office and charged up to this account.

Q. And Traveling? A. From this heading, it is all 1107
of the traveling expenses.

Q. From the Albany branch? A. Originating in the Albany branch.

Q. Rent, Light and Heat explains itself, I take it. It is the rent, light and heat in the Albany branch? A. That is right.

Q. Express and film delivery? A. That explains itself.

Q. It is expenses they had after delivery had been made to them? A. It is delivering film to the exhibitors; and accessories.

Q. They may have received the film from some central place and then made delivery? A. Yes.

Q. Telephone and Telegraph; Postage; they explain them- 1108
selves. What is Checking and Clocking? A. That is checking the gross receipts of theatres where the film is shown on a percentage basis, sometimes on a percentage of business that is done and sometimes on the basis of net receipts after expenses. Clocking is of the same nature as checking.

Q. Explain the clocking. A. Clocking is to check up the actual attendance in theatres. If we have a situation where we know that the price of admission is fifty cents and they report gross receipts of a certain amount of money, by clocking people in at the door during the rush hours and all that sort of business it enables us to verify within reason the total amount of the income. The technical 1109
meaning of the word "clocking" refers to the fact that a man has a little implement that he punches every time a person passes, and that records the total number of people that have gone by in a certain length of time.

Q. To whom was that money paid for the clocking? A. Employees and outsiders that we engaged in that capacity.

Q. Did you also employ a service for that purpose? A. At times there is a special service employed for the checking and clocking.

1108 Q. What is the name of the service? A. Ross Federal Service, Inc.

Q. Does that operate in many places? A. It does. I find now that it did operate at that time in all of the branches. I did not state that at first because I thought it was only in part of them.

Q. Are they generally employed in the motion picture business by other distributors as well as yourselves? A. They are. All distributors use the same method.

Q. Stationery and Supplies explains itself, and I think Alterations, Repairs etc. do. A. That is right.

Q. Film Maintenance and Repairs; that means what, Mr. Mills? A. Where any expenses apart from salaries are
1109 incurred in the upkeep of the film.

Q. Stationery and Supplies, that means the stationery and supplies of the several branches? A. That includes all the stationery and supplies paid for by the branches.

Q. And is distinguished from the stationery and supplies item of the home office to which you testified? A. Entirely seperate.

Q. And also distinct from the item to which you also testified yesterday of certain expenses for the shipment of supplies from the home office to the branches? A. Yes; all items in this statement are entirely distinct from those yesterday.

1110 Q. And are borne by the branches? A. Yes.

Q. Taxes, local and state, I suppose those are mostly property taxes? A. It would be more personal property taxes and license fees of different nature.

Q. Advertising in the apparently few instances where there was advertising, means advertising by the branches of the productions as a whole? A. It means advertising by the branches in the case of small items. I see an item of $10 of one branch. I assume that might be advertising such as advertising for help, and might include any form of advertising that they paid for.

Q. Projection Expense? A. Projection Expense is in

the main the expense of maintaining projection machines in the branches for the showing of pictures. In some cases they might rent another place in addition to the branch proper. 1111

Q. Did the branches in some instances in 1932 have projection machines of their own which they showed pictures to exhibitors? A. They did.

Q. That would have to be purchased or maintained? A. Maintained.

Q. General expense, can you give us a general idea of general expense? A. Of course, it is everything that is not specifically specified under descriptive headings, and will include almost any item that can be imagined in the way of car fares and other items. 1112

Q. Minor supplies, I suppose? A. Minor supplies and almost anything that is not included in the other captions.

Q. I notice even supper money is taken out. I suppose that is money paid men for working overtime? A. Yes.

Q. These items naturally vary in amount for the several branches. Were they in character the same in all instances and does the testimony you have given about them apply to them? A. It does apply as to instances where we have shown in general the character is the same.

Mr. Pollak: Do you accept, Mr. Driscoll, Exhibit 19-C as prima facie proof of the expenditures therein listed by the Distributing Corporation through its branches? 1113

Mr. Driscoll: Yes.

Q. The item of $296,707.65 appearing on Exhibit 19-C opposite New York is an item of expense entirely distinct from that of the home office? A. Entirely distinct.

Q. The New York branch has in fact a location of its own? A. Entirely distinct from the home office.

Q. Entirely distinct from the Pictures and Distributing Corporations? A. Yes.

1114 Q. What is the location? A. 630 Ninth Avenue.

Q. And it was in 1932 distinct? A. Right.

Q. Turning to Exhibit 19-D, what does Exhibit 19-D represent? A. That represents the depreciation on the cost of the equipment in the various branches as listed, amounting to $48,151.63, actually taken from the books, on actual cost.

Q. And computed at what rate? A. Ten per cent, same as office equipment.

Q. I suppose the equipment of the several branches for the most part was office equipment; is that right? A. Yes. There were also some projection machines and some little
1115 film winding machines.

Mr. Pollak: Do you want further detail, Mr. Driscoll, of Exhibit 19-D?

Mr. Driscoll: Not as prima facie proof.

Q. As to Exhibit 19-E, Interest on Investment in Branch Office Equipment, how is that made up, Mr. Mills? A. We have taken the net undepreciated cost of the equipment in each branch at the beginning and end of the year, all as detailed on this schedule, taken the average of those two elements, arriving at a total net undepreciated investment of $339,593.69, and taken six per cent interest on that amount,
1116 or an interest item of $20,375.62, which is reflected on Schedule 19-A.

Q. Is the word "undepreciated" correct there? A. I think so; undepreciated cost, the depreciated cost having been deducted, leaving the undepreciated cost or residual value.

Q. It is the residual cost after deducting depreciation? A. That is right.

Q. The figures in all cases of cost are, of course, drawn from your books? A. Correct.

Q. In computing the depreciation there to get your final figure, at what rate did you compute? A. Ten per cent.

Mr. Pollak: Do you accept Exhibit 19-E as prima 1117
facie proof of the fact that these investments, under the explanation given of the rate of depreciation, are the investments on which computation of interest was made?

Mr. Driscoll: Prima facie, yes.

Q. Going back to Exhibit 19-A, Mr. Mills, we have gone through the schedules, but there are some things that are not scheduled. There is an item under Distributing Expense marked Franchise Offices Expense; what does that mean? A. That represents the payment to an outside franchise holder, which existed in 1932, namely, the Philadelphia 1118
branch exchange.

Q. I notice in your list of branches Philadelphia does not appear; that is correct, is it not? A. On Schedule 19-C?

Q. On the 19-C schedule. A. That does not appear as a branch because it was not a branch of the Corporation.

Q. It does appear on Exhibits 19-D and E concerned with depreciation and interest on investment? A. That is correct, because we did own the equipment in the branch and paid for it.

Q. You bought it? A. We did.

Q. What was the difference, stated in general terms, between your relationship to the Philadelphia franchise office and your relationship to what you have called branches pure 1119
and simple? A. The branches were simply a department of the company; I think that describes their relationship; while the franchise holder was in exactly the same relationship as the Regal Film Company in Canada, an entirely outside man.

Q. How was he compensated? A. He was compensated by payment of his expenses plus a certain amount to him for his services.

Q. What does the $277,000 item, in relation to that payment, mean—in relation to that franchise office? What

1120 was it composed of? A. It was composed of his actual expenses in that branch exchange, in accordance with weekly vouchers which he would submit, including his compensation, and this amount was deducted from the gross collections of Metro-Goldwyn Pictures Corporation, and he remitted the difference to us.

Q. From the Philadelphia district? A. That is right.

Q. And the $277,707.19 represents the amount actually retained by him? A. It does.

Q. Over and above this sum which he retained, he remitted all collections to you? A. That is correct.

Q. And these are, of course, included in the gross film rental? A. The gross figures are included in the gross film
1121 rentals.

Q. Now, from a total of distributing expenses of $4,955,525.60 you make deductions for certain receipts by the Distributing Company? A. Right.

Q. Including its branches? A. Yes.

Q. Of which the largest is the sales of advertising Accessories. What does that mean, Mr. Mills? A. The sales of advertising accessories, amounting to $761,395.68, are the gross receipts in the year from the sales of advertising paper and heralds and everything of that category for which we charged the exhibitor, not segregated by pictures. It was impossible to arrive at the exact amount of adver-
1122 tising sales on Letty Lynton, the same as it was impossible to arrive at the exact expense on Letty Lynton in these other items of expense. Therefore, we took the net profit on advertising accessories, which was the $761,000 mentioned, less the cost of the same, $428,902.03, bringing in a net profit of $332,493.65, which is the main element of the deduction from the above expenses.

Q. How was the cost of this advertising material made up? A. That is the actual cost paid to printers and lithographers for the material.

Q. In other words, the exhibitor, besides paying a rental

for specific pictures, had to pay for the advertising acces- 1123
sories that were supplied to him? A. That is true; they were sold to him at a profit.

Q. The profit amounting, for the fiscal year ending August 31, 1932, to $332,493.65? A. That is right.

Mr. Pollak: Now, the miscellaneous income, do you want any particularization of that, Mr. Driscoll? You are getting credit for it.

Mr. Driscoll: I am not asking for any particularization.

Q. Making a total distribution expense, after deducting income of $339,967.11, of $4,615,558.49? A. That is correct. 1124

Q. Now, with that as a basis, will you explain the 76.87 per cent of net film rental income, the figures represented by a ratio of this $4,615,558.49 to $6,004,105.22, being the net film rental income of that corporation? A. That is correct.

Q. Now, turning to Exhibit 19, you get your figure of $111,777.26 as being an average distributing expense of the Distributing Corporation compared with the total income? A. With the net income on Letty Lynton.

Q. The 76.87 per cent is derived as an average? A. Yes.

Q. And then you apply it to the $145,410.77 received from Letty Lynton? A. Right.

Q. Which gives you a net income from Letty Lynton of 1125
the Distributing Corporation, before taking off Federal income taxes, of $33,633.51? A. That is correct.

Q. To which you apply the 14½ per cent Federal income taxes paid that year, and get a final, ultimate income, after deduction for Federal income taxes, of the Distributing Corporation for Letty Lynton of $28,756.65? A. That is correct.

By Mr. Pollak:

Q. Mr. Mills, will you, in your own way, consider Exhibit 18-F and Exhibit 9, and explain whether there is any dis-

crepancy whatever between them? A. On Exhibit 9 the base of the cost of equipment on which 15 per cent is depreciated is stated as $1,519,489.80, and another item of $784,291.95, making a total of $2,303,781.75. Turning to Exhibit 18-F, that combination of figures is stated in one amount of $3,846,210.07, showing an apparent discrepancy of $1,542,428.32.

That $1,500,000 odd is the amount of equipment included in the $3,846,210.07 which had become fully depreciated at the beginning of the year 1932, and likewise the $2,166,959.25 reserve for depreciation is the reserve for depreciation or partially exhausted equipment as well as the reserve for depreciation on the equipment which had been fully depreciated. So that this $3,846,210.07, total cost, and the $2,166,959.25 total depreciation, should each be reduced by the $1,542,428.32, leaving the same net residual value of $1,679,250.82.

To clear up a further item that bothered Mr. Driscoll; as to why I can't subtract the depreciation for the year ending 8-31-32, amounting to $345,589.18, from the $2,303,781.75 so-called balance at the beginning of the year, and arrive at the net value at the end of the year—is because Exhibit 9 does not show the amount of depreciation taken in the preceding years on the equipment which is still being depreciated. So that if on Exhibit 18-F we were to substitute the figures to show the cost of the equipment not fully depreciated and the corresponding reserve on that equipment not fully depreciated, we would have the cost of the equipment not fully depreciated at the beginning of the year, $2,303,781.75; reserve for depreciation on that cost, $624,530.93; leaving a net undepreciated value of $1,679,250.82.

Q. In other words, getting exactly the same result? A. Getting the same net result on both schedules.

Q. Isn't this correct, that in Exhibit 18-F you put in all the items of cost that appeared on your books? A. That is right.

Q. Including the items of cost of equipment wholly de- 1129
preciated? A. That is right.

Q. You also included, because it also appeared in your books, the depreciation on the items wholly depreciated before the year in question? A. That is correct.

Q. That is, you enlarged each figure by exactly the same amount, is that correct? A. That is right.

Q. That amount being—you have given the figure already, but just give it again. A. The amount was $1,542,428.32.

Cross examination by Mr. Driscoll:

Q. On this Schedule, Exhibit 9, you have the wholly de- 1130
preciated item of $921,078.02. Now you tell us the item is $1,542,428.32. A. That is correct, because $621,350.30 represented the depreciation on the Hollywood studio equipment which had been fully depreciated prior to 1932. In the first column on Exhibit 9, where we show at August 31, 1931, $2,440,567.82, that does not include this $621,350.30 already deducted, because that is stated you will notice as Culver City studio equipment and you have no Hollywood equipment on that schedule, having been entirely depreciated and ignored.

Q. Supposing we add this $621,350.30, which is the Holly- 1131
wood equipment which had been depreciated and charged off prior to August 31, 1931, to the figure of $2,440,567.82, or to the figure of $2,440,567.82 plus the $784,291.95, how do you then reconcile them with the statement of equipment up here in Exhibit 18-F of $3,846,000? A. I will put these figures down: $2,440,567.82; under that I add $784,291.95; add my stated $621,350.30, and the total of those three figures is $3,846,210.07, the gross cost still appearing on our books, and the gross depreciation reserve still appears there, which is the reason we used those gross figures on this 18-F, coming to the same net figure. But naturally we can't use the gross figures when we are arriving at our base for depreciation but must eliminate

the total of $1,542,428.32 composed of two elements, subtract from the gross book cost before we can arrive at the base to calculate the depreciation for the year.

Q. How do you reconcile that with the figures that Mr. Craig has given of additions to equipment for the years 1925 to 1932, inclusive, which you figured out would have a net value of— A. I think I was to prepare a statement from our books to see if there were any other additions that Mr. Craig did not know about that were added on the books at the home office, and to show these figures year by year which will also disclose year by year any discrepancies between Mr. Craig's figures and ours, and also to ascertain and state how the cost of props was handled and whether it was included in the figures or not.

Q. Now, to make this clear to myself and possibly to others, you start here on Exhibit 18-I on August 31, 1931, with a net value of $1,679,250.82 for equipment? A. That is correct.

Q. You take a depreciation, not on the value that was in that equipment on the first of your fiscal year, but you take it upon the basic figures that were on your books prior to that? A. I take it on the basic cost of items that have not been fully depreciated.

Q. So that you are charging us, or charging "Letty Lynton", not 15 per cent. of the net value of the property of that year, but you are charging fifteen per cent. of the basic figure? A. Of the cost.

Q. Of the cost? A. Of the cost of the equipment which had not previously been charged off.

Q. Which as a matter of fact is about— A. That is the $2,303,000 appearing on Exhibit 9, divided into two elements there. You get the same result.

Q. Which as a matter of fact is more than 20 per cent. of the net value at the beginning of that fiscal year? A. It might be 100 per cent. of the net value at the end of the year.

Q. it is not, is it? A. I don't see any comparison.

Q. Now, making the comparison, I am just asking you 1135
if it is? A. Mathematically, yes.

Q. That depreciation that you are charging off to "Letty Lynton"—we are not in partnership with you—we don't care how you keep your books—you are charging off depreciation here that amounts to more than 20 per cent. of the value of this property that you had on your books at the beginning of that year. A. That is mathematically correct.

Q. And it does not gibe with the figures given by Mr. Craig, does it? A. No.

Q. One further question. The figures on your books, is it actual cost or the appraisal made by the American Appraisal Company as of June 30, 1925? A. Actual cost. 1136

Q. Then this appraisal made by the American Appraisal Company as of June 30, 1925, does not enter into this calculation at all? A. I have entered no appraisal.

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, Mr. Driscoll put to you one or two questions to the effect that the depreciation factor is more than 15 per cent. of the ultimate value as it appears at the end of the fiscal year. Am I right in this, that in computing the depreciation factor, whether it is 15 per cent or anything else, one necessarily takes a continuous factor down from the beginning.— A. You mean as a matter of book- 1137
keeping, not as a matter of accounting to some one else for profits?

Q. I ask you if that is a necessary bookkeeping practice? A. It is.

Q. I ask you this: If you did not take your 15 per cent. so on an original amount, but took it over again each year on the residual amount, would you ever completely wipe out the original amount? A. You would never; you would always have a small residual value.

Mr. Pollak: I think that is all.

Cross examination by Mr. Driscoll (continued):

Q. Have you those ledger sheets with you on the equipment? A. Not on the prior years, Mr. Driscoll. From these here I could not answer you today as to the movements of the prior years. We have only the ledger sheets for that year.

Q. Let me ask you this, while we are about it. While you are reconciling the figures, will you kindly reconcile the fact that your basic figures of cost on Exhibit 9 on the real estate, I mean on the buildings, show $3,500,840.58, whereas the same basic figures on Exhibit 18-F are $3,528,251.97, a difference of $27,000 odd? A. The total building cost on Exhibit 9 is $3,500,840.58 on which depreciation is calculated. At the end of the year 1931 we had a separate account of $27,411.39, representing construction work in progress which for depreciation purposes was not taken because it had not been completed, but was included in the cost of the buildings to go on Exhibit 18-F.

Q. So you used one base for Exhibit 9 and another for Exhibit 18-F? A. I used the reduced base in calculating my depreciation.

Q. I mean on cost. A. On cost, yes.

Q. The two bases differ by 25 or $28,000 on those two things. A. I used the completed cost of the buildings for the purpose of depreciation and did not include the $27,000 work in progress, figuring that had not started to depreciate yet.

Q. What was that? A. The total figure on Exhibit 18-F of $3,528,251.97 is correct as to buildings completed and in progress. When I came to arrive at the basis for depreciation of five per cent for that year, I reduced that amount by $27,411.39, since that construction work during the year had not been completed and was not subject to depreciation.

Q. Have you any check or any records that show whether or not all these buildings are still standing, that you are

depreciating in this way? A. I have not the records to show 1141
the present status of the physical buildings.

Q. So you do not know whether these buildings that you are charging off against this accounting are standing or not standing? A. That is correct; that is why we use the five per cent. As I stated, we have a common rate of five per cent on buildings and 15 per cent on equipment, which we consider to be the average useful life of the asset, being composed of a great many elements and various classes of buildings as well as various classes of equipment.

Q. I suppose that it is also true that you have no record to show whether or not this property is being used, these various buildings, all of them, and all of the equipment? A. 1142
I have no record here.

Q. Have you any record anywhere? A. It could be obtained from the Coast.

Q. These figures that you have given on Exhibit 18-F as the undepreciated value of the real estate, land and buildings, as of August 31, 1931, and August 31, 1932, are considerably in excess of Hubert's valuations for these respective dates, aren't they? A. Apparently.

Mr. Pollak: This witness is not putting any estimate on the value. It is not fair cross-examination. The two witnesses were not testifying to the same thing; they were testifying to two quite different 1143
things. I object to it.

Mr. Driscoll: Your Honor has the point.

Mr. Pollak: The witness there was testifying to values of the property, the buildings and equipment. He was testifying to the values in the particularly depressed year of 1932 which I believe was the very trough of the depression. This witness is testifying from the books to the actual investment.

Mr. Driscoll: Of course, this witness's testimony is the basis of your endeavor to charge against the

1141 receipts of this picture depreciation; that is what we are discussing; and whether or not as a practical matter and not as a bookkeeping, theoretical matter you are entitled to charge against as depreciation on half a million dollars of value that did not exist in 1932, I say you can't as a matter of law. I don't care anything about bookkeeping.

Mr. Pollak: We are entitled to charge interest on the investment that was made. We are also entitled to charge off depreciation. Those are propositions of law, Mr. Driscoll.

Mr. Driscoll: I understand that.

1145 Mr. Pollak: For those propositions it is necessary to get bases in fact showing what the investment was and what the depreciation was. Those bases have been given by this witness.

Re-direct examination by Mr. Pollak:

Q. There was an elaborate attempt to show some contradiction between two exhibits introduced, and there was no contradiction. I want to ask you one question. It is true, of course, that Exhibit 9 is a depreciation schedule? A. Yes.

Q. Exhibit 18-F is an investment schedule? A. Right.

1146 Q. The $27,000 odd represented by buildings under construction, of course, was an item included in investment? A. Yes.

Q. And, therefore, appearing on Exhibit 18-F? A. Right.

Q. Your practice is not to depreciate on buildings under construction, is that right? A. That is right.

Q. It was, therefore, not included in Exhibit 9? A. Right.

Mr. Pollak: Anything further, Mr. Driscoll?

Mr. Driscoll: No.

(Discussion off the record.)

Jesse T. Mills—for Defendants—Recalled—Re-re-re-direct.

Q. Mr. Mills, as I think I have already stated to the Master, for Pictures and Distributing you took the year 1932 for computing profits? A. For computing the comparison of cost of distribution to gross receipts. 1147

Q. As to Culver and its subsidiaries you took what year? A. The year 1933.

Q. Will you explain why? A. Yes.

Q. First, by the year 1932 you mean the fiscal year, is that right? A. Ending August 31, 1932.

Q. And by the year 1933 you mean the fiscal year ending August 31, 1933? A. Ending August 31, 1933.

Q. Will you explain why you took the year 1932 in the case of the Distributing Corporation? A. Because the majority of the income of "Letty Lynton" came in in that year and, therefore, that year's results of operations on the pictures was more of a representative year to arrive at a pro rata expense on account of "Letty Lynton" than any other year could be. 1148

Q. You said "the majority"; it was about 80 per cent, is that right? A. Roughly about 80 per cent. I may have the exact figures (examining paper). I haven't the exact figure, but it was roughly 80 per cent of the domestic income of "Letty Lynton" came in in the fiscal year 1932; therefore, we took out total operations for the year 1932 to arrive at a fair percentage of distribution cost.

Q. Now, the case of Culver, in the year 1933, roughly, what percentage of the foreign income from "Letty Lynton" came in? A. Roughly 80 per cent of the total income from foreign on "Letty Lynton" came in in the fiscal year 1933. The foreign always coming in much later than domestic income. Therefore, to arrive at a proper percentage of the cost of distribution, we used our figures for 1933, in the case of foreign. 1149

Mr. Pollak: Is there any objection to that practice, Mr. Driscoll?

1150 Mr. Driscoll: I don't know, frankly. You haven't offered any schedule showing when the respective contracts were made. I can't tell. You may have had a terrible year, one of those two years, and a very good one the other year.

Mr. Pollak: The only way of altering it would be by an elaborate percentage of weighting.

Mr. Driscoll: You haven't even shown us schedules of how the contracts were made, which is a simple matter taken from your contract ledger.

Q. Have you a schedule showing when the foreign contracts were made with the distributors? A. Not when the
1151 contracts were made. I have a schedule of the actual receipts of the film rentals; I have that figure before me now.

Q. The testimony is already in that the picture was released in May of 1932 for the domestic and that the great bulk of the contracts had been made not only before May but before the period of commencement of release, some two or three weeks before that; the great bulk of domestic contracts was made before the middle of April and before it was known even what play it was to be, just that it was a Joan Crawford production.

Mr. Driscoll: Did you offer in evidence the other
1152 day a schedule showing when those contracts were made?

Mr. Cohen: Yes.

Mr. Driscoll: What exhibit is it?

The Special Master: Exhibt 15; that is the domestic contracts; I don't believe there is any evidence in about the foreign.

Mr. Pollak: On the question of the fiscal years selected, 1932 as to domestic distribution and 1933 as to foreign distribution, my practical point is that if Mr. Driscoll is going to make a point of that I think

he should tell us so now. There will be considerable more accounting work to be done, in that event. 1153

Mr. Driscoll: When you say you took the year 1932 what do you mean, the year ending August 31, 1932?

Mr. Pollak: Yes.

The Witness: Here are the figures, if they will help you. On domestic, in 1932, there was received $681,000 in the year, which is 93 per cent. of the total. 93 per cent. of this income came in in that year.

(Discussion off the record.)

Mr. Driscoll: I am willing to pass it unless something develops at a later date that causes us to take a different position. 1154

Mr. Pollak: That is a satisfactory disposition.

(Hearing adjourned to Friday, May 7, 1937, at 10 o'clock a. m.)

HEARING OF MAY 7, 1937.

Mr. Pollak: If your Honor please, this document is a statement in five pages of the Culver Export Corporation, Net Income from "Letty Lynton." I am producing it, sir, because the order of accounting does include the Culver Export Corporation. 1155

We want specifically noted, and if your Honor rules against us an exception, on the ground that the Culver Export Corporation, being solely engaged with the exception of about $6,000 of income, in export abroad in countries in which the United States copyright law does not operate, we object to so much of that accounting and to any liability therefore as is represented by receipts from foreign distribution.

1156 The Special Master: Your objection is noted, and your exception.

The document just offered was received in evidence and marked as follows: (Defendants' Exhibits Nos. 20, 20-A, 20-B, 20-C and 20-D.)

Mr. Pollak: If your Honor pleases, here is another document of six pages which, as your Honor will observe, is marked "Foreign Subsidiaries—Net Income from 'Letty Lynton'".

1157 In this connection, if your Honor pleases, I want to raise another and somewhat more detailed objection. This is the income of the foreign subsidiaries of the Culver Export Corporation. I object to the accounting for these foreign subsidiaries on the ground that they are not named at all as defendants in the law suit nor are they named within the order of reference. Moreover, as has already appeared, the only relation of Culver Export Corporation or of any defendant in this case to these corporations is as stockholder.

As to the Philippine and Porto Rico corporations, I object on the ground, as to each of them, that the copyright laws of the United States do not extend to territorial possessions not part of the American continent.

1158 I further object on the ground that the income of these foreign subsidiaries was entirely derived from their transactions outside of the United States, the only exceptions being, as I believe, the Philippine and Porto Rico corporations, which at that time had a relation to the United States.

As to all the corporations, I also object on the separate and inclusive ground that none of them is named a defendant and none is named in the order of reference.

The Special Master: They all are wholly owned 1159
subsidiaries.

Mr. Pollak: As appears from the schedule, one or two are only partially owned; the Swedish corporation, I think, was only partially owned.

The Special Master: The objection is noted, and the exception.

Mr. Pollak: And finally, sir, as to the countries having productions in the Spanish language, a list of which countries is to be supplied, I object on the further ground that the production was, in that instance, made outside of the United States, as well as the distribution.

If your Honor pleases, may I have a ruling on that 1160
objection on these various grounds?

The Special Master: The objection is noted, with an exception to Mr. Pollak.

Mr. Pollak: May I have an exception to each ground of objection stated as to each country and corporation included with each ground of objection without separately enumerating them?

The Special Master: Certainly.

The document just offered was received in evidence and marked as follows: (Defendants' Exhibit Nos. 21, 21-A-1, 21-A-2 and 21-B-1, 21-B-2, 21-B-3).

The Special Master: Do I understand that your 1161
Exhibits 20 and 21 supplement your Exhibits 4, 5 and 6, or do they completely replace the previous accountings that have been made on behalf of the Culver Export Corporation?

Mr. Pollak: Exhibit 4 was an accounting by Culver which is completely superseded.

The Special Master: It is completely superseded.

Mr. Cohen: 2 and 4.

The Special Master: And they completely supersede the accountings previously made?

Mr. Pollak: Taken together they show all production and all distribution of "Letty Lynton."

JESSE T. MILLS, resumed:—

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Direct Examination by Mr. Pollak (continued):

Q. Will you look at Exhibit 20, Culver Export Corporation; Net Income from "Letty Lynton." The first item is Film Rental Income by Foreign Subsidiaries, $414,986.41. That is actually tabulated where? A. The schedules by countries supporting that will be contained under Exhibit 21-A-1, being the first column of that page.

Q. And Exhibit 21-A-1 shows, does it not, that gross rentals of the various foreign versions and also of the English version in various foreign countries; is that right? A. That is true, taking into consideration the following

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page which details the English versions, carried as one total on that page.

Q. Now, going back to Exhibit 20: This item of $414,986.41, based on your books, shows the total film rental income by all the foreign subsidiaries; is that right? A. That is right.

Q. That is the gross? A. That is their gross.

By the Special Master:

Q. When you say "total income by foreign subsidiaries", you mean wholly owned foreign subsidiaries? A. No.

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Mr. Pollak: That also includes the Swedish.

Q. It does not include Canada? A. It does not, because Canada is not now included in Culver, that being included in Pictures Corporation.

By Mr. Pollak:

Q. The film rental income, direct, that represents what, Mr. Mills? A. In the main, income from the United States Navy, or steamship lines which Culver sold direct instead of through subsidiary.

Q. The item of $417,862.51, then, totals the entire gross 1165
receipts outside of the United States and Canada; in the whole world? A. That is correct.

Q. Then the item, Less: Retained by Foreign Subsidiaries, $142,339.84, is a total of all the retentions by all foreign subsidiaries anywhere in the world? A. That is correct, and is supported by the schedule, the fourth column of schedule 21-A-1, by countries.

Q. All these things are shown by your books, are they, Mr. Mills? A. All these things are shown by my books.

Q. Culver then received gross, the difference between $417,862.51 and $142,339.84, or a gross sum of $275,522.67 from "Letty Lynton"; that is right, is it? A. That is 1166
correct.

Q. Now, then, Culver had certain distributing expenses, did it not? A. That is correct.

Q. How do you compute Culver's distributing expenses? A. If you will refer to Exhibit 20-A, the next sheet on that Exhibit 20, you will note that the total film rental income from foreign sources was $15,563,592.34.

Q. From all pictures? A. From all pictures—in the year ending August 31, 1933, which is taken as a basic year; less amount retained by foreign distributors. That $15,000,000 for all pictures corresponds to the $417,862.51 on "Letty Lynton" alone. Then, the amount retained by foreign distributors was $4,933,162.64, which was the 1167
amount retained on all pictures by foreign distributors, as compared with $142,339.84 on "Letty Lynton." Subtracting those two large figures, four million dollars odd, from fifteen million dollars odd, we arrive at the total net film rental of Culver for all pictures, $10,630,429.70, corresponding to the net income from "Letty Lynton" by Culver of $275,522.67 on the first page.

We then find that our total distributing expense, the last figure on page 20-A, was $484,058.15, which results—

Q. Your net total distributing expense? A. Net total dis-

1168 tributing expense—which is 4.55 per cent of the $10,000,000 odd total income, showing that for each $100 of income it cost $4.55 to distribute.

Q. For each $100 of net film income? A. For each $100 of net film income—as a distribution cost. Therefore, we have applied the 4.55 per cent to the picture "Letty Lynton", to the $275,522.67, the amount of "Letty Lynton" included in the $10,630,429.70, and we arrive at a net cost of film distribution for "Letty Lynton" of $12,536.28, which explains that figure.

Q. The distributing expense of the Culver Export Corporation is made up in much the largest part of an item of home office expense, which on Schedule Exhibit 20-A is
1169 marked "per schedule". The schedule is Exhibit 20-B, is that right? A. The schedule appears on 20-B.

Q. That schedule starts off, under Home Office Expenses, with Salaries, per schedule, and that schedule is 20-C, is that right? A. That is correct.

Q. Now, I think as to the persons named on 20-C testimony has already been given as to many or most of them in connection perhaps with the 1932 accounting given by Culver. I ask you generally whether all the persons named as receiving salaries in the total sum of $470,951.78 received salaries in fact and in the amounts therein specified from Culver Export Corporation? A. They did.

1170 Q. Were the salaries paid by Culver Export Corporation direct? A. They were.

Q. Were all those persons engaged in the distributing business of Culver Export Corporation? A. They were.

Q. As a matter of fact, it had no other business? A. They had no other business.

Mr. Pollak: Do you want, Mr. Driscoll, any further testimony concerning the persons who are set forth on Schedule 20-B and their activities, than has been given, or do you accept that schedule as prima facie proof?

Mr. Driscoll: I want no further testimony except such as I may elicit on cross-examination. 1171

Mr. Pollak: So far as prima facie proof is concerned, you want no more?

Mr. Driscoll: No.

Q. Returning to Exhibit 20-B, the rent, light and heat represents rent, light and heat charged to and actually paid for by Culver Export Corporation, is that right? A. That is correct.

Q. The advertising is general advertising for foreign distribution of pictures that the Culver Export Corporation sent abroad, as a whole, is that right? A. Right. 1172

Mr. Pollak: The General Expense, do you want any itemization of that, Mr. Driscoll?

Mr. Driscoll: Do you know what it is?

Q. Can you tell us what the General Expense of $4,174.30 of Culver is? A. It is a multitude of items. We haven't the details of those items here. It can be obtained readily.

Mr. Driscoll: We will pass it.

Q. Now, we turn to Exhibit 20-D. The item of Negative Cost, English Version, 25 per cent from Metro-Goldwyn Pictures Corporation, is a figure of $106,582.99. That is the same figure that was deducted from the total negative cost of the English version in order to get the Pictures Corporation's share? A. That is correct. 1173

Q. Being 25 per cent of the negative cost? A. Yes. I think I should call attention to the fact that these figures on Exhibit 20-D now are specific figures of "Letty Lynton," while the figures we have been dealing with have been total cost and expense.

Q. Mr. Mills, Mr. Beatty properly corrects me. When I have spoken of the French, German and Italian versions as

1174 having been made by Culver I was in error in reality, was I not? They were made at Culver City by the Corporation there? A. That is true. I don't think you said "made"; I thought you said Culver bore the expense.

Q. Culver bore the expense, but Culver made nothing? A. That is true.

Q. And said Exhibit 20-D shows total production cost for Culver Export Corporation of $195,560.42? A. Yes.

Q. Which again appears, of course, on Exhibit 20, which summarizes the whole thing? A. Yes.

Q. You thereby show a net income from "Letty Lynton" of $67,425.97 for Culver Export Corporation? A. For Culver Export Corporation.

1175 Q. Less your Federal income tax of 14½ per cent. We will now pass to Exhibit 21. A. I have a copy.

Mr. Pollak: I suppose you don't want to cross examine until you have all these in.

Mr. Driscoll: No. That is the better way to get rid of it.

Q. Exhibit 21, and the accompanying Exhibits A-1, A-2, B-1, B-2 and B-3—see if this is a correct generalized statement of what Exhibit 21 and the accompanying exhibits show. Out of the amounts retained by the foreign subsidiaries, which amounts tended to run to about 35 per

1176 cent., in some instances the foreign subsidiaries themselves in general made a profit out of their retained amounts; is that right? A. That is right.

Q. And Exhibit 21 and the accompanying documents show, do they not, the amount of profits earned by the foreign subsidiaries and ascribable to "Letty Lynton" out of the retained amounts; just yes or no? A. Yes.

Q. Would you explain the basis on which that showing is made? A. You notice on Exhibit 20 that the amount retained by foreign subsidiaries was $142,339.84. We show

on Exhibit 21 that same amount of $142,339.84, being the third item on the schedule. 1177

Q. That figure is the amount retained specifically out of "Letty Lynton"? A. That is correct.

Q. By all of the foreign subsidiaries? A. Yes. Then on Schedule 21-A attached you will find, at the bottom of the third column of Schedule 21-A-1, the item $84,260.05, being the distributing expense of all of the foreign corporations on "Letty Lynton", arrived at in the same manner as the accounting for Culver Export Corporation and Metro-Goldwyn Pictures Corporation and Distributing Corporation, by taking the gross receipts of each country from all pictures, ascertaining their gross distributing expense on all pictures, taking that percentage of distributing 1178
expense to gross income in each country, which percentage appears in the second column on the Schedule 21-A-1, which results in the actual amount of cost of distributing "Letty Lynton" on that basis.

As an example, the first item, Austria, where the gross income was $4,339.75 out of the total of $414,986.41, it cost the Austrian company to produce that gross rental of four thousand odd dollars $1,510.23, being 34.80 per cent. of the four thousand odd dollars; that resulted in $1,510.23 cost of distribution in Austria. The next column 4 shows that the Austrian company retained from Culver $1,735.91, which is one of the items of $142,000 which was retained. Therefore, since the Austrian company retained $1,735.91 1179
on "Letty Lynton" and it cost them $1,510.23 to distribute "Letty Lynton", based on the total cost, they made a so-called profit on "Letty Lynton" of $225.68.

Mr. Driscoll: Are columns 3, 4 and 5 supposed to total column 1?

The Witness: No. Column 3 is the result of the percentage, 34.80, on the base of $4,339.75 gross rentals. After that, the gross rentals are dropped,

and we now have the net cost and the amount retained from Culver.

Mr. Driscoll: Column 1 is gross; column 3 is expense, as you have it set up here; columns 4 and 5 is the computation of what is supposed to be left, is it not, or which should be, should it not? The thing that bothers me is that 3, 4 and 5 do not total 1.

The Witness: No, they will not.

The Special Master: They are not meant to.

Mr. Driscoll: I understand it now.

The Special Master: Have you finished your answer?

A. (Continued.) That illustration of Austria, being the first item, applies to all of the other countries right down through to the total for Exhibit 21-A-2 whose total is brought forward onto 21-A-1; that is, the total of those various items which I have shown for Austria agree with the totals in the main Exhibit 21, and show the net profit of the foreign subsidiaries on the amount retained from Culver.

Q. Is this correct, Mr. Mills, that taking Austria as an example, the $225.68 represents the difference between the amount retained by the subsidiary and the distribution expense, which itself is represented by 34.80 per cent. of $4,339.75? A. That is correct.

Q. And then the $225.68 is the net profit earned by the subsidiary? A. Yes.

Mr. Driscoll: The difference between columns 3 and 4.

Q. The same, of course, goes for all of the countries? A. I said that.

Q. And in the case of Finland it is pleasantly noticeable that the Finnish corporation suffered a loss of one cent? A. That is correct.

Q. Now, in the case of Sweden, of course you have deducted for the minority interest of that one corporation that is not wholly owned? A. Yes, that is $526.52, the last item on that statement, which is copied over on the main schedule. 1183

Q. The only difference between A-1 and A-2 is that A-1 shows the foreign versions and A-2 the English versions in foreign countries? A. Yes, and the total of the English versions on the second page is brought over on the first page to make the combined total.

Q. Now, Exhibit 21-B-1 shows, country by country, the itemized expense of the corporation of that country, is that right? A. And the gross income from film rental.

Q. Taking as an illustration M-G-M Argentina, the Argentine company, $725,878.39 represents, of course, the total rental income from all pictures of that corporation in the year 1933? A. That is correct. 1184

Q. This, in other words, is designed to get a ratio for each country of expense, is that so? A. Of distributing expense.

Q. Of distributing expense, being the ratio that has already been shown as a percentage figure in— A. Schedules 21-A-1 and 21-A-2, in the second column.

Q. In the second column, that is right. Now taking the Argentine company as an illustration, do they send you statements of their expenditures? A. They do. 1185

Q. The salaries of $87,032.97, of course, those were total salaries paid by the Argentine company? A. Right.

Q. Entirely connected with distribution in Argentine? A. Yes.

Q. And shown by your books or the books of that company? A. By the books of the Argentine company and forwarded to us in statements.

Mr. Pollak: I want to ask Mr. Driscoll, do you want, in the case of these various foreign companies itemization of the salary items?

1186 Mr. Driscoll: No, only such as I may develop on cross-examination.

Mr. Pollak: That applies to all of them?

Mr. Driscoll: Yes.

Q. As to the Traveling, Entertaining and Auto Expense, they are expenses of doing business in the Argentine? A. They are.

Q. And similarly as to other countries? A. They are.

Mr. Pollak: I suppose Mr. Driscoll does not want any itemization of those except such as he brings out on cross-examination.

1187 Mr. Driscoll: That is right.

Q. Advertising means advertising of the company of the M G M productions, distributed by the Argentine company, for illustration? A. Yes.

Mr. Pollak: I take it that unless Mr. Driscoll says he wants itemization on some particular point as to some item or country, we will assume that it is prima facie proof as to each item of that country.

Mr. Driscoll: The assumption is well grounded.

1188 Q. Under the heading Light, Heat, Rent, Power, Cleaning, and so forth, that represents expenses of the corporation in the particular country for these named purposes? A. It does.

Q. Printing and Stationery explains itself. A. Yes.

Q. Postage, Telegraph, Cables and Telephone explains itself. Repairs and Maintenance are like repairs items we have had before in Pictures and Distributing Corporations? A. Right.

Q. Cartage and Freight means cartage and freight incurred down there in the foreign country? A. Yes.

Q. Legal and Auditing explains itself. Insurance ex- 1189
plains itself. Commissions, which is represented in only a few countries, in a few instances salaries were paid on a commission basis? A. There were apparently various commissions in connection with the film distribution. We have the details in regard to that.

Q. They were actually paid? A. They were all paid and classified under that item.

Q. As to New York Overhead Charged—Salaries and Traveling—Field Supervisors, you might tell us what that means. A. In a great many countries where we have traveling auditors and supervisors visiting more than one country and having charge of more than one country, the expenses 1190
are paid primarily from the New York office, charged to these various companies, and not included in the accounting which we have rendered of similar items by the Culver Export Corporation.

Q. That is, they were borne by these several companies? A. They were.

Q. General Expenses explain themselves. Taxes, of course, means taxes paid in the several countries by the distributing companies? A. It does.

Q. Depreciation is like depreciation items we have had? A. Depreciation on equipment, generally.

Q. Do you know what rate was used or whether they varied in different countries? A. They would vary in dif- 1191
ferent countries.

Q. They were computed? A. Yes, and charged on their books and reports.

Q. In some instances several foreign countries had minor accounts receivable written off? A. Yes. You will notice that sometimes they resulted in a credit.

Q. That is where they were written off and then recovered? A. Yes.

Mr. Pollak: I suppose, to save time, we may assume that Mr. Driscoll's concession as to this being

prima facie proof extends to the whole schedule, subject, of course, to his right to cross-examine.

Mr. Driscoll: I think that would be a fair assumption.

Q. Exhibit 21-B-2 is exactly the same as Exhibit 21-B-1 in principle, is it not? A. It is exactly the same for an additional group of companies. It took three sheets to cover all of the companies.

Q. And similarly as to Exhibit 21-B-3? A. Exactly.

Mr. Pollak: Does your concession extend to the three pages of companies?

Mr. Driscoll: To the three sheets.

Q. Going back to Exhibit 21, that shows complete, on the basis of the exposition you have given of the exhibits which have gone in evidence, 21 and accompanying papers, exactly what the total profit of the foreign companies was on the amounts retained from the "Letty Lynton" receipts, does it not? A. Yes, that is $58,079.79, but since Culver's share of the Swedish company was only a fraction we have taken and deducted from that total the $526.52.

Q. That deduction you have already explained. A. Making $57,553.27, as Culver's share of the profits.

Q. As Culver's share of the foreign corporations, retained by the foreign corporations, making deduction for the fact that in the case of Sweden one corporation was not wholly owned? A. Right.

Q. This Cost of Prints—England, appearing on Exhibit 21, will you explain that item, $6,619.27? A. In the case of England, it is the practice on all pictures, including "Letty Lynton", that England bears the cost of their own prints, the positive prints distributed in England, while in most or practically all of the other countries Culver bears the cost of the prints. This was an expense by the English company for cost of the prints of "Letty Lynton".

Mr. Driscoll: That is to avoid duty. They have 1195
so many prints that it pays to send the negative, whereas in other countries it does not pay.

Q. Will you explain Cost of Negative—Spanish Version, $7,638.94? A. I think that charge explains itself.

Q. In the case of the Spanish version the negative was actually made abroad? A. Actually made in Sain.

Q. And the expenses borne by the Spanish corporation? A. That is true, and that expense is now included in the Spanish company's expenses and the details attached supporting the cost of distribution.

Q. Nor, of course, the cost of prints—England, included 1196
in the English company? A. That is right.

Q. That gives a final net income from "Letty Lynton", before deduction for Federal income tax, out of the amounts retained by the foreign subsidiaries, of $43,295.06? A. Right.

Q. From that you deduct your Federal income tax? A. I would like to say a word on the deduction of Federal income tax for foreign companies. It might be asked, why should foreign companies pay an income tax to the United States? I understand the entire accounting of the profits of these foreign subsidiaries out of the amount retained is only a possible claim against Culver, and if Culver ever is going to realize the $43,000 when they do realize it they 1197
will have the 14½% income tax deduction the same as any other profit.

Mr. Pollak: Now, Mr. Master, we have now accounted for all the profits of production and distribution and for all of the expenses of production and distribution, in these exhibits now in evidence. You may cross-examine, Mr. Driscoll.

1198 Cross Examination by Mr. Driscoll:

Q. While we are on this item of Federal income tax on Exhibit 21, Mr. Mills, that is not an item that you have paid? A. We have paid part of it.

Q. $6,277.78? A. We have paid part of it.

Q. What part of it have you paid? A. Such part as may have been received as dividends from these foreign companies that made profits.

Q. How much did that amount to? A. I couldn't tell you that without some research.

Q. Then your figure of $6,277.78 is not an item that you have paid? A. It is not an actual item paid in that amount.

1199

Q. Your contention is that you have paid whatever taxes are represented by the profits that you have actually received from the subsidiaries, is that right? A. Profits in the way of dividends.

Q. And under the law, whatever taxes you paid on the foreign income was taken as a credit against the domestic income and you have only paid the difference? A. I am sorry; I don't get that.

Q. The taxes that you paid on the foreign income abroad —A. You are speaking of Culver now?

Q. The taxes you paid on foreign income abroad is deducted from the taxes you paid here, and you only pay the

200 difference? A. It varies in different countries. Some countries—

Q. We are talking about the taxes in this country. You pay a tax on foreign dividends less the tax already paid on that income abroad. A. No; less the tax that the Culver Export Corporation, for instance, would pay. If Culver when they get that dividend in has to pay a tax of 14½ per cent on each dollar of dividend, we pay no tax to the United States Government, but on the other hand you pay the tax to the foreign government. Between the two governments you may pay 20 per cent, in some countries, and only get a credit of 14½ per cent.

Q. (By Mr. Pollak): But in no event less than 14½? 1201
A. That is right.

Q. (By Mr. Driscoll): This item of $6,277.78 is allowed for any such payments? A. Yes.

Q. You have figured 14½ per cent of the income that you have set up on these schedules, is that true? A. That is true. There is no such allowance due, Mr. Driscoll.

Q. Let us turn to Exhibit 18, your second amended accounting for the Pictures Corporation. Schedules 18-B, Home Office Expense of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation. Let me understand the situation, Mr. Mills. These two corporations maintained the same suite of offices? A. They 1202
did.

Q. At that time? A. They did.

Q. And were operated by the same individuals? A. Not exclusively.

Q. We will now turn, for instance, to Schedule C-4 then. Will you kindly tell me which of those individuals named there are employees or were at that time—my questions are directed entirely to this period 1931-1932—were employees of Metro-Goldwyn Pictures Corporation and which were employees of Metro-Goldwyn-Mayer Distributing Corporation? A. They were all strictly employees of Metro-Goldwyn Pictures Corporation.

Q. I see. A. Their salaries being paid by that corpora- 1203
tion; that would fix their character directly as employees of that corporation.

Q. And carried as such on the books of the corporation. Were there any employees at the home office— A. Excuse me. Carried as such on the books of the corporation—the statement was made here that this is a combination accounting and is later separated on a 30-70 basis.

Q. What you want to bring to my attention is the fact that you charged 30 per cent to one corporation and 70 per cent to the other? A. That is right.

1204 Q. I thought that was fully understood by everybody. These employees are carried as employees of the Pictures Corporation on the books of the Pictures Corporation, aren't they, Mr. Mills? A. They are.

Q. Now then, are there any employees at the home office of the Pictures Corporation whose salary has not been divided 30 and 70 in this manner? A. There are none.

Q. So that we are right back where we started from; the salaries of all the employees, then, are shared by both corporations? A. They are.

Q. Distributing and Pictures? A. Yes.

Q. Was your answer pointed to the fact that there might
1205 be some employees who do no work whatever for the Distributing Corporation but work entirely for the Pictures Corporation? A. No, on the contrary, a great many of the employees only do work of the Distributing.

Q. And do nothing for the Pictures? A. That is correct.

Q. Now, this rent of $108,921.58, to whom was that paid? A. The Marcus Loew Realty Corporation.

Q. One of the Loew subsidiaries? A. A subsidiary of Loew's Inc.

Mr. Pollak: It is conceded that neither the item of General Expense, $76,550.31, nor the item of Legal, $50,552.02, appearing on Exhibit 18-B, had any
1206 specific relation to the picture "Letty Lynton." It is explained that both items were concerned with general litigation or problems on a general character applicable to various motion picture producers and/or distributors and affecting the industry or large parts thereof generally, and that the Pictures and Distributing Corporations bore a ratable share along with other concerns not connected with these defendants; and the figures therein set forth are the ratable shares of these defendants, and further itemization will not be called for as to these particular items.

Q. You have on this same schedule, Mr. Mills, 18-B, an item marked Scenario, $20,626.79, and you stated on direct examination that was compensation paid to outside readers: A. Right. 1207

Mr. Pollak: Subject to correction, as these are put down as office expenses, there is not the slightest suggestion that it was directly for "Letty Lynton." I will at this time stipulate, subject to correction, that they were not employed in reading "Letty Lynton."

By Mr. Pollak:

Q. Does Bernstein receive a salary from Loew's Inc., if you know? A. He received it from Marcus Loew Booking Agency, which is the paying agent for Loew's Inc. 1208

Q. Is that a separate corporation? A. Yes.

Q. Is it wholly owned by Loew's Incorporated? A. It is.

By Mr. Driscoll:

Q. Mr. Mills, in this Pictures Corporation accounting on Exhibit 18-D-5 you allocate this overhead 1/36th to "Letty Lynton," is that right? A. That is correct.

Q. Was that your idea? A. It was not exclusively my idea. It was developed after talking with Mr. Pollak and Mr. Cohen who were out at the Coast and secured a great deal of original information as to the actual total pictures whose production was attributable to the year 1932, based on the entire pictures taken and completed in that year and a certain percentage of other pictures which were finished during the year and a certain percentage of other pictures which were taken during the year and not completed until the following year, resulting in 36 units. 1209

Q. As an accounting proposition, overhead is usually allocated on a basis of either labor and material or sales, is it not? A. As an accounting proposition? I don't get that.

1210 Q. Overhead is usually allocated, if it is a manufacturing overhead, it is usually allocated on the basis of labor and materials? A. On the cost of labor and material entering into production.

Q. That is the usual thing, isn't it? A. Yes, in manufacturing.

Q. The making of this picture was manufacturing, wasn't it; that is the classification you would put it in, wouldn't you? A. Yes.

Q. When you allocate it on the basis of 1/36th to each picture, that means that a picture that might have cost 6 or $700,000 by way of labor and material gets the same
1211 classification and overhead as a picture that costs half of that? A. That is true.

Q. And during the year 1932 we had certain instances of that, did we not? Let me ask you if you are familiar with Exhibit C-25 that has been offered in evidence? A. I would have to see the schedule; I don't recognize it from the number.

Mr. Pollak: It was an exhibit out at Culver City (paper handed to the witness).

A. (continued) I am not familiar with this schedule; I have only glanced at it before.

1212 Q. I will ask you to look at it, then, and maybe I can familiarize you to some extent as you go along. You have before you Exhibit C-25, haven't you, Mr. Mills? A. I have.

Q. Will you kindly look at Production No. 633, Rasputin; that had a final cost complete of $1,019,000? A. I have it.

Q. Let us look at 615, As You Desire Me; that had a cost of $183,000? A. No, $183,000 seems to be cost of Night Court.

Q. Night Court, No. 614, $183,000. A. Yes.

Q. And those two pictures, under your system of allocating overhead, would bear the same cost of overhead? A. That is right.

Q. Just the same as a picture like "Unashamed", No. 629, which cost $163,000, would bear the same overhead as the picture that cost $1,019,000? A. That is true. 1213

Q. Now, you are familiar with the motion picture business, Mr. Mills. You have been in it a great many years. A. Yes.

Q. The amount of labor and material that goes into a picture is not measured wholly by the number of shooting days, is it? A. That is a fair basis to allocate——

Q. My question is, whether or not the amount of labor and material that goes into a picture is measured wholly by shooting days? A. It is not measured wholly by shooting days.

Q. For instance, looking again at Schedule C-25, Production 578, 32 shooting days, at a cost of $539,000; and the one just above it, 577, with only 33 shooting days, at a cost of $381,000, or about $150,000 less although it had one more shooting day. A. That is correct. 1214

Q. And that is a frequent occurrence as you look over this list, isn't it? A. Yes.

Q. And the picture that cost $539,000 represents more labor and material, in your opinion, does it not, than the picture that cost $381,000? A. Yes.

Q. Will you turn to the next sheet, please. There you have, for instance, the cost of foreign versions, $734,000 plus and there are no shooting days charged at all from which a portion of the overhead could be charged against foreign versions, isn't that true? A. There are no shooting days entered there. 1215

Q. There are no shooting days on this schedule from which this 1/36th is made up. There are no shooting days charged against that item of foreign versions of $734,000? A. That is apparent.

Q. And that $734,000 represents labor and material, does it not? A. It does.

Q. And ought to share some part of the overhead? A. That seems reasonable.

1216 Q. And you take the cost of shorts, $110,000, there are no shooting days charged up on this schedule against the cost of shorts, is there? A. There are no shooting days; there are no shooting days noted as charged in any of these items; there are notations of how many days were spent in shooting in each of the items, but I don't find in this schedule any notation of how much was charged for each shooting day; so that for all I know there may be an allowance on this item of $110,000 and in the $734,000 for shooting days.

Q. I will ask you this: Conceding that the cost of shorts is $110,000, it is reasonable to say that represents a certain amount of labor and material and, therefore, ought to

1217 share in the overhead; isn't that correct? A. To that extent, yes.

Q. Considering that foreign versions cost $734,000, it represents a certain amount of overhead, a certain amount of labor and material, and ought to share in the overhead? A. That is right, I think.

Q. And when you are making up a schedule upon which you based 1/36th allocation to the picture, there should be allowance for those items in the overhead, is that correct, as an accounting proposition? A. As an accounting proposition that sounds correct.

Q. Look at these items above on the same sheet. A. What item?

1218

Q. Take, for instance, No. 635, Hell Below; at the end of 1931 there is an investment of $25,901. During the year there is an increase of $39,973, but there is no shooting days charge against that, is there? A. No.

Q. None whatever. You take, for instance, Fast Life, No. 637, I think there is an increase for the fiscal year there ending 1932 at $39,381, and there is no shooting days charge against that. A. That was apparently started in the year 1932.

Q. That was the amount expended that year? A. Yes.

Q. That represents labor and material, too? A. Yes.

Q. And there is no shooting days charge against that? 1219
A. That is right.

Q. In view of these facts, Mr. Mills, would you say as an accounting proposition that taking the shooting days, from which you figured that 36 pictures were made, that it is fair, then, to take 1/36th of the overhead and allocate it to each picture—as an accounting proposition, I am asking you as an accountant, Mr. Mills, whether you think that is a fair allocation of the overhead. A. I think the proper allowance should be made for these additional items of production below the line showing the total of 14,991—that a certain allowance should be made for these other items, before dividing by 36.

Q. I will ask you this, Mr. Mills: As an accountant, 1220
isn't it a much fairer proposition to make this allocation of overhead on this labor and material which is represented as near as can be by the final cost or by the cost put into the picture during the year? A. Not the total overhead to be charged to the studio. Should I elaborate on that?

Q. Yes, elaborate; go ahead. A. It is not fair, or you don't get a correct allocation of cost, in my opinion, if you only consider one or two elements which go to make up your allocation of expense to income. One picture which cost $200,000 negative cost may gross a million dollars; another picture which cost $800,000 may gross 1221
a million dollars—I say, may; they do. We have these very large discrepancies between cost and income constantly. If we had a complete list of eventual income from these various productions in which we have a complete negative cost here, we would find that they would not vary with the cost of production. Therefore, taking all of these elements together and the fact that a great deal of this overhead should be attributed to productions as such irrespective of the eventual actual investment of labor and material in the production, we would still have a total of 36 productions to divide the overhead into.

1222 Q. Now, Mr. Mills, we started off, did we not, with the agreement between us, you and myself, that production was one thing, or manufacturing, and sales was another. That is true in any business, isn't it? A. Yes, in this business.

Q. In this particular case you have charged up, allocated, the overhead on the basis of 1/36th or per picture basis? A. Yes.

Q. You have allocated the overhead of the sales on an entirely different basis? A. On sales? I have allocated my cost of distribution on an entirely different basis?

Q. Yes. A. Yes.

1223 Q. So that when you allocate your overhead you do not take into consideration that a picture costing $200,000 may gross a million dollars, and one costing $800,000 may gross a million dollars, and that, therefore, to set them right here you would have to have the gross receipts; you didn't take that into consideration in making up these schedules? A. The cost of distribution?

Q. In other words, Mr. Mills, you took and allocated your manufacturing overhead on a per picture basis; you allocated your distribution overhead on a percentage basis? A. Yes; the cost of distribution was based on receipts; that is a common practice in the motion picture business.

Q. As common practice in almost any industry it is usual 1224 and ordinary to allocate overhead of selling on gross receipts, isn't it, regardless of what it cost to make the thing? A. That is right.

Q. And when you allocate the cost of manufacturing you allocate it on labor and material, as an accounting practice? A. As an ordinary practice, unless other elements enter into it.

Q. So that when you just answered a question a moment ago you said that you could not say that it could be so allocated on this cost here, because one picture costing $200,000 might gross a million dollars and one picture

costing $800,000 might gross a million dollars; in other words, you wanted to confuse the selling end with the manufacturing end of it? A. I don't want to confuse anything. 1225

Q. Why did you put in this condition about a picture costing $200,000 grossing a million dollars and another costing $800,000 grossing a million dollars; why is that necessary in order to allocate this overhead of manufacturing? A. Because the overhead which has not been heretofore allocated, $5,000,000 odd as I remember the figure, is an overhead expense which is not concerned with the actual expenditure at the studio of these respective items. As I understand, the $900,000 item as additional compensation paid to Louis B. Mayer Pictures in addition to their salary 1226 was payable to them on an earning basis, the entire idea of the formula by which this $900,000 odd is arrived at was based on a profit; that if they made profitable pictures they were to get a percentage of that profit; if their pictures were not profitable they would be correspondingly reduced in their remuneration. I think you will find there are other items of $1,500,000 interest in that overhead total not previously allocated to pictures, which is based on other elements than the individual assigned cost of labor and material in each individual picture. That is my reason for saying that in this instance, when I am allocating a large amount of general overhead, that it is not fair to only consider one of the elements, but all of the elements should be 1227 considered.

Q. Now, will you kindly explain a little further, Mr. Mills, and show me how, in arriving at 1/36th for each picture because there were 36 pictures, you were influenced by the fact that one picture costing $200,000 may have grossed a million dollars and another costing $800,000 may have grossed a million dollars, how that varied the formula you eventually adopted of 1/36th? Did it? From 35 to 36 or from 37 to 36? A. No, that 1/36th was arrived at by taking 36—

1228 Q. 36 what? A. By taking the approximate number of pictures completed in the year, of 36 units, not completed pictures but 36 units of completed pictures, as being the fairest method of allocating this total overhead not heretofore assigned to pictures.

Q. How did the gross receipts modify that in any way? A. The gross receipts modified it in that it showed that the values of these pictures were not measured by their respective costs.

Q. You mean that is an argument that might justify your 1/36th formula, don't you? A. No, I don't mean that.

Q. When you arrive at 36 you are dealing entirely with
1229 the production end? A. I am dealing with the—

Q. Where did you get 36? A. It was the figure that I understood that they had arrived at in the examination at the Coast of the number of picture units produced in the year.

Q. So that you are dealing with the production end when you fix 36? A. I am allocating it to production as distribution of production cost.

Q. If it had been 40 pictures produced during the year, it would have been 1/40th? A. Yes.

Q. So that you are allocating it on a per picture basis produced during the year? A. Yes.

Q. So that you are dealing entirely with the production
1230 end, isn't that true? A. I am afraid that is a conclusion, isn't it?

Q. I am trying to have you conclude that. Isn't it true? A. I will have to think about that a little bit. I think I am dealing with other elements than the strict production end attributable to the original cost when I am dealing with interest paid on investment in all kinds of pictures, and I am dealing with compensation of $922,000 paid on the question of profits entirely apart from the production end since the production was only an element of the cost of an item to charge against those profits, and I have $310,000 interest

on investment in the studio plant and equipment which 1231
studio plant and equipment might have been used, for all I know, equally among the pictures instead of twice as much on a picture costing $400,000 than on a picture costing $200,000.

I say I have taken all of those elements into consideration and considered that a proper allocation of this total overhead is to divide it into the number of units produced during the year.

Q. I want to get your reactions as an accountant to this proposition, Mr. Mills. A. That is my position as an accountant.

Q. What you are dividing up is overhead. The base upon 1232
which you are dividing it is what we are talking about, and that is based entirely upon production? A. That is right, based entirely on production, the division.

Q. As an accountant, Mr. Mills, did you stop to figure out that if you charge "Letty Lynton" proportionately to the cost incurred during that year for the various productions made, that the share of "Letty Lynton" in the overhead would be considerably less than 1/36th? A. I didn't stop to figure that far.

Q. That did not occur to you at all, did it, Mr. Mills? A. I don't know that it did.

Mr. Pollak: As a matter of fact, he did not have 1233
anything to do with the preparation of the exhibit.

Q. Nor did you have anything to do with the 1/36th? That is what I want him to acknowledge. He is trying to defend you fellows that invented the 1/36th.

Mr. Pollak: As a matter of fact I would be glad to have him share in the glory of it. As a matter of fact it was done out in Culver City.

1234 Mr. Driscoll: That is what I say.

The Witness: I think I did say so in the beginning.

Q. It is true, isn't it, Mr. Mills, that you never made the 1/36th formula? A. It might be difficult to say who made the 1/36th formula; maybe Soule invented it when he invented accounting in the first place. I do not claim authorship of the 1/36th formula.

Q. Let me ask you this, as an accountant will you say that the 1/36th formula is a fair formula for the division of overhead in this case when "Letty Lynton's" proportion of
1235 the cost expended in that year is 1.8 per cent? A. I would still say it was a fair allocation of cost.

(Hearing adjourned to Thursday, May 13, 1937, 10 a. m., to be continued on Monday, May 17, 1937.)

HEARING OF MAY 17, 1937.

JESSE T. MILLS, resumed.

Cross examination by Mr. Driscoll (continued):

1236 Q. When these contracts are made do you generally get a deposit on contracts?

Mr. Pollak: What contracts do you mean?

Mr. Driscoll: Exhibition contracts.

A. Answering your question, Mr. Driscoll, there is very little deposit received in advance. At the end of the year 1932 on the domestic exhibitors on all pictures there was only $27,800.91 in that class. And on foreign companies, I believe in the foreign companies, not Culver, there was a total of $7,720.

Q. Do you know what part of the contracts for "Letty Lynton" were percentage contracts and what part was flat rentals? 1237

Mr. Pollak: That is really a matter for the contract department, Mr. Cohen says.

A. That is contract department information which the general books would not indicate.

Q. Do you know, on the percentage contracts—exhibition contracts we are talking about—whether or not it is customary to receive a cash deposit on the making of the contract? A. It is not customary of late years.

Q. Was it in 1932 and 1931? A. Not in 1932, as is proven by the fact of the small amount on deposit at the end of the year. 1238

Q. On this particular picture "Letty Lynton," out of a total of 7,666 exhibition contracts, 7,315 of those, or practically all but 350, were made prior to release, isn't that true? A. I think that is what was testified by the contract department. I haven't those figures before me, nor the data making them up.

Mr. Pollak: That is an exhibit.

Mr. Driscoll: Exhibit 15.

1239

Q. Have you Exhibit 18 before you, Mr. Mills? A. I have Exhibit 18 (producing paper).

Q. Turning to sheet 18-A, the total film rental income there does not include Canada, does it? A. That is true.

Q. Will you turn to Exhibit 20, please? A. I have Exhibit 20 (producing paper).

Q. Turning to sheet 20-A, does your total film rental income there include Canada? A. It does not.

Q. So that you have not got the film rental of Canada on either of those statements, that is, 18-A or 20-A? A. That is correct.

1240 Q. And that would vary your total distributing expense percentage, would it not, if you had it on either one or the other; it would lower that percentage by so much? A. It has no effect on the distributing expense because we spent nothing for Canadian expense, being an outside distributor.

Q. Let us see whether it is or not. In 18-A you presume to give the total expense for maintaining the office of the Corporation for the year 1931-1932? A. Home office expense.

Q. Into that office goes the money that comes in from Canada? A. Yes; it is handled.

Q. And in Exhibit 20-A you have taken a portion of that
1241 home office expense and assigned it to Culver? A. That is right.

Q. And you have allowed nothing for the Canadian receipts on either statement? A. That is correct.

Q. You say it would not make any difference in the percentage? A. Because the real expense is in the field and handling distribution, which is borne entirely by Regal. The handling of the mails and other small matter, of course——

Q. You are asking both as to Culver and as to Pictures Corporation the percentage of expense as against the total film rental, isn't that correct? A. That is right.

Q. And you have not allowed for the Canadian receipts?
1242 A. Because we allowed for Canada separately; we collected the Canadian separately on "Letty Lynton."

Q. Where are the Canadian receipts allowed for separately; show us? A. I say we accounted for the Canadian receipts for "Letty Lynton" distinct from the others.

Q. So we have in these various accounts the direct charges to "Letty Lynton?" A. That is right.

Q. You are dealing here in these two schedules with something else; you are dealing with the undistributed expense of the home office? A. That is right.

Q. You have not included the Canadian receipts? A. That is right.

Q. Now, looking again at 18-A, this film rental income 1243
of $30,020,526.08, did that include the income from the shorts? A. It did.

Q. How much income is represented in that $30,000,000 by the shorts? A. $772,284.74.

Q. Does that figure of $30,000,000 include the receipts on Cosmopolitan Pictures? A. The $30,000,000 includes the receipts on Cosmopolitan Pictures.

Q. How much is represented by Cosmopolitan? A. It will take a little time to segregate that figure.

Q. As a matter of fact, the receipts of each picture are set up separately on your books, are they not? A. Yes, there is a separate sheet for each picture. 1244

Q. So that it is not a difficult job to show just how that $30,000,000 is made up? A. It is not difficult; it would take some little time because the ledgers are voluminous.

Q. Is the Cosmopolitan figure larger than the shorts figure?

Mr. Pollak: If you know, off hand.

A. I would rather not estimate an amount on that without referring to the old ledgers.

Q. Can you tell me, whether or not the figure includes the gross amount of the Cosmopolitan, or the share of the Pictures Corporation? A. It includes the gross amount. 1245

Q. In distributing Cosmopolitan the distribution was on a fixed percentage charge, percentage of the gross? A. It was on a fixed percentage basis.

Q. Will you kindly get for me, please, when you can, the part of that $30,000,000 represented by Cosmopolitan receipts? A. Right.

Q. I presume it is represented by about four pictures or six Cosmopolitan pictures? A. It is more.

Q. Will you kindly break it down into pictures? On this 18-A you have taken depreciation on equipment of the

1246 home office of $14,927.54. That is based, is it not, on a depreciated cost figure? A. That is based on an original cost figure.

Q. Original cost figure? A. $149,000.

Q. Depreciated over what period of time? A. Ten years.

Q. Let me get that again. It is based on original cost figure of $149,000? A. Odd.

Q. And you took 10 per cent against that for depreciation? A. That is true.

Q. And this $149,000 had no relationship, no direct relationship with the value of the equipment at the beginning of this fiscal year? A. On the depreciated basis it repre-

1247 sented the value.

Q. That is your argument, isn't it, Mr. Mills? A. Yes.

Q. As a matter of fact you did not estimate the value of that equipment at the beginning of that fiscal year to fix the depreciation? A. I did not.

Q. You simply took cost and depreciated against the original cost as a basic figure? A. Yes.

Q. Didn't Mr. Rubin have an expense account of $1,000 a week besides the figures you have set forth, these two figures of $50,550 each? A. The total basic compensation including allowance for expenses was $2,000 per week. That was divided into two checks of $1,000 each, and there was seven weeks of the year during which 35 per cent cut applied to

1248 his salary when those checks were $650 a week each, which is the reason for the total being $50,550 instead of $53,000.

Q. Exhibit 9, if you will turn to that, please, that is the depreciation schedule. There you have two items of depreciation on studio equipment and studio sound equipment totaling $345,589.18. I don't believe we definitely ascertained as yet whether or not the basic figure upon which that 15 per cent is charged included the cost of props or properties. A. I sent for that information from the Coast. It only came in this morning by wire and I have not had an opportunity to see what figures are included.

in it. If I can answer that at a later time, it will not be 1249
necessary to take the time now to prepare them.

Q. In estimating this interest on investment of $310,584.16 that we talked about a moment ago, that appears on Exhibit 18-D-5, does that include interest on investment in props? A. It will include any moneys invested in props which we capitalized, yes.

Q. Let us see what we can find out that might give us some information in response to the question. Were moneys invested in props capitalized? A. So far I have found one item of $12,000 in the year 1932 for props capitalized. I have not been able to trace any other amounts.

Q. But this $310,584.16 is based upon the investment 1250
that had taken place prior to 1932, is it not? A. That is correct.

Q. Do you know how much of the capital, of the principal figure on which that is the interest item, is represented by moneys invested in props? A. No; that is the figure I have asked for a little time to digest, the figures that I have received from the Coast this morning.

Q. So that we have two items then, one is depreciation and two is investment. We want to know if they include moneys invested in props. A. That is right.

Q. Now, Exhibit 19, that is the accounting of the Distributing Corporation, will you tell me whether or not that figure of film rental income of $727,000 includes the rental 1251
from shorts and Cosmopolitan? A. The $727,000, the first item on Exhibit 19?

Q. Yes. A. That is the income from "Letty Lynton" only.

Q. That is my mistake. This figure of $30,020,526.08, on 19-A, that is the same figure that we have had before? A. On Exhibit 18.

Q. All of these schedules that had to do with depreciation and had to do with interest on investment are based upon cost and investment figures and not upon the value of the properties at the beginning of that fiscal year? A. I am sure, with one exception.

52 Q. What exception is that? A. That is the value of the land.

Q. That is appraised? A. That is the appraised figure.

Q. Your schedule includes the figure that was given by your appraiser at Culver City? A. Yes.

Q. Except for that my statement is true, is it not? A. Yes.

Mr. Pollak: I think, for your convenience, Mr. Master, we should get the exhibit number on which this land valuation appears.

Mr. Driscoll: You will find it, if you are interested, on 18-F, the first figure on that page.

53 Mr. Pollak: Land, $969,210.

Q. This general situation applies not only to these investment and depreciation figures based upon the home office equipment and studio equipment and so forth, but also to these schedules you have attached to Exhibit 19 having to do with equipment of foreign offices? A. That is true.

Mr. Pollak: That is, that the testimony was based upon actual cost.

Mr. Driscoll: Actual cost; the schedules are made up on that basis.

54 Q. Now, referring to Exhibit 20-A, this film rental income of $15,563,592.34, you have already testified, did not include the Canadian rental, did you not? A. That is correct.

Q. How about shorts and Cosmopolitan? A. It includes all other income received by Culver or its distributing subsidiaries, except Canadian.

Mr. Pollak: Culver did not receive Canadian.

A. (Continued.) It includes all income from foreign sources, excluding Canada, as already stated, from all classes of pictures.

Mr. Pollak: If I may just amplify that—and therefore includes all income received by Culver or its subsidiaries? 1255

The Witness: It does.

Redirect examination by Mr. Pollak:

Q. Mr. Mills, there will be some more matters looked up and there may be some interrogation on one side or the other about that. You have testified to depreciation on a straight line basis, both as to lands and equipment out at Culver City and as to office equipment here in New York. Will you explain what the theory of straight line depreciation is? 1256

Mr. Driscoll: I don't believe there is any depreciation as to land in here. I don't think that is correct.

Mr. Pollak: You are right.

Q. Both as to buildings and equipment at Culver City and as to equipment at the New York office?

Mr. Driscoll: What is the rest of the question?

Q. Will you explain the theory of straight line depreciation? A. We take the total cost of the asset, whether it is buildings or equipment, and charge ten per cent a year on the office equipment and branch equipment, which is mainly office, 15 per cent on the studio equipment, and five per cent on the studio buildings. As items of cost are added subsequent to the original installation, the ten per cent depreciation is started in the next year after the addition of the improvements or new equipment or new buildings or improvements on the buildings. That 10 per cent is carried on until the cost of the asset is exhausted, in other words, in ten years. So that the total amount on which the depreciation is calculated is always the cost of the asset. 1257

After the depreciation of all equipment entered into an

1258 account, the cost of which has been entered into the account, has passed ten years, there is naturally a certain cost there which has been fully depreciated and on which no further depreciation is taken, which accounts for the one million five hundred some odd thousand dollars of which there seemed to be a little confusion—or between two statements—which show no confusion, but rather the actual condition of the account, since this reserve for depreciation was not reduced by the cost of the asset entirely written off, as is done in some cases.

Q. I think we understand that $1,500,000 item. What exhibits were used for comparison, the two exhibits? A. I

1259 think one was 18-F, and 9.

Q. The essence of the matter is—and sticking now for the moment to this $1,500,000 odd item—is that the same item appeared as original cost of equipment acquired more than ten years before and, therefore, completely depreciated, and also appeared as the write-off on that equipment; is that right? A. That is right.

Q. And it washed itself out? A. It did.

Q. What I wanted to get more particularly was this general theory of so-called straight line depreciation. Is this correct, Mr. Mills, that unless you depreciate on a straight line basis you would never completely depreciate any item?

1260 Mr. Driscoll: You asked him that before and it is in the record.

Mr. Pollak: I would like to get an explanation of what that is.

A. I will explain it in this manner: If we buy equipment for $100,000 and write it off on the straight line basis, we would write off $10,000 a year for ten years. At the end of the ten years we would have no cost left to depreciate and our asset would be entirely depreciated.

If we were to take a percentage of the undepreciated cost at the beginning of each year, you would have to take a

very much larger percentage than the ten per cent to get 1261
a fair distribution of depreciation charge in any one year. You would have to go as high as 20 per cent to arrive at a fair charge for depreciation on the equipment, and assume that you are keeping up this equipment by constant expenditures, as is our case, at the end of any one year you will have some equipment which is, say, nine years old and some which is eight years old and some which is five years old and some which is only a year old, and the composite result of these various aged equipment written off, for instance, 20 per cent of the value at the beginning of the year, would still give you a fair basis for arriving at your depreciation for that year. But you can hardly jump from 1262
one system to the other in the middle of your term of depreciation.

Q. Without regard to that, isn't this true, that if I take an office safe, which I suppose is as durable as anything, and depreciate it not on some fraction of the original cost each year, but on some fraction each year of the residual value at the end of the last year, I would never get it completely depreciated? A. You never would.

Q. Because I would always be getting a fraction? A. You would only be taking a part.

Q. That applies to whatever object you depreciate? A. Yes.

Q. Mr. Mills, do you want to add anything to the testi- 1263
mony that you have given with regard to your not including distribution expense for Canada in your estimates of ratio of overhead to receipts, either the Culver estimate or the Pictures and Distributing estimates? I know you have given some testimony. A. Yes. I would like to say, on the Culver, of course, that there Canada is entirely eliminated.

Q. There is no relation whatever? A. No relation to it whatever. On Pictures, I have considered that to arrive at a fair basis of total expense allocated to "Letty Lynton" as one of the pictures, as distinguished from all pictures, that

1264 Canadian income from all pictures should be excluded because none of the expenditures included in the general overhead had anything to do with, or rather, was affected in any way, by the Canadian distribution. They were entirely expenses applicable to the domestic distribution, and the fact that the Canadian distribution was handled by an entirely independent concern on a percentage basis stopped me from including any of those expenses as applicable to Canada and, therefore, as applicable to their gross receipts.

Q. Putting it succinctly, is this a fair statement—that your made no allowance for distribution expense in relation to the Canadian business because there was no distribution expense in relation to the Canadian business? A. That is
1265 correct.

By Mr. Driscoll:

Q. I suppose the same thing applies to the foreign subsidiaries? A. No, the foreign subsidiaries are subsidiary corporations of Culver, require a certain amount of supervision on our part, on the part of the office, and traveling expenses and other items enter in there. They are not outsiders, except one of the small companies, Sweden.

By Mr. Pollak:

1266 Q. Which are only partial? A. Yes.

By Mr. Driscoll:

Q. They are part of the family, these foreign subsidiaries; they are subsidiaries of Culver; they are not outsiders? A. They are not outsiders.

Q. But in the case of Canada there is not any necessity of including that cost as part of the general expense? A. That is true.

Mr. Driscoll: That is all.

WILLIAM L. KEATING, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows. 1267

Direct examination by Mr. Pollak:

Q. What is your occupation? A. Certified public accountant.

Q. Are you a member of any accounting firm? A. A member of the firm of Miller, Donaldson & Co.

Q. They were accountants for M-G-M in 1932, is that correct? A. That is correct.

Mr. Driscoll: I hope they are still. 1268

Q. And Mr. Driscoll is correct in his hope that you still are the accountants for M-G-M? A. We still are.

Q. Mr. Keating, I will show you a certain item of $500,000, Reserve for Continuities——

The Special Master: Exhibit 18-D-5?

Q. On Exhibit 18-D-5 there appears an item of $500,000, Addition to Reserve for Continuities. Exhibit 18-D-5 is an accounting here (handing paper to the witness). A. I recognize it.

Q. You can just answer this question yes or no. Did you ever have anything to do with the setting up of that item in 1932? A. Yes, I did. 1269

Q. Will you tell in your own way how that item came to be set up in 1932?

Mr. Driscoll: I don't think I am so much interested in that as what it represents. I object to the form of the question.

Mr. Pollak: The answer will give what it purports to represent.

Mr. Driscoll: How it came to be set up—it might

1270 have been raining that day and they had nothing else to do.

Mr. Pollak: If that is true then it won't mean anything.

A. Would you like a schedule on that, or my own words?

Q. I want your own words. A. It was evident to us from experience in previous years, and particularly in this year, that not every continuity which was purchased would find its way into production and eventually appear in a picture. It is extremely difficult to measure the value of a writer simply because his thought has been expressed upon paper, and to make provision for those continuities which were 1271 doubtful of ever reaching the finished picture stage we analyzed all the pertinent data and in conference with our colleagues, Price, Waterhouse & Co., arrived at a figure of $500,000 as representing a reasonable reserve against the total balance of continuities which would not eventually be used.

Q. That is, did you find from your analysis of the business and of its past history that as a regular practice there were more continuities written than were put into production? A. Yes.

Q. I now show you a schedule. Did you prepare this schedule, Mr. Keating (handing paper to the witness)? A. 1272 Yes.

Q. And it was correctly prepared, of course? A. I believe so.

Q. Did you have anything to do with the setting up of a reserve for continuities in 1930? A. I had much to do with the direct write-off of continuities in 1930. There was no reserve set up.

Q. In 1930 you just completely wrote off the accumulation? A. Yes, those which we believed to be unuseful.

Q. Will you explain in a general way or as thoroughly as you can, how you came to select the figure of $500,000 for the reserve in 1932? A. Well, the first arrival of that

figure naturally con. ted of two steps. First we considered 1273
all of the figures ava. le to reach a decision that a reserve was required, and sec adly, it was a matter of exercising judgment as to how much of a reserve appeared at that time to be required to provide for these continuities of doubtful value. It would be pretty hard to tell how much you were going to lose from doubtful ones; it will be impossible to tell exactly until several years have passed which of them will prove not to be used.

Q. But among a great many doubtful ones you assume that a number will not be used? A. That is true.

Mr. Pollak: I offer this schedule in evidence. 1274

(The paper just offered was received in evidence and marked Defendants' Exhibit 22, of this date.)

The Witness: You mean, explain the method by which we arrived at the necessity for a reserve and the path of actual thought we followed in arriving at the $500,000?

Q. That is exactly what I want. Explain it in your own way. A. We started off in 1930 with a balance of continuities costing $881,000 odd. The exact figures are on that schedule. During 1930 we spent two million two and used 1275
one million seven, which left an excess charge that year of a little less than $500,000, and at the end of the year we wrote off $505,000, so that the net decrease for the year was $20,000, and we ended the year with a balance of $861,000.

Starting with that balance at the beginning of 1931, we expended a little less than two million three and used or sold a little less than two million one, so that we had an excess of expenditure of a little above $200,000 for that year. However, some of those that we had specifically written off in 1930 were reinstated because they found they

1276 could use them, and also a small amount was written off directly that year; but the net change was $22,000 of reinstatements.

Q. In 1931? A. In 1931. So that we had a net increase in the balance of $236,000, ending the year with a balance of $1,097,000. A further thought in 1931 was that the studio continued to operate at a very high rate. I believe 1930 was the peak up to that time, and 1931 was substantially the same total expenditures.

Further, productions used in 1930 were only sixteen million dollars, whereas in 1931 they were twenty-one million dollars.

1277 All of these indicated to us at the end of 1931 that there was every chance that this excess continuity charge would find its way into productions, completed productions, and that there existed no necessity this year for write-offs of continuities or setting up a reserve. In other words, we had cleaned house pretty thoroughly in 1930 and there was every expectation that production would continue at a high rate.

However, in 1932 the picture changed considerably with respect to the production and consumption of continuities. We expended for continuities during the year two million one and used or sold only one million five, leaving an excess of $581,000. There was written off specifically $51,000,

1278 leaving a net increase of $530,000. Also, studio expenditures had fallen, had decreased $4,000,000 from the previous year, and productions consumed only sixteen million dollars as against twenty-one million the previous year.

All of these facts, together with an analysis of the age of the continuities remaining on hand indicated that we should either write off specifically or set up a reserve if unable to specify exactly which continuities should be designated as worthless, a sum of roughly $500,000. There was some talk at the time of making it a larger sum, but my colleague, Mr. Brewster of Price, Waterhouse, decided that if

we had to decide upon a specific amount that $500,000 1279
clearly was absolutely necessary to correctly state the real value of the continuities on hand at that time.

Q. In substance, did you find that in that year 1932 there was a great diminution in the consumption of continuities at the studio and a relatively large production of them? A. Yes.

Q. Mr. Keating, you have been connected, have you not, with M-G-M accounting continuously since the year 1930? A. As a public accountant I have visited the studio and audited them every year except one, in which year my senior partner, Mr. Miller, visited the studio and performed the same supervisory work that I would have done had I 1280
been there.

Q. Mr. Keating, have you prepared a second schedule showing the figures as to continuities written and charges incurred therefor and the continuities used or sold or rejected after once having been reinstated, for the whole period 1930 to 1936? A. Yes.

Q. Is this that statement (handing paper to the witness)? A. Yes, it is.

Q. And of course this was correctly prepared? A. Yes.

Mr. Pollak: I offer it in evidence. I think it completely explains itself.

1281

(The paper just offered was received in evidence and marked Defendants' Exhibit No. 23, of this date.)

Q. Mr. Keating, I have asked you to do another piece of work for us, also including the whole period from 1930 to 1936. Have you prepared for that period a statement of relative cost, I think we may call it, of on hand material, inclusive of stories and continuities and all other costs of production at the M-G-M studio, with a breakdown of cer-

1282 tain of the regular material costs? A. Yes, I have. (Paper produced.)

Q. And that was correctly prepared? A. I believe so.

Mr. Pollak: I offer it in evidence.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues in any way.

Q. You personally prepared this document which I have handed to the Special Master, this comparative statement of direct production costs? A. I have supervised the preparation of it, but an assistant took the data from the material which has appeared in our reports for this whole period.

1283

Q. And it is correct? A. I believe it to be correct.

The Special Master: It will be received, and the exception noted.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. 24, of this date.)

Q. On Exhibit 24, what does the item "Book" on the last column indicate, except for the percentage item? A. That represents the purchase of books.

1284

Q. The item "Original Stories, Continuities, Dialogue and Script Expense" means the expense in connection with writing at the studio? A. Yes.

Q. Including re-writing for picture purposes of material which in book form had been acquired? A. That is right.

Mr. Pollak: I think that is all; you may cross-examine.

Cross examination by Mr. Driscoll: 1285

Q. Let us go back to Exhibit 22. You start with 1930 there, the balance at the beginning of the year, $881,793.27. Where did you get that figure? A. That is the accumulated cost of continuities which were on hand at the beginning of the fiscal year ended in August, 1930; or, in other words, it would be the balance on hand at the end of August, 1929.

Q. Was that after deducting any write-offs or setting up any reserves? A. There was no reserve set up, Mr. Driscoll; that was the only sum that was on the balance sheet in 1930.

Q. Actual cost? A. Actual cost of continuities on hand 1286
at the end of the fiscal year 1929, which is equivalent to the beginning of the fiscal year 1930.

Q. When you speak about continuities do you distinguish between the term continuity and other literary material? A. No; continuity is a general term, out there. I think the expenditures are broken down into Books, Original Stories, Continuities, Dialogue and Script Expense. This term Continuity is a general term embracing all original stories, continuities, dialogue and script expense.

By Mr. Pollak:

1287

Q. You mean, as used in Exhibit 22? A. There are no book costs in this expense, Mr. Pollak. Books are carried in New York until such time as they are transferred to the studio to be used in production.

By Mr. Driscoll:

Q. When you speak of books you mean a published story? A. Book rights.

Q. If it was a play it would come in under the term Con-

1288 tinuity? A. No, it would come in under the term Books. If we bought a play it would be a book.

Q. Then you exclude in arriving at this term Continuity books, plays and things of that sort that you buy?

Mr. Pollak: On Exhibit 22.

Q. We are talking entirely about Exhibit 22. A. That is true.

Q. Then what does it include? You are excluding books and you are excluding plays, and your are excluding short stories that may be bought from magazines and things of that type. A. This would include original stories produced

1289 at the studio, the salaries and expenses of writers developing purchased books and plays and short stories, the writing of dialogue, the script expense in the preparation of them, all to bring an idea or somebody else's ideas expressed in a purchased book or play through to completion.

Q. Expressing it differently, it practically represents labor expended by the corporation in the preparation of literary material? A. Plus any overhead of that department, which is relatively small.

Q. But does not include purchases of literary material? A. That is right.

Q. How long had that item of $881,000 been on your

1290 books, or any part of it? A. That is very easy to explain; it represents all our reports for 1929, 1928 and 1927 back.

Q. Generally speaking, part of it may have been on there for a great many years, isn't that true? A. Some portion of the $881,000 may have been there for a year or two or more, which I can furnish you if you wish to have it.

Q. When you are preparing a story for production in pictures in the ordinary course of business that story is produced in the matter of months, isn't that correct? A. I would rather show the facts than to make my observations, Mr. Driscoll.

Q. Have you those facts to show me? A. If you wish a general observation, some stories take a few months; some of them, if they are big stories, may practically take a year or even more to bring through to this completed stage, and others might sort of die on the vine while they are waiting their development; but the average story, I should say, could be developed in three or four months. 1291

Q. When such a story goes through to production, you charge out of this item here the money, labor and material expense put into that particular story, and charge it to that particular production? A. Yes, when it is ready for shooting it is charged to production and is carried along there until completion.

Q. Take Grand Hotel for an illustration, and you were working on that for a year; you would transfer out of this account here and charge directly to Grand Hotel all of these charges as soon as Grand Hotel got into shape for shooting? A. That is correct. The practice is to collect the charges around the continuity of Grand Hotel until it was ready for shooting, and then to continue the charge in what we call Work in Process and is one of the final charges against the picture as they begin to shoot. 1292

Q. And when you come to that shooting on a production, you do gather together all these items that you spoke of as having been centered around that production and charge that to that production? A. Yes.

Q. They become a direct charge against this production? A. Yes. 1293

Q. Then this item, $881,793.27, might properly be called Work, Labor and Material that has been put into continuities which have been temporarily abandoned? A. No.

Q. Well, permanently abandoned? A. No.

Q. How would you describe it, Mr. Keating? A. That represents work in process on continuities uncompleted and may include some that never will be completed and put into production, but they include quite a batch of continuities that are not ready for shooting.

1294 Q. Do you think "may include some" is strong enough? A. I agree th. it did include some that never did find their way into production.

Q. As a matter of fact, are you familiar with the account of the "Letty Lynton" picture? A. With the account of it?

Q. Yes. A. I am familiar with the costs collected around "Letty Lynton."

Q. You have examined the books on "Letty Lynton", I presume? A. We have examined the books of the company in the studio, and when I think of "Letty Lynton" I think of the cost accounts; and we have examined the production
295 costs on "Letty Lynton."

Q. In the case of "Letty Lynton" there was taken out of this account I presume the cost of this continuity for "Letty Lynton, and transferred to "Letty Lynton" as a charge against "Letty Lynton" direct? A. That is right.

Q. And all of the work, labor and material that you could segregate against "Letty Lynton" was charged against "Letty Lynton" direct? A. Yes.

Q. That is a sort of reservoir that has been used as a means of separating them that way? A. May I say this? That if "Letty Lynton" were in preparation in the fiscal year 1930 and had accumulated some costs on the continuity, it would be in there to the extent that the cost had
296 been expended. Now, suppose there was picture XYZ; we kept it a year and then put it through to completion, upon which we had some expenditures for continuity, that also would be there. It represents a long list of continuities upon which money had been spent but were not quite ready for shooting.

Q. I think I understand it quite well, Mr. Keating. As a matter of fact, if there were these various payments and expenses centered around the continuity of "Letty Lynton" that had accumulated in the year 1930, and then if in the year 1930 it had not gotten into shooting yet, you would

carry that into 1931 and it would still be carried in this account? A. Yes. 1297

Q. In 1932, assuming that "Letty Lynton" was shot in February, 1932, all of this would be picked out of that account and put against "Letty Lynton" directly? A. That is right.

Q. And "Letty Lynton" would pay for those things; they would never go back into this account again? A. In the ordinary course, that is true.

Q. Assuming that "Letty Lynton" was completed and was distributed, and so forth, they would not go back into this account? A. If "Letty Lynton" were completed and distributed the continuity cost accumulated around "Letty Lynton" title would flow into the Work in Process and flow out into the total cost for "Letty Lynton" as such. But if you wish me to add a bit there, it would not include any overload for these rejected continuities in the form that I have described. 1298

Q. Is it fair, then, to characterize these as rejected continuities, Mr. Keating? A. Which?

Q. These, this overload which you speak of; they are actually rejected continuities, aren't they, Mr. Keating, using your term? A. Let us make sure that we understand each other, Mr. Driscoll.

The Special Master: I think I understand it. Others of them might not have come out at that particular time. 1299

The Witness: I would have to refer to Exhibit 23, to find out how many are good or bad or make other schedules which would show directly.

Q. Let me ask you this one question. This item of $500,000 set up in 1932, wasn't that simply a profit and loss charge rather than a production cost charge? A. What makes you say that?

1300 Q. I am asking. I am not an accountant; I don't know a thing about it, and am willing to learn. A. If you are seeking the facts, that is a job that I always like to endeavor to explain. If you were a small merchant and had a list of accounts receivable on your books, or an inventory of groceries, and you knew that some of your accounts were going to become bad but you didn't know which ones, and you knew some of your groceries were going to spoil; and you wanted to value your inventory and accounts receivable, you probably, as a prudent man, would set up a reserve for those which were going to become bad. It is a matter of judgment whether you set up a reserve of $500 for a small merchant or $500,000 for a large one. This is
1301 the best expert opinion of two very good public accounting firms as to the valuation reserve of these continuities still on hand.

Let me say it this way,—that having on hand an inventory of continuities which came out of the brains of the writers employed on this work, which cost us a million six, the question is what are they really worth, and a valuation reserve of $500,000 was set up, so that this might be expressed at $1,128,425.04, leaving what we considered to be their value as nearly as it could be ascertained in evaluating the products of the writers' work.

1302 The Special Master: That doesn't exactly answer Mr. Driscoll's question; does it, Mr. Driscoll?

Mr. Driscoll: No, it does not.

The Special Master: Do you wish to press your question?

Mr. Driscoll: No.

The Witness: I would be glad to answer your question, if I have not done so.

Q. Strictly speaking, it is a profit and loss proposition which has nothing to do with production cost whatever?

A. I cannot agree with you, Mr. Driscoll. If we had time I would be very happy to try to explain it to you. 1303

Mr. Pollak: I think that you might perhaps expand the answer.

The Special Master: What did he do; charge it against earnings or did he charge it against surplus?

Q. Which did you charge it against? A. The rejected continuities, directly written off specifying the titles or written off into the reserve valuation, is charged to general overhead and the unabsorbed overhead at the end of the fiscal period, as I understand it, although this is done at New York and not at the studio, charged to the picture X 1304 and written off exactly as if a picture of that title had been produced.

Q. In other words, you charged it to profit and loss? A. No.

Q. You did not charge it to earnings, did you? A. It could be an overlay or an overcharge, a small amount of which would be apportioned against every picture that had been produced at the studio, therefore finding its way into cost. But instead of that it is charged to what might be called a fictitious picture; in other words, it is charged to the cost of all of these pictures, but concentrated into one picture which I take is a fictitious picture but nevertheless 1305 accomplished substantially the same purpose without attaching small sums to pictures already released.

Q. Did you set up on your books an account for this picture X? A. Yes. It is not done at the studio, but is transferred to the New York office.

Q. You don't know what is done at the New York office? A. I do through my New York men and from my partner's supervision of the work in New York. What I wish to try to make clear is that it does make its way into the cost of their production.

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1306 By Mr. Pollak:

Q. Was there a reserve for continuities or write-offs prior to 1930? A. The reason I started this schedule in 1930 was because that was the occasion of my first visit to the studio of which I had personal knowledge, but I can very easily ascertain from our reports made by accountants resident in Los Angeles who did the work for us, for any year prior to 1930. I have no personal knowledge, as I said, of reserves or any write-offs made prior to that year 1930, but I do feel that the reserve method was not followed prior to the period for which this statement is prepared.

1307 By the Special Master:

Q. Is it your testimony that since 1930 there has been actually set up $500,000 as reserve for continuities? A. The first reserve was set up in 1932 in the amount of $500,000.

By Mr. Pollak:

Q. There was an actual write-off in 1930? A. There was an actual write-off of $505,179.87.

1308 The Special Master: And there was in 1932 an annual reserve set up?

Mr. Driscoll: Not annual.

The Special Master: Just the year 1932?

Mr. Driscoll: Yes.

The Witness: May I say there was a reserve in 1932 of $500,000, and it so happens there have been reserves taken of $500,000 each year every year since except in 1933 it was $450,000; continuing in 1934, it was $500,000; in 1935 it was $500,000, and in 1936 it was substantially $1,100,000.

By Mr. Driscoll: 1309

Q. So that there is not any set figure on it? A. No.

The Special Master: You are asking for the account in which that appears?

Mr. Driscoll: Yes; I would like to see what they do with this. I am not satisfied. I want to see this account, this picture X. That is all I want to ask at the present moment.

Re-direct examination by Mr. Pollak:

Q. Mr. Keating, in each year the write-off or reserve, 1310
whichever it is, represents the best judgment that you can bring to bear on this problem, of your firm of Miller, Donaldson & Company? A. That is correct. It results from a new survey each year of the conditions at the end of each fiscal year.

Q. It appears that the figure for 1936 was much bigger than for previous years, and also that in that year it was an actual write-off and not the creation of a reserve? A. Let me put it to you this way, Mr. Pollak. At the beginning of the fiscal year 1936 we had accumulated a reserve in the fashion I have described of $1,950,000. At the end of the year we found that there had been accumulated large charges for continuities which were not being used, in much 1311
the same state of conditions as we had in 1932, so that instead of taking a reserve for $500,000 we realized that we had to have a larger reserve. Understand, all these years we were trying to get what we call specific write-offs, but it was difficult to have them say which continuities they were willing to abandon. In 1936, at the end of the fiscal year, they were willing to specify which particular stories would not in all probabilities reach the finished stage, and the accumulation of that amounted, as I say, to $1,100,000. If they had not specified, with our collaboration, the par-

1312 ticular stories they were willing to abandon, we would have continued the reserve method and set up a million one or a million five hundred thousand dollars.

By Mr. Driscoll:

Q. In other words, they arrived at a decision that certain stories A, B or C, were worthless? A. Yes.

Q. And just wrote them off? A. That is right. It is a difficult thing to do and it takes a lot of pressure to get people to say that something brought along to a certain point will never be completed. They find it difficult to say that.

1313 Q. You don't know how much was done before 1932 and how much was done after 1932? A. I know for each title just when the work was done.

Q. You have those records? A. We have those records and my reports and papers.

Mr. Pollak: Anything more?

Mr. Driscoll: No.

1314

HEARING OF MAY 24, 1937.

1315

At the office of the Special Master, No. 50 Broadway, New York, N. Y., May 24, 1937, at 10 o'clock A. M.

Pursuant to mesne adjournments.

Present—THE SPECIAL MASTER.

APPEARANCES:

As before.

JESSE T. MILLS, resumed the stand: 1316

Cross examination by Mr. Driscoll (continued):

Q. For the purpose of the record, Mr. Mills, will you tell me whether or not you have ascertained whether or not the items of equipment that appear on the various schedules which we talked about at the last hearing include the cost of props? A. It does.

Q. Have you the Schedule 20 before you, Mr. Mills? A. That is Exhibit 20?

Q. Yes. A. Yes.

Re-direct examination by Mr. Pollak: 1317

Q. Mr. Mills, have you information at hand on the question Mr. Driscoll has been interested in, whether your depreciation of equipment, Exhibit 9, in which you depreciated equipment, include in the figures a certain amount of props? Is that correct? A. That is correct.

Q. Can you state whether those props were props that were specific to any production, or were they a part of the permanent appurtenances and devices of the studio? Which were they? A. They were not specific to any particular

1318 production, but were props used for all productions and purchased for all productions at the time of their purchase. They were definitely allocated to that group.

Q. To general production? A. To general production.

Q. That is true of that whole item? A. Of all items that enter into the props and equipment account.

Q. Exhibit 9? A. Yes.

Q. There was testimony, I believe, at Culver City, about the practice of salvaging props that were specific to a particular production; is that right? A. I don't know about that testimony.

Q. At all events, whether you know about the testimony
1319 or not, do you know that these props did not enter into the accounts of any particular production? A. That is true.

Q. That is, they were turned over to the production when needed, and then turned back from the production to the general equipment of the studio, is that right? A. That is right, without charge to the particular production.

Q. Without charge to the particular production; without either profit or loss on account of the particular production? A. Yes.

Q. Can you state in general terms what those particular props are? A. No. I would have to get that information.

Q. Who would know that? A. From the Coast.

1320 Q. But you are informed by the Coast that these props were of that type? A. Very definitely.

Mr. Pollak: Teletype message from Mr. Craig at Culver City studios to Mr. Mills: "Props included in equipment schedules by fiscal years as follows: 1927 $138,600.38; 1928 $35,427.68; 1929 $34,628.52; 1930 $58,383.69; 1931 $51,882.22; 1932 $12,948.04. These figures include only those props which were purchased to increase our property stock and do not include those props which were purchased speci-

fically for a definite picture. Props that are pur- 1321
chased for specific pictures are charged directly to the negative cost. No credit is given to the picture when such props are returned to our property storeroom. The basic reason for this is that the properties purchased for a specific picture are usually such as are not common to the general run of pictures so that the prop would not be stocked except for its definite requirement in the picture to which it is charged. I trust that this explains information which you requested."

Q. Now, Mr. Mills, going to another matter, did you 1322
have certain computations made of overhead of the studio based on gross receipts from the pictures produced at the studio in the year 1932; just answer yes or no? A. Yes.

Q. In making that computation you excluded, did you not, such so-called outside producers, what does that mean? A. Pictures produced by others than Metro-Goldwyn-Mayer, not at the Metro-Goldwyn-Mayer studio.

Q. That is, you distributed those pictures, but you did not produce them, is that right? A. That is true.

Q. The calculation made under your direction was a correct calculation, was it? A. It was.

Mr. Pollak: I offer it in evidence, Mr. Master. 1323

(The paper just offered in evidence was received in evidence and marked Defendants' Exhibit 25, of this date.)

Cross examination by Mr. Driscoll:

Q. What are these outside producers that you speak of? Can you tell us more about them? A. They are principally productions of Hal Roach, comedies.

Q. How many productions did Hal Roach have that

1324 year? A. There were approximately 36 to 40 Hal Roach productions.

Q. Will you make up a schedule showing the breakdown of this, outside producers receipts? A. Yes.

Q. You have taken the United States receipts for 1932 and the foreign for 1933? A. Yes.

Q. As a matter of fact, the foreign for 1933 was considerably less than for 1932? A. I don't recall those comparative figures. (Examining papers.) Gross receipts from the foreign for 1933 were 700 odd thousand dollars less in 1933 than in 1932.

1325 By Mr. Pollak:

Q. Out of a total of how much? A. The figures for 1932 were $16,339,787.44, and for 1933 were $15,563,592.34.

By Mr. Driscoll:

Q. Let me understand this schedule a little more thoroughly. You have here in your first column, under the heading "All Pictures" gross receipts in the United States in 1932, $30,020,526.08? A. Right.

Q. Now, what does that represent? A. That is the same figure that you will find on Schedule 18-A at the top of the page, as the total film rental income excluding Canada

1326 of the Metro-Goldwyn Pictures Corporation, for the year ending 8-31-32.

Q. Let us come back to this item of $30,000,000. What you are showing here is the gross rental that all the pictures brought in during that fiscal year? A. That is true.

Q. And a picture like Grand Hotel, that was not finished until the end of the fiscal year and not released until the following fiscal year, is not represented at all in that item? A. There are receipts from Grand Hotel represented in that item. It was finished before the end of the fiscal year.

Q. It was not released until after the end of the fiscal 1327
year? A. The general release date. But the receipts from the road shows were included in the $30,000,000.

Q. But all of the receipts from Grand Hotel were not in there? A. Only the receipts up to August 31, 1932.

Q. But all of the cost of making Grand Hotel was included in that fiscal year? A. That is true—or in the previous year.

Q. It is true, isn't it, that strictly speaking these figures here do not represent exactly the same product that was made during that fiscal year? A. That is true.

Q. And some of this product represented in this thirty million dollars of receipts was made during the previous 1328
fiscal year and some of them that fiscal year, isn't that right? A. That is true.

Q. Some of it might have been made two or three years prior to that fiscal year? A. Some small receipts still received from the older pictures.

Q. May I ask you this, Mr. Mills? In the manufacturing plant, in the ordinary commercial plant for the manufacturing of shoes, for instance, or automobiles or something else, there is, we might say, a direct relationship, is there not, between the cost of production and the sales? A. In the manufacturing of shoes I should think the direct relationship would be closer.

Q. In the theatrical or motion picture business it is a 1329
fact, is it not, that the amount of money put into a production is not a guide as to the amount of money that you are going to get out of the production? A. That is true.

Q. It is a fact also, is it not, Mr. Mills, that pictures that have cost a small amount of money have oftentimes brought in a large amount of money? A. That is true.

Q. It is true, in the motion picture business, that pictures that have cost a large amount of money have oftentimes brought in a small amount of money? A. In comparison.

Q. So that there is no definite charging up of a per-

centage of profit between production cost and sales, is there? A. I don't get your conclusion.

Q. What I mean by that is this: You do not arrive at your sales price by adding onto your production cost a certain percentage of profit, as you might in the manufacture of shoes or automobiles? A. That is true.

Q. Your production, in other words, has very little relationship to the sales of the picture? A. I wouldn't say it has very little relationship.

Q. What is the relationship? A. As you say, a production which may cost half as much, one production may cost half as much as another production, and yet they will both gross the same amount of sales, and while to some extent the more expensive productions would be expected to gross correspondingly larger sales, it is true that the more moderate the cost of a production the greater the chance of profit on the investment is. And that is the reason that we have gone into the gross receipts basis as distinguished from the direct cost basis, because the gross receipts of the various pictures are more a measure of their real worth than the actual cost of production.

Q. Exactly. They are more a measure of the real worth of a picture than the actual cost of production. Now, as matter of fact, you do not put on your books a distribution of the overhead in proportion to the receipts, do you. Answer yes or no, please. You do or you do not. When I say "overhead" I mean studio overhead. A. We do not place that on our books.

Q. It is not good accounting, in your opinion, is it, Mr. Mills, to distribute studio overhead in proportion to the receipts of pictures? A. If it can be ascertained, it is the best of accounting, in my opinion.

Q. It is the best of accounting, in your opinion, that a picture that has cost $100,000 and brings in a million dollars should bear as much overhead as a picture that cost half a million dollars and also brings in a million dollars? A. Yes, for the overhead item.

Jesse T. Mills—for Defendants—Recalled—Re-re-cross.

Mr. Pollak: When I put in that exhibit (No. 25) 1333
I said it was not in substitution of our theory of 1/36th. It is in confirmation of it. It was also for the purpose of laying before the Court other possible bases of computation, in case the Court should disagree.

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, if you happen to know, speaking generally, is it true that a more expensive picture will gross more than a less expensive picture, by and large? A. It is true.

Cross examination by Mr. Driscoll (continued): 1334

Q. Mr. Mills, you have already testified here that the business consists of making of pictures and the distribution of pictures? A. Right.

Q. Those are the two functions of the business, aren't they; your distribution corresponds to the selling of an ordinary product? A. Yes.

Q. Manufacturing on the one hand and selling on the other, your production of pictures and the distribution of pictures, that is correct, isn't it? A. That is correct.

Q. And the production of your pictures takes place in Culver City? A. Actual production.

Q. You have a cost department there, an accounting 1335
department? A. Yes.

Q. They keep complete records, do they not? A. They do.

Q. Vouchers and receipts and checks and all that sort of thing? A. They do.

Q. And any expense incurred at the studio is kept out there in detail, is it not? A. Some expenses are paid from the home office.

Q. Are they kept accurately? Can you definitely ascertain what they are? A. Yes.

Q. What expenses in the production of pictures are there,

overhead expenses or other expenses, that you have that you cannot ascertain? A. When you say that I cannot ascertain, do you mean I cannot ascertain as being directly applicable to certain pictures or to the studio in general?

Q. To all of the work at the studio? A. We have work at the home office in addition to the work at the studio.

Q. Do you know what it is? A. Yes.

Q. Are you able to ascertain what it is and set it up on your books? A. I am.

Q. And that is done ordinarily? A. Yes.

Q. Isn't it reasonable to say that you can definitely ascertain the cost of operating your studio from the beginning of the fiscal year to the end of the fiscal year, applying to any fiscal year? A. That is true.

Q. And in that expense you separate it between direct charge to pictures and undistributed cost? A. That is true.

Q. And you know what your direct charges are of each and every picture manufactured at the studio, do you not, and so enter them up on the books? A. The charges directly applicable to pictures are segregated.

Q. And the other charges, you know what they are, the undistributed expenses, for a year? A. That is right.

Q. And you carry that right out in dollars and cents for the fiscal year? A. That is right.

Q. And that expense, those accounts, are entirely separate and distinct in so far as your accounting department goes, from the cost of distributing the picture, isn't that true? A. The studio expenses are entirely separate.

Q. On the other hand, you take the cost of distributing the pictures in much the same way, and you keep your records complete so that you are able to show the cost of distributing the pictures for any one fiscal year, isn't that true? A. The cost of distribution, yes.

Q. There is no conflict between the cost of production and the cost of distribution? A. There is no conflict.

Q. There is little, if any; that is the way your books are set up? A. That is right. 1339

Q. And that is the way you have them? A. Yes.

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, have you general figures that show additions to sound equipment, other than the additions or installations testified to by Mr. Craig? Just yes or no. A. Yes.

Q. Can you give me the figure for the year 1928? A. $66,000.

Q. And for the year 1929? A. $408,638.97.

Q. And for the year 1930? A. $232,623.31. 1340

Q. For the year 1931? A. $77,029.67.

Q. And these were included, of course, in the items of equipment that you depreciated? A. They were.

By Mr. Driscoll:

Q. It is true, is it not, that most companies divide the negative cost between domestic and foreign on a 60 and 40 basis, Mr. Mills? A. No, I think you will find that each company uses such a percentage as they find from past experience represents their pro rata income from domestic and foreign.

Q. In other words, they try to divide it as nearly equal with the income in the same relationship between the income from domestic and from foreign exhibition as they can? A. They do. 1341

Re-direct examination by Mr. Pollak:

Q. Mr. Mills, when you make contracts for distribution you make them, generally speaking, for a large number of the pictures at once, do you not? A. That is true.

Q. In other words, there is no possible way of segregating

the exact cost of distributing an individual picture; that is true? A. That is true.

Mr. Pollak: The form of distribution contract, if your Honor please, is in evidence as Exhibit 16, and shows that.

It is stipulated that either side may offer in evidence any part of the record on the trial had in the District Court between the parties to this accounting proceeding, subject to the objection as to materiality and relevancy and not subject to objection as to competency.

It is stipulated, in view of the fact that the gross figure for the making of the Spanish version is already in evidence, that the defendants may withdraw Defendants' Exhibits 7 and 8, which have to do with the detail making up that gross figure. (Defendants' Exhibits 7 and 8 were returned to Mr. Cohen.)

Mr. Pollak: The order of reference calls for an accounting by Loew's Incorporated. As has appeared from the testimony already introduced, Loew's Incorporated had no part in either production or distribution and no share in the profits of "Letty Lynton" except as a stockholder in certain corporations some of which are the other defendants, and also as a stockholder in various theatrical companies which exhibited "Letty Lynton". As I understand, its relationship to those companies was in all instances that of a stockholder. On a total of about 100 companies, I am informed, though I have not checked this, that exhibited "Letty Lynton", Loew's Incorporated did have such an interest. In, I think, less than half of those companies, approximately 50, it was the sole stockholder; in other cases it was a partial stockholder, generally interested about one-half in those other companies.

A simple accounting by Loew's Incorporated will, of course, be an account of one page saying that it made nothing out of "Letty Lynton"; it did not produce; it did not distribute. 1345

If Mr. Driscoll is willing to let the matter rest at that point, of course, our problem is simple enough. Obviously, the general rule of law is that a stockholder as such is not liable for anything. It is its corporation that is the defendant. If, on the other hand, it should be ruled that an elaborate accounting by Loew's is in order to show profits, if there were profits, through its stockholdings in theatres which exhibited this picture and many others, that will be a vast task, I suppose much larger than the task which we have thus far completed, and I should like to know what Mr. Driscoll's desires are in that regard. 1346

Mr. Driscoll: Of course, I can't answer you and decide the form in which the accounting shall be made. It is entirely a problem for you to decide. It is right in your lap, whether or not you are going to put in a one-page account or a hundred pages. The Court has ordered Loew's Incorporated to account. You should comply with the order of the Circuit Court of Appeals. I am not acting as counsel for Loew's Incorporated and telling them what ought to be done; not acting as counsel for them I don't want even to suggest. 1347

The Special Master: Mr. Pollak, you have put on the record here that Loew's has a stock interest in a lot of distributing companies.

Mr. Pollak: In distributing companies.

The Special Master: And exhibiting companies? They did apparently make profits out of the exhibiting "Letty Lynton".

Mr. Pollak: That is correct.

1348 The Special Master: Suppose you just put in a one-page account that you are talking about; what can I say about it?

Mr. Pollak: That is a problem. It proceeds on the simple proposition that a stockholder is not as such liable. The wrongdoer, if there is one who is the liable party in tort or contract, is the corporation which does the act. The stockholder suffers through an impairment of that corporation's finances. Mr. Driscoll has not chosen in this suit to sue any of the exhibiting companies. He has pending a suit against one other exhibit company, the Capitol Theatre.

1349 The Special Master: With reference to "Letty Lynton".

Mr. Pollak: Yes. The question I want to know from Mr. Driscoll is not what Loew's should do. It is quite clear what Loew's should do. The question is, if he objects to that form of accounting and insists upon a report on Loew's, a stockholder of corporations not themselves defendant, whether that problem, for instance, would have to be taken up with the District Court. I do not know. I am not sure that even that solution is satisfactory, because it is conceivable that if the District Court should

1350 hold against Mr. Driscoll, for instance, and should say that a showing that Loew's did no producing and no distributing satisfied the terms of the order, it is conceivable that a higher Court may hold otherwise. Nothing can take care of this situation except the statement of Mr. Driscoll that a definite statement by Loew's that it did no producing or distributing and had no connection with "Letty Lynton" otherwise than as already shown as a stockholder in one or two of these companies that are defendant, whether that will satisfy him. If it does, we can be through by June 28th.

Mr. Driscoll: In other words, you want me to waive any claim I may have against Loew's Incorporated.

Mr. Pollak: You understand the problem entirely?

The Special Master: I certainly do.

Mr. Pollak: You understand how it does affect the entire schedule from top to bottom.

The Special Master: After all, if you are going to introduce a one-page accounting on behalf of Loew's Incorporated, which is going to state that you have no income from this picture, and the record shows that you were the sole stockholder of a substantial number of exhibitors, what is going to be my finding? Suppose I find that Loew's was sole stockholder of fifty exhibitors, what is the District Court going to say to me if it takes the position that Loew's is accountable for any interest that it has in them?

Mr. Pollak: I agree that it leaves you in a difficult position.

The Special Master: You are not going to take my judgment one way or the other, but it is my duty to make the findings, take evidence on all facts and make the findings sufficient so that the Court won't have to send it back again to a Special Master.

Mr. Pollak: I don't dispute any of it. In fact I rather stress it. And that is why I say Mr. Driscoll cannot insist on two things, as they are absolutely inconsistent. The two things that are absolutely inconsistent are a speedy determination of this accounting and the inclusion of Loew's in it.

The Special Master: Why don't you put in that one page accounting and force Mr. Driscoll to disclose his position?

Mr. Driscoll: I will disclose my position now. I

1354 say that Loew's ought to be held liable, and the Circuit Court of Appeals has said so in the first instance. Mr. Pollak wants me to waive that.

The Special Master: You refuse to do that?

Mr. Driscoll: Yes.

The Special Master: And since Mr. Driscoll takes that position in regard to Loew's, what do you believe you will have to do to preserve your rights?

Mr. Pollak: I believe that I shall have to present an accounting of the sort I have suggested, just setting forth that Loew's Inc. has no interest in production, distribution or exhibition except as stockholder in the theatres which exhibited and, as al-

1355 ready shown, in one or two distributing companies; that it was the stockholder of such and such stockholding in theatres A, B and C and so on through the alphabet; that it was the stockholder in theatres X, Y and Z, as sole stockholder in those theatres; that those theatres did exhibit "Letty Lynton"; that presumably some of them made profits by exhibiting "Letty Lynton"; and then the problem would be as to which theatre to select, if you really want to have a record—and maybe you do, Mr. Master; I always believed you might—if you want to have a record that as far as is humanly obtainable will never call

1356 for a retrial, whatever view is taken by any court.

The Special Master: I am clear that in this case, with justice to the plaintiffs, this case ought never to have to come back to a Special Master again. I am going to try, I hope with your assistance, to have it in such shape that all of the facts that could assist the Court will be set forth. I don't think there is any justification in sending this case back to a Master.

(Discussion off the record.)

The Special Master: In order to protect your

rights when Mr. Driscoll objects to this one page accounting of Loew's, what are you going to do then? 1357

Mr. Pollak: If you tell me to put in a fuller account, an account for each of these theatres, on the ground that you want a record with findings that will prevent any possible retrial, I don't see there is anything possible to do except to give you that account. The only possible way, I think, is for the Circuit Court of Appeals itself to amend its mandate, because I do not believe the District Court would have authority in a matter on which the Circuit Court of Appeals had passed—unless, of course, Mr. Driscoll consented—but he does not appear to be in a consentive mood. 1358

(Discussion off the record.)

Mr. Driscoll: It is entirely up to him as to the method in which the Loew accounting is made. I say, he is ordered to make an accounting, and I say if there is a one-page account put in it is not an accounting.

The Special Master: On that basis, what are you going to do, irrespective of what I think?

Mr. Pollak: Your Honor might want to go with us or without us to the District Court in that situation, especially in view of Mr. Driscoll's explanation that the Circuit Court of Appeals did think that even after its reversal up there the form of the accounting was in the hands of the District Court. 1359

The Special Master: But the trouble in doing that is that they will say, "What is your record? The only record you show is that there is a statement made by counsel for Loew's that Loew's has a 100 per cent. interest in certain of these exhibition companies. We are not going to pass on that main question in the case until it comes before us with your findings."

1360 Mr. Pollak: My feeling is that there is nothing to do until Mr. Driscoll challenges that accounting.

The Special Master: He has challenged it.

Mr. Pollak: If he is going to challenge it, then we will have to account for these theatres.

Mr. Driscoll: Why shouldn't they account? Under the decisions everyone that assists in any way in the use of that picture is a joint tort feasor and is liable. They are liable anyway under the decree. On the trial of this case they testified on cross examination that when they were acting they were acting for all these corporations.

1361 The Special Master: I think so far as we are concerned here you have to file an accounting of Loew's, just as much as you have got to file an accounting of the foreign subsidiaries.

Mr. Pollak: It is something of the same problem.

The Special Master: If you are satisfied to stand on just a one-page account, that is your business. On the other hand, when you put it up to me, I don't know how the District Court or the Circuit Court of Appeals is going to decide in a equity case as to the liability of Loew's. I think I have got to take the evidence.

(Discussion off the record.)

1362 Mr. Pollak: We will submit an account at the next hearing.

HEARING OF JUNE 16, 1937.

Mr. Pollak: Mr. Master, with that out of the way, we have come to the problem mentioned at the last hearing of the accounting that has thus far been ordered by Loew's Inc. The present status is as follows: The account that seems to the defendants

the correct account for Loew's I have here. It is, 1363
as I stated it would me, a mere showing that Loew's connection with this situation is simply a passive one, that of a stockholder in numerous theatres exhibiting "Letty Lynton", many though not all of those theatres owned by corporations in which Loew's is the sole stockholder, other theatres owned by corporations in which immediately or through the mediation of one or more corporations Loew's is a partial stockholder.

As has already appeared, Loew's is also a stockholder in one or two of the other defendants. Your Honor recalls that.

As we view the law, and with this statement of 1364
fact which I do not understand is challenged, I will also add, simply for the sake of clarity, the concession of fact, if it is deemed a concession, that Loew's exercises its ordinary function of participating in the choice of directors. In the case of corporations solely owned by Loew's the directors of the operating companies are, I think, officials connected with the Loew corporation.

If your Honor feels, of course, that this accounting that I have here prepared showing, simply the stock ownership—when I say I have prepared, Mr. Mills and his associates have prepared—is sufficient ac- 1365
counting to establish there is no liability of Loew's, which we believe is the clear legal rule, these discussions concerning the method of accounting if no accounting further is ordered will become academic; and on that point of law of course your Honor understands the underlying principle perfectly clearly. A claim for copyright infringement, whether primarily as a claim for damages or profits, is a claim to recover by reason of a tort. Your Honor, of course, knows that the stockholder of a corpora-

1366 tion is not as such liable for its torts. He is not as such liable for its torts if he is the sole stockholder. If any other tort were claimed to have been perpetrated by any one of these exhibiting theatres, the claimant would sue the exhibiting theatre.

If someone were injured by a truck belonging to the Diamond Amusement Corporation, which happens to be the first on the list, that operates the Alpine Theatre, of course he would sue the Alpine Theatre, not sue the stockholders. The stockholder's estate might be diminished by the recovery, but liability would not thereby be created by virtue of injury claimed or proved as to any person.

1367 The Special Master: Let us hear what Mr. Driscoll has to say to that.

Mr. Pollak: If I might say just one word more, as an illustration that the rule is no different in copyright cases and that the plaintiff well understands this, I refer to the fact that the plaintiff is right now suing one of these corporations, a corporation that appears on this list, a separate litigation, tried last week but not decided.

The Special Master: With respect to "Letty Lynton"?

Mr. Pollak: With respect to "Letty Lynton",

1368 and he is suing the Moredall Company, Moredall Realty Corporation which operates the Capitol Theatre. The Moredall company is itself held in part by Metro-Goldwyn Pictures Corporation, which is itself held by M. G. M. Inc., which is itself held by Loew's Inc. and which appears on the list. That is our case on these issues.

The Special Master: What is the suit for?

Mr. Pollak: For infringement and account of profits, originally for damages, but it was amended at the trial. They claim an accounting of profits.

The Special Master: You offer the accounting of Loew's? 1369

Mr. Pollak: Yes. Would you mark this for us?

Mr. Driscoll: May I see it before it is marked?

Mr. Pollak: Certainly (paper handed to Mr. Driscoll).

Mr. Driscoll: I have no objection to this paper that is now being offered as an exhibit being received for what it is worth, but I do object if it is to be received as a complete accounting for Loew's Inc., on the ground that it is not a compliance with the orders of the Court.

The Special Master: Mark it subject to the plaintiffs' objections. 1370

(The paper just offered was received in evidence and marked Defendants' Exhibit L-1, of this date.)

Mr. Driscoll: Answering Mr. Pollak's statement, it is true that since our last session here we tried out the Moredall case. The case of Sheldon against Moredall Amusement Company was started about the same time as this action here, maybe a matter of weeks or months after this action was begun, based on the showing of the picture at the Capitol Theatre in New York City. I have not any doubt in my mind but what we could in the same manner begin similar actions against each and every one of the Loew corporations that has shown this picture. In fact, Judge Patterson from the bench said that each exhibitor was a tort feasor. I do not think that anyone can seriously disprove that. 1371

That does not prove or disprove our right to our relief here in this suit against Loew's Inc. It is just thrown in. It does not mean anything. It is all right to say that the Diamond Amusement Company,

running the Alpine Theatre, has played this picture and that we have to go after the Diamond Amusement Company; and that the Ruby Company running the Rocky Mountain Theatre, another one, we have to go after that, although that was owned a hundred per cent. by Loew's Inc. But I do not think that is the law.

The Circuit Court of Appeals has held Loew's Inc. liable in this case and ordered an accounting. Loew's, therefore, has been held guilty. Now, then, Loew's comes into court and says, "That is all right, but we did not do this personally; a 100 per cent. owned corporation of ours is the one that did it." Mr. Pollak looks at this problem from the other end of the telescope. We all know and are free to admit that one of the main purposes of corporations is limiting liability. There is not any question about that. But that is not your situation here at all. If we were trying to hold Loew's Inc. by going through the other end we might have a more difficult situation. For instance, if we sued Moredall and if we sued Diamond Amusement and if we sued the others and we said we have shown these others are guilty and we want a decree against Loew's Inc., the Court might agree with what he has said. It is not an effort to hold Loew's Inc. guilty. It has been held guilty of selling our picture and it has been ordered to account for profits, and it says, "I do not have to account for profits; all my profits come from A, B, C, D, E and F, 100 per cent. owned subsidiaries." Well, it just does not hold water. It might get those profits from those subsidiaries and still have to account for them. He just goes after that problem from the wrong end. We are not trying to hold Loew's Inc. They have been held liable and they have been ordered to account by the Circuit Court of Appeals.

It is up to them to report what moneys came into 1375
their hands by way of profits as the result of this showing of this picture, through their agencies. These subsidiaries are in fact their agencies and there is not any escape from that.

I admit we can't get together with the opposition on any basis they have thus far suggested.

The Special Master: Let us wait on that for a moment. You have raised a question of law, as to the liability in this action of Loew's for the acts of its wholly owned subsidiaries.

Mr. Pollak: And of subsidiaries, if you want to call them subsidiaries at all, that are partially owned 1376
corporations.

The Special Master: Is it my function to decide that question of law one way or the other at this particular moment? Suppose I say I agree 100 per cent. with Mr. Pollak on the question of law and I refuse to take any evidence or to compel any evidence with reference to the profits of these subsidiary companies in this action, and then suppose the District Court or the Circuit Court of Appeals disagreed with me completely. They would send it back for a new accounting.

Now, supposing I said I agreed with Mr. Driscoll 100 per cent. that Loew's should be forced to ac- 1377
count here, and they put in this accounting and the District Court or the Circuit Court of Appeals said, "Yes, we agree with you;" then they would have all the facts. If they say, "You are wrong in your law. The Master should not have taken any of that evidence," where is the harm? It has extended these hearings for a certain length of time due to my mistaken knowledge of the law, but isn't it better to extend these hearings now, and isn't it fairer to extend them now than to close them at this point

1378 completely and if I am wrong to have the whole thing sent back for further hearings?

The reason I think it is better is that this case has been interminable, apparently. I am not blaming anyone for it one way or the other. But it seems it has dragged out five years, I am told. Isn't it my duty to do everything I can to shorten the period, then within which this case will be finally determined? If I refuse to force Loew's to account for these subsidiaries I take the chance of dragging out this case for a great deal longer. If I insist that Loew's account, I drag these hearings, possibly, but 1379 I put a final date on the final determination of this controversy and I certainly shorten it.

My inclination is that I do everything possible to shorten the period within which this case will be finally determined. I do not believe it is my function to decide such an important question of law in such a way as to prevent the fullest kind of an account.

Mr. Pollak: Your Honor, of course, the procedural question involved is one that is before you to determine. The considerations that you have adduced that full accounting by us as to each of these theatres will produce a record that will, 1380 as far as human foresight can provide, be the last record, the only record—there is no doubt those considerations are most cogent. I suggest in opposition to those considerations simply this,—the combination of two considerations; one of them is that the point of law that is raised seems, to us at least, an exceedingly simple one. The other is that the further hearings that will have to be held, in view of the very natural inability of counsel on the two sides to agree on how to allocate overhead as to these theatres, for instance, among the fifty

or a hundred productions that a given theatre has in a year—and as your Honor recalls that "Letty Lynton" ran for a week or part of a week only—it occurred to me that perhaps you would feel that the issue of law was so simple and the burden and expense of accounting and the delay resulting from it would be so great, that you would in this particular instance want to run the risk of making a decisive ruling on the evidence and at this point which would obviate the necessity of going ahead. 1381

The Special Master: It is Mr. Driscoll's attitude that the law is simple on his side.

Mr. Pollak: Your Honor of course understands the procedural situation in the Circuit Court of Appeals to which Mr. Driscoll made reference. What happened was this. In the District Court Judge Woolsey found no infringement at all and, therefore, no liability. Appeal was taken by Mr. Driscoll and taken successfully. The issue that was contested in the Circuit Court of Appeals was not the issue whether there was liability by anybody, but whether there had been any infringement. The question of liability by anyone and how it was to be determined and who would share in it is a question that would naturally arise, as it has arisen, after accounting has been ordered. 1382

Mr. Driscoll: I do not agree with that at all. That is carrying it too far. As a matter of fact, on the trial of the action before Judge Woolsey, Mr. Rubin testified that what was done was on behalf of all the defendants jointly, and there was not any escape from it; and I stopped there when I had that prima facie evidence of liability of all the defendants equally. That was the record that went to the Circuit Court of Appeals, and they had no escape from it. 1383

The Special Master: Perhaps there is some testimony adduced at the trial which would make it simpler for me to decide this question one way or the other.

Mr. Driscoll: I don't believe there is any testimony adduced at the trial that will assist you at all in deciding this particular question. The only testimony adduced at the trial that bore even indirectly on this was the testimony that would make Loew's Inc. a joint tort feasor with the other defendants named. Now that has been settled judicially and Loew's has been held to be jointly liable and ordered to account. We get down to the subsequent question that arises for the first time as to how Loew's is to account. That is the question before us, which is an entirely different question than the question that was on trial before Judge Woolsey.

Mr. Pollak's statement that upon that trial we naturally could not litigate which defendants were liable—why, there isn't anything to that. That trial was the place to litigate as to which defendants were the ones liable. Any one of them might have taken the position that it was not liable and moved for a dismissal at the end of the case. None of them did. They stood jointly. They elected to stand jointly, and when the case ended they were all held together.

The Special Master: Let me ask you. Mr. Pollak has submitted this accounting. You object to it and claim it is not a full accounting of Loew's?

Mr. Driscoll: That is correct.

The Special Master: Is it my function as a master, or have I the authority as a master, to say to Mr. Pollak, "I do not regard this as a full account of Loew's at this particular time and I desire you

to put in testimony with reference to the profits 1387
of these theatres." Have I the right to do that?

Mr. Driscoll: I say the alternative is this: If, for instance, you have not that right, then I certainly have the right to subpoena the officers of Loew's and the books and adduce the facts.

The Special Master: I think he has got that right. I don't know whether I have got the right under the broad powers of a master to develop testimony.

Mr. Driscoll: The only thing I have to do is to prove the gross receipts.

The Special Master: I don't know whether I 1388
have the right. I would rather not exercise any direction as to what the parties do with reference to their testimony.

Mr. Pollak: Mr. Master, I will say this: whether you technically have the right, our point will certainly not be a question of your right. Our application really is to your discretion. But the position I take is this: The order of the Circuit Court of Appeals does establish, as it stands at present, and places on each defendant the duty to account. We have never disputed that, of course. We think that this is a sufficient account. We have never litigated the question as to whether, for instance, one of the 1389
defendants had any relation to the situation whatever. If a defendant had been named through inadvertance which had never been connected with "Letty Lynton" in any shape or manner, we might have litigated that question.

There was no election of the defendants to stand together. There was a contention that there had been no infringement of copyright.

Mr. Driscoll: There was testimony by Mr. Rubin on my cross examination, that all of the defendants stood together.

The Special Master: If you have that testimony I should like to see it.

Mr. Pollak: The testimony, as I recall from simply looking through the record, is testimony of Mr. Rubin as to the character of the organization of the various companies that were defendants.

The Special Master: Mr. Pollak, by filing this Defendants' Exhibit L-1 you really are filing a statement which you say supports your theory that Loew's does not have to account.

Mr. Pollak: Not quite, Mr. Master. I say that this document shows that the accounting defendant Loew's Inc. by no possibility can be liable either for any damages or any profits; that this document, which certainly was not before the Circuit Court of Appeals, establishes that the only relation of Loew's to this situation is that of stockholder.

The Special Master: And, on the theory that a stockholder is not liable for the torts of his corporation, therefore, is not required to file any further account. On the other hand, you have stated here and put me on notice at the last hearing that this particular picture was exhibited in all these theatres.

Mr. Pollak: Yes.

The Special Master: Even on that statement could I take the account of any profits that may have been made by the exhibition of this picture and which would inure to the benefit of the stockholders?

Mr. Pollak: Of course, as it seems to us, if you should be satisfied that a stockholder as stockholder is not liable, the showing now having been made that the only relation is that of stockholder, you could now be satisfied that there could by no possibility be any profits for which the stockholder merely as stockholder should account.

The Special Master: If I take that position I would have to deny Mr. Driscoll's request for a subpoena of these books, wouldn't I? 1393

Mr. Pollak: Yes.

The Special Master: I just can't see it is my duty to do that. It seems to me that the consideration of presenting a full case to the higher court outweighs any other consideration in this case.

Mr. Pollak: Your Honor will, of course, grant me an exception on this?

The Special Master: Certainly. There has been a tremendous amount of evidence put in in this case which Mr. Driscoll claims is entirely and wholly incompetent, and it has all gone in. You claim that this evidence that Mr. Driscoll wants in is incompetent, but I think it is my duty to take it. 1394

Mr. Pollak: In order to save time, will your Honor allow me at this point a separate exception to the introduction of any evidence concerning the profits of each one of these exhibiting theatre corporations?

The Special Master: Certainly.

Mr. Pollak: Mr. Driscoll will not call for any repetition of exceptions? 1395

Mr. Driscoll: No.

Mr. Pollak: With a specific exception also, added to the general objection which includes all the theatres, a specific objection in the case of some of these theatres as to which the stock interest was less than 100 per cent.

The Special Master: Certainly.

Mr. Pollak: And the specific exception includes certain theatres—there are six—where the stock interest, whatever its proportion, was subordinate

to the outstanding preferred stock interest in the hands of the public; and a specific exception in the case of those theatres listed on page 3 of the exhibit in which Loew's Inc. had no direct interest in the stock of the operating theatre company but an interest only as holder of stock of a corporation which itself held stock in the operating company, or in some instances an interest only as the holder of stock of a corporation which itself held stock in a corporation which itself held stock in the operating company. And finally, if your Honor please, specifically to the case of the Moredall Realty Corporation which operated the Capitol Theatre, on the grounds above stated that the ownership of stock was only intermediate, plus the special ground in that case suit is now actually pending and for some five years has been pending against the Moredall Realty Corporation.

Mr. Driscoll: It is.

The Special Master: I don't know anything about the suit against the Moredall Corporation, but my inclination would be to keep that testimony out altogether. What do you say about that, Mr. Driscoll?

Mr. Driscoll: I don't care anything about Moredall. It is a separate piece of litigation. I do not ask to bring that in.

The Special Master: I don't think any testimony should be offered with reference to Moredall.

Mr. Pollak: I understand Mr. Driscoll has acquiesced.

Mr. Driscoll: It is satisfactory to me.

The Special Master: All of those exceptions are noted, as stated by Mr. Pollak.

Mr. Pollak: And without need to repeat them at any time.

The Special Master: And no testimony with reference to the Moredall Corporation will be introduced in this hearing. 1399

JESSE T. MILLS, resumed:

Direct examination by Mr. Pollak:

Q. Mr. Mills, you have shown me a document headed, Theatre—Metropolitan; what is this document (referring to document produced by the witness)? A. That is a photostatic copy of the weekly statement of the Metropolitan Theatre in Brooklyn showing the result of the operations for the week ended May 20, 1932, during which entire week the picture "Letty Lynton" was shown at that theatre. 1400

Mr. Pollak: I offer it in evidence.

Mr. Driscoll: May I ask a few questions?

By Mr. Driscoll:

Q. That, Mr. Mills, is really a photostat of a report gotten up by the manager of the theatre and submitted to the company itself? A. That is right. 1401

(The document just offered was received in evidence and marked Defendants' Exhibit L-2, of this date.)

By Mr. Pollak:

Q. Mr. Mills, if you happen to know, there is an item in the lower right-hand corner marked Overhead. Has it been explained to plaintiffs' counsel, off the record,

1402 that that figure of overhead which is here $3,430 is computed on a 40-week basis in this report? A. That is correct.

Mr. Pollak: I think it will simplify matters for your Honor to know that in the computations that we are going to present for each theatre we are computing overhead on a 52-week basis instead of a 40-week basis. The change is somewhat favorable to the plaintiff.

Q. The 40-week basis is actually used in the business? A. It is.

1403 Q. On the theory that the theatre is closed or less active during the other twelve weeks? A. Yes.

Q. Have you made a computation of the overhead in regard to the Metropolitan Theatre? A. Yes.

Q. On a 52-week basis? A. Yes (producing paper).

Mr. Pollak: I offer it in evidence.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. L-3, of this date.)

1404 Q. This computation of overhead is based upon an actual analysis of the expenses of the corporation for a year, isn't it? A. For the year ending August 31, 1932.

Q. The amount of overhead appearing on L-2 is $3,430 was an estimated figure made up at the time, I suppose? A. And on a 40-week basis.

Q. And on a 40-week basis? A. Yes.

Q. You said that Exhibit L-2, which is the weekly report, is a photostat of a document prepared at the time? A. That is correct.

Q. Returning to Exhibit L-3, have you a copy for Mr. Driscoll? A. No. We can make one.

Mr. Pollak: Referring to Exhibit L-3, I will ask 1405
Mr. Driscoll if it prima facie proves the matter set forth, and if he wishes any further testimony.

Mr. Driscoll: I can better judge after I look over the Exhibit L-2. The only way I can do that is to get photostats.

Mr. Pollak: We will have them.

Mr. Driscoll: I need an opportunity to study them. I can't assimilate all this at a glance.

Q. On Exhibit L-3, of which you will have a copy, the item Insurance Premium, $5,495.81, means the insurance paid upon that theatre for that year? A. Insurance accrued for the year as distinguished from payments. You 1406
might pay insurance premiums for two years with one check.

Q. The real estate taxes would represent actual accrued obligations? A. That represents actual payments.

Q. The interest on mortgage means an accrued obligation? A. Yes.

Q. The item of interest on net investment? A. That is the interest on the net equity of the corporation in the property, the fixed assets, consisting of land, building and equipment, less reserve for depreciation and less the amount of the mortgage, calculated at six per cent.

Q. Now as to the item of depreciation of building and 1407
equipment, on what rate have you depreciated the building there? A. Three per cent. on the building.

Q. And on the equipment? A. Three per cent. on building equipment and ten per cent. on theatre equipment.

Q. How do you distinguish between building equipment and theatre equipment? A. The building equipment in this instance is merely equipment which becomes a fixed part of the building rather than the movable equipment. The boiler plant would go in as building equipment; the cooling plant I believe would go in as building equipment, such items.

1408 Q. Now, the item of Sundry Expense is small. A. Yes.

Mr. Poliak: Do you want to bother with that, Arthur?

Mr. Driscoll: No.

Q. You have deducted from gross expense for the year ascribable to overhead, $158,606.53, certain items of income. I find an item of $11,473.42 of rent income. I do not think Mr. Driscoll will criticize any deduction, but I would like to know what that rent income means? A. That is rent income from commercial space in connection with the theatres; most theatres have a certain amount of rentable
1409 space not used for theatres, in the way of lofts or stores, more particularly stores.

Q. Taking Exhibits L-2 and L-3, can you show what the profits, after deducting overhead items as now computed, from the exhibition of "Letty Lynton" at the Metropolitan Theatre, were?

Mr. Driscoll: Doesn't that show on Exhibit L-2?

The Special Master: He has changed the overhead.

A. I can show what the profits were from the operations
1410 of the theatre for the week during which "Letty Lynton" was shown.

Q. By the way, there were other things shown besides "Letty Lynton", weren't there? A. There were. They are listed on the statement, the various other attractions, in the third column.

The Special Master: Who got the $2,000 which you have listed against "Letty Lynton"?

The Witness: Metro-Goldwyn Distributing Corporation.

Q. That is, of course, an item included under a prior accounting of the intake of that Corporation? A. It was. 1411

Mr. Pollak: Now there arises a fundamental problem as to which we have tried to come to an agreement, but naturally have not—anyway, we have not. We are taking, as your Honor understands, this theatre as an illustration chosen almost at random to illustrate the problems which will arise.

The Special Master: I understand.

By the Special Master:

Q. Let me ask you this. You paid $2,000 for "Letty Lynton", and according to this statement you paid $5,500 odd for all talent at that theatre? A. May I see that (paper handed to the witness)? That is correct. 1412

Q. And at the end of the week, with a readjusted overhead, the theatre made $2,100, I think. I am talking roughly. Is that correct? A. That is correct.

The Special Master: Now, with those facts before you, have counsel been able to adopt any formula with reference to this?

Mr. Driscoll: No. We contend the cost of the other acts or whatever they might have been, music or what not, during the week, goes in as a part of the expense of the week which they have deducted. But they are not entitled under the decisions to split up the net of $2,100 they speak of. They are entitled to take off the cost of the other acts, but they are not entitled to split up the $2,100 in any way. 1413

Mr. Pollak: And we say, if your Honor please, we know of no decision that will lend the least support to such a contention; and we say that the very fact that the contention is made might illustrate

1414 the underlying policy of the plaintiffs' whole claim not only against Loew's Inc. but as well against the other defendants. Because the essential position of the plaintiffs right along is that in an infringement, even though contributing to the result as we have already seen in the case of production and we now see in the case of exhibitions comes from sources absolutely innocent and unexceptionable, that they can take all the profits. It is one of reductio ad absurdum. It emerges right here, but applies equally well in the other position too.

The Special Master: That, of course, I suppose is a question of law.

1415 Mr. Driscoll: That is right.

The Special Master: All I am trying to do now is to shorten this proof. You can argue your question of law later. Am I right in saying that under Mr. Driscoll's theory the $2,100 is attributable to and should be accounted for as profits out of this thing, or that some rough figure of 20/55ths of $2,100 should be attributable to "Letty Lynton" if you take it according to the expenses, or some arbitrary computation of that sort should be made? What is your contention? Assuming that Loew's is responsible, what do you say they are responsible

1416 for of that $2,100?

Mr. Pollak: May I, before categorically answering your question, bring out certain facts?

The Special Master: The only thing I am trying to do is to shorten this proof. Perhaps it can't be done.

Mr. Driscoll: I was going to say this, if I am permitted to get in a word. It seems to me that your Honor is entirely right here. This does not depend upon any extraneous facts that may be developed through this witness or any other witness

or calling in experts to divide this thing up between the various attractions. It is a question of law. It seems to me that we can shorten this case. This was a suggestion of mine to Mr. Cohen before. Out of these one hundred theatres all they need to do is to have a photostatic copy of the manager's report for the week, which is in evidence in this case here, and the breakdown of the overhead. So far as we are concerned, we are not going to ask for any further information or testimony unless there is something suspicious or something that we feel compelled to question as not being clear. But those two sheets will constitute a complete report for each one of these hundred. 1417 1418

The Special Master: On your statement is it your belief that you have to bring out additional information with reference to these sheets, or can we just stick in those sheets and argue your question of law later on?

Mr. Pollak: I think the sheets will pretty well speak for themselves, if I can show the facts that support our views that some apportionment should be made among the attractions.

The Special Master: Can you do that in general terms or do you have to do that with reference to every attraction? 1419

Mr. Pollak: I think I can do that in general terms.

Mr. Driscoll: That is a question of law.

Mr. Pollak: It is a question of law that depends on the facts.

The Special Master: I think he is entitled to put it in.

Mr. Pollak: The answer to your question as to what our theory is, I will say that as a simple, practical matter we have proposed on an arbitrary

basis to give to "Letty Lynton", which in general was the feature, a two-thirds sharing of the profits for the week, that is to say, 66-2/3rds to "Letty Lynton" and 33-1/3rd to the other things whatever they were, vaudeville, shorts, sometimes a double feature, news reels and everything. We were unable to come to an agreement on that.

The Special Master. It comes down to the question as to whether, according to Mr. Driscoll, it should be the entire thing, or, according to you, two thirds.

Mr. Driscoll: I have never heard the two-thirds before.

Mr. Pollak: We think two-thirds is more than generous.

The Special Master: Are you willing to agree to the two-thirds?

Mr. Pollak: We do, but we want to produce this evidence.

The Special Master: Are you willing to stipulate that if there is a recovery against Loew's for this transaction you would be satisfied with a two-thirds?

Mr. Pollak: Yes.

The Special Master: And Mr. Driscoll says he is not satisfied with that; he wants 100 per cent.

Mr. Driscoll: Yes.

The Special Master: That is narrowing it a little. Can I hold you to this? I don't want to embarrass you.

Mr. Pollak: There is only one qualification to this. Your Honor understands that besides our contention that there should be apportionment among the attractions on the basis of two-thirds to "Letty Lynton" and one-third to the other attractions, we also contend that, with respect to the

exhibition of "Letty Lynton" much as we contended with regard to the production and distribution of "Letty Lynton", that "Letty Lynton's" own share of the profits in this accounting is recoverable only in proportion of plaintiffs' infringed work's contribution to the result. Have I made myself clear on that? 1423

The Special Master: It is entirely clear.

Mr. Pollak: And the point also that we deny that this stockholder is liable at all. I think with those explanations we understand each other. I am perfectly willing to take two-thirds' assignment to "Letty Lynton". We might want to show what these other attractions were, that varied from theatre to theatre. 1424

By Mr. Pollak:

Q. Generally speaking, Mr. Mills, is this true, that the ordinary playing time of one of these theatres would be about two and a half hours or more, up to three hours? A. Ordinary playing time.

Q. The time that it took "Letty Lynton" to run was 84 minutes, wasn't it? A. Approximately.

Q. It is not only approximately; it has been measured. That is correct, isn't it, Mr. Mills? 1425

Mr. Driscoll: Perhaps he doesn't know.

Mr. Pollak: Subject to correction, will you take my statement, Arthur?

Mr. Driscoll: Yes.

Q. Am I right in this, Mr. Mills, that audiences, so far as is known, go on to an exhibiting theatre for a combination of attractions?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, unless this witness can qualify as the average audience.

The Special Master: If you want the answer, certainly Mr. Mills is in the movie business and he can give his opinion.

Mr. Pollak: I don't want his opinion; I think it is self-evident.

Mr. Driscoll: If he knew the answer to that one he could get any salary he wanted.

The Special Master: Read the question.

(The pending question was read.)

Mr. Driscoll: Do you overrule my objection?

The Special Master: I don't like that kind of testimony coming from Mr. Mills. Mr. Mills is supposed to be a great auditor.

Q. This you do know, Mr. Mills, do you not, that the theatres referred to in the list Exhibit L-1 make payments for other attractions besides the feature, and do so for business reasons? A. Yes.

Q. Do you happen to know what Release Metrotone 266 was? A. That was the news reel.

Q. And the same for Release Metrotone 267; that was also a news reel? A. Yes.

Q. Between them they ran for the whole week, one for four days and one for three. What is Columbia Snap Shots No. 8? Can we agree that it was a short?

Mr. Driscoll: Yes, a short gotten out by Columbia and shown at that theatre during that week.

Q. What is Metro Nickel Nurser? A. A comedy.

Q. That is all that are listed under films, either "Letty Lynton" herself or shorts or the trailer of "Letty Lynton"? A. Yes.

Q. On Exhibit L-2 you have told us about all that appeared under the caption Films, and there is in this instance the one feature, a certain short and an item of trailer for the feature which is carried as an expense because it was incurred in connection with that week's production? A. Yes. 1429

Q. Under the heading of Acts I find first Dave Gould's Boys and Girls. What is that? A. That is the title of an act. Each of those captions is the title in which the act was presented on the stage, advertised.

Q. Acts, meaning "performances" by living performers? A. Yes, ordinarily known as vaudeville.

Q. Without going into the detail of this, I find here six different acts, each of which was separately paid for. Your testimony that has been given in regard to Dave Gould's Boys and Girls would go for the other five? A. Yes. 1430

Mr. Pollak: Mr. Driscoll, would you stipulate, subject to objection and exception by you to the relevancy and materiality of such testimony, that defendants could produce an expert in the exhibition of pictures who would testify that the picture-going public goes in part for attractions other than the feature, and particularly in theatres where vaudeville is shown goes in large part by reason of the vaudeville, and the children especially go in part and the parents who accompany the children go in part also to see the shorts? 1431

Mr. Driscoll: Subject to the objection that it is immaterial, I will stipulate that you could produce such a witness.

Mr. Pollak: In the form in which I have stated it?

Mr. Driscoll: In the form in which you have stated

1432 Q. I show you, Mr. Mills, a photostat and ask you what that represents (handing paper to the witness). A. That is a photostatic copy of the weekly statement rendered by the manager of the Lexington Theatre for the week ending May 20, 1932, during a part of which week "Letty Lynton" was shown at that theatre, and specifically on the three days of Saturday, Sunday and Monday, 14th, 15th and 16th of May, 1932.

Q. And the last theatre with which we dealt was a theatre in which "Letty Lynton" appeared for the whole week? A. That is correct.

1433 Mr. Pollak: I ask to have this marked in evidence.

(The document just presented was received in evidence and marked Defendants' Exhibit No. L-4, of this date.)

Mr. Pollak: To shorten this, may we explain as to every one of these weekly reports, of which there will be about 100, I suppose, that the item Overhead in each instance means the then estimated overhead and estimated on a 40-week basis, and that in each instance it will be superseded

1434 by the exact computation of overhead on a 52-week basis.

By the Special Master:

Q. That is the only time it ever appeared at the Lexington? A. That is correct.

By Mr. Pollak:

Q. For the Lexington Theatre, Mr. Mills, have you made a computation of overhead? A. I have.

Q. This is a computation given on a weekly basis, 1435
isn't it? A. It is the total overhead expense for the year ending August 31, 1932, and the additional figure shows 1/52nd part of that total, which is the overhead for the week.

Mr. Pollak: I offer it in evidence.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. L-5, of this date.)

Q. Mr. Mills, I suppose the item Insurance Premiums 1436
is the same as in the similar case of Metropolitan Theatre? A. On the same principle.

Q. And so as to real estate taxes? A. Yes.

Q. And also as to interest on mortgages? A. Yes.

Q. And also as to interest on net investment? A. Right.

Q. And also as to depreciation of building and equipment? A. Right.

Q. In this case, Mr. Mills, the determination of income that on any theory is ascribable to "Letty Lynton" is somewhat different from the last case, where "Letty Lynton" ran for the whole week, is it not? A. You are now referring to the weekly statement and not to the overhead schedule? 1437

Q. I am referring to the combination of the weekly statement and overhead statement which would show profits ascribable to "Letty Lynton". In the case of the Metropolitan Theatre it can be readily ascertained by substituting the new overhead figure in place of the 40-week figure? A. Yes.

Q. That cannot be done in the case of a theatre where "Letty Lynton" ran for part of a week only? A. Right.

Q. But can you, and will you, please, compute what share of the profits of the week is due to the days on which "Letty Lynton" appears? A. That can be done.

438 Q. Would you do it right now? A. I think so.

Mr. Pollak: We will do this in this one instance right here, but we will have to prepare a statement under our own theory on the others.

The Witness: I have the computation.

Q. Does that also allow for a reduction of the overhead expense to the fraction of the week in which "Letty Lynton" appears? A. It does.

Q. What is the result of that computation? A. The result of that computation shows that for the three days on which "Letty Lynton" was shown the net profits for
439 those three days were $2,612.23.

Q. Will you explain the theory on which that computation was made? A. The theory is as follows. I took the box office receipts for the entire week, which were $11,267.65. The receipts for the three days on which "Letty Lynton" was shown were $6,593.75, or 58.5 per cent of the total receipts for the week. Our total expenses for the week, starting off with overhead of $2,629.39; we have general pay roll, $1,105.35; what is ordinarily called their trade bills, which is the next column, where all classes of expense are listed, $1,361.02, making the total expense for the week, including overhead applicable to
440 both the three days in which "Letty Lynton" was shown and took in the six thousand odd dollars and the remaining days when they took in the difference of four thousand odd dollars, a total expense for the week of $5,095.76.

I then took the 58½ per cent of this expense, the same ratio as the receipts of "Letty Lynton" bear to the receipts of the week. Taking the total expenses of the week unallocable otherwise, to give the total expense, we have $2,981.02; 58½ per cent of that total expense; to which we add the shorts and news for the time that "Letty Lynton" shows, which is $100.50; in other words, we are allocating wherever we can the direct expense and only allocating on the percentage basis where it cannot be allocated otherwise.

The feature "Letty Lynton" cost $900. Adding the $2,981.02, being the 58½ per cent of the general expenses including the overhead, to the cost of the shorts and the cost of the feature, makes a total cost of $3,981.52 allocated to the showing of "Letty Lynton" in that week. 1441

$3,981.52 deducted from the gross receipts of the days on which "Letty Lynton" was shown, $6,593.75, leaves a net profit allocable to the days on which "Letty Lynton" was shown of $2,612.23.

Mr. Driscoll: May I ask a few questions there, your Honor?

Mr. Pollak: I think we may ask you for a stipulation first. I want to ask Mr. Driscoll to add to the stipulation concerning the expert witness; would you stipulate, Mr. Driscoll, that the defendants could produce an expert witness who would testify that in his judgment the public goes to movie houses on an average to the extent of one-third on account of attractions other than the feature—subject to your objection as to materiality and relevancy? 1442

Mr. Driscoll: I won't stipulate to that. I don't think any sane expert could so testify.

Mr. Pollak: In other words, that part of the stipulation is refused? 1443

Mr. Driscoll: Decidedly.

Mr. Pollak: You want to cross examine Mr. Mills?

Mr. Driscoll: I want to ask a few questions.

Cross examination by Mr. Driscoll:

Q. What did you say was the net applicable to "Letty Lynton"? A. Net profit?

Mr. Pollak: At which theatre?

1444 Q. The Lexington. A. $2,612.23.

Mr. Pollak: He said for the playing days on which "Letty Lynton" appeared. Is that correct?

The Witness: Yes.

Q. For those three days. In your first column, your pay roll, you have $1,105.35. That is for a 7-day week? A. That is correct.

Q. In the next column you have headed here Trade Bills, including incidental bills like advertising, trailer, sign shop, maintenance and repair, supplies and other items, totalling $1,361.02?

1445

Mr. Pollak: Do you mind giving the Exhibit?

Q. Exhibit L-4. That is also on a 7-day basis, isn't it? A. That is correct.

Q. In addition to that you have overhead of $2,629.39, according to Exhibit L-5? A. That is correct.

Q. And that is on a 7-day basis? A. That is correct.

Q. Those items taken together total $5,095.76? A. Yes.

Q. That is on a 7-day basis. Now, then, if reduced to a daily basis that would be about $728 per day, is, that correct? A. Dividing by 7 equals that.

Q. Dividing by 7 equals $728? A. That is mathematical.

1446

Q. That is what you were doing, Mr. Mills? A. Not when I allocated my weekly expenses.

Q. You were testifying as an expert. I think you were testifying to this computation. That is what you were asked about. A. I didn't divide by 7.

Q. You were asked to explain what you had computed? A. Yes.

Q. That is what I am asking you. If you divide by 7 it will give you $728; that is correct, isn't it? A. Yes.

Q. If we multiply that by 3 days that will be $2,384? A. That is approximately correct.

Q. We have particular definite information as to the cost for the three days of the show, on the 14th, 15th and 16th; there is no confusion between those three days and the other days of the week for the cost of the show? A. That is correct. 1447

Q. The cost of the show is $1,000.50? A. Yes.

Mr. Pollak: That is direct cost.

Q. The direct cost of the show. So that if we take the overhead on this basis, plus the payroll, plus the trade bills, on this basis we have $2,184, and the cost of the show is $1,000.50; we have a total cost on this basis of $3,184.50 for the three days, have we not? A. Right. 1448

Q. Now, the receipts for those three days that "Letty Lynton" was showing was $6,593.75; is that correct? A. Correct.

Q. And if we subtract the total expenses on this basis I have outlined to you, we get $3,409.25? A. That is approximately correct.

Q. Is the admission tax included in the receipts you have stated here, or is it separate? A. That is not included. Wherever it exists it is entirely separate.

Mr. Driscoll: That is all.

By Mr. Pollak: 1449

Q. Mr. Mills, will you explain why you apportioned the overhead items as between the days on which "Letty Lynton" ran and the days on which it did not run on a ratio of gross receipts? A. Because the gross receipts for the week end, Saturday and Sunday, which is known as the good half of the week or the preferred playing time, is much greater than on the ordinary week days. For that reason the better class of attraction is given a preference in the showing time. Where there are two attractions

1450 shown, one for the week ends and the other for the middle of the week, the better attraction is always given the preference, as "Letty Lynton" was in practically all cases, probably all, but I will say practically all cases, certainly in this case.

Knowing that you do give the preference to the week end and knowing that we depend for a much greater share of our business on Saturday and Sunday than we do for other days of the week, it is a generally accepted rule in the motion picture business that the allocation of weekly expense on a day basis, by dividing the weekly expenses by 7 and charging the same amount of expense to Saturday and Sunday that is charged to other days, is not a fair
1451 allocation of expense and is never used when you are figuring the common sense allocation of profits to individual attractions for the week end and the other days of the week.

Mr. Driscoll: I move to strike out, that it is never used. I do not believe that this witness can be quite as sweeping as he has been in his testimony. He can testify to his experience. To make a statement like that and have it remain in the testimony is not reasonable. He does not know it is not used. It is used.

1452 Mr. Pollak: Are you testifying, Mr. Driscoll? I will consent to have the phrase "it is never used", stricken out.

Q. Is it a general practice, if you know, in accounting in the motion picture exhibiting industry to ascribe overhead expense on a gross receipts basis as between days of the same week?

Mr. Driscoll: I object to that unless this witness can qualify by showing that he has personally had charge of accounts and accountings for other concerns than Metro-Goldwyn.

Mr. Pollak: All right, if you want his experience. 1453

The Special Master: Isn't Mr. Mills's testimony simply to the effect that he as an accountant thinks that is a fair allocation between the days of the week? As a practical matter, I don't believe this particular situation has ever occurred before, has it?

Mr. Pollak: I think I can bring that out.

Q. Mr. Mills, are you familiar with the accounting of chains of theatres generally in the motion picture business? A. I am. 1454

By the Special Master:

Q. Has there been any necessity for splitting up a week in those accountings? A. There has.

By Mr. Pollak:

Q. Not merely in this litigation, but generally? A. Yes, every day.

Q. Are contracts written on a profit-sharing basis between distributors and exhibitors? A. They are; it is quite the custom.

Q. Is there a custom, in estimating profits, of making a larger allocation, whether or not exactly on the gross receipts, to the week end itself? A. It is quite the custom. 1455

Q. Will you explain one practice that is used in connection with such contracts? I am referring now to divisions into tenths of a week. A. The contracts between exhibitors and distributors are very often based on tenths of a week dividing the week into tenths as distinguished from sevenths ascribing two units to Saturday, three to Sunday and one to each other day, so that a picture that shows on Saturday, Sunday and Monday would be ascribed six tenths of

1456 the week's expenses rather than three-sevenths, being slightly over a half. Those contracts are made every day.

Q. And expenses are then allocated on that proportion as between the days of the week? A. Yes, sir.

Q. Does the testimony that you have hitherto given as to the direct expenses also apply to the direct expenses as between the days of the week? A. Yes.

Q. And contracts so written allocate direct expenses on this basis of tenths, do they not? A. Correct.

Q. And this is a familiar practice in the motion picture industry?

1457 Mr. Driscoll: I object to the form of the question.

The Special Master: He has already said that there has been such practice.

Q. Is this practice a general one in the motion picture industry?

Mr. Driscoll: Object to the form of the question.

The Special Master: They have done it in your own company?

The Witness: Yes.

Q. Has it also been done by other companies?

1458 Mr. Driscoll: I object to that unless this witness can testify that he has had experience in other companies.

Mr. Pollak: There is no such rule. All that an expert has to show is that he knows the practice.

The Special Master: I think all he has to do is to say that he has done it in his own industry.

A. I have done it for other companies.

The Special Master: What I am trying to bring out is whether there had been other cases where this practice was used, or whether it was gotten up for this case. 1459

The Witness: I have done it with other companies.

Q. Does Loew's itself deal on this basis with other companies? A. Yes.

Q. Because these theatres have themselves contracts with other producers and distributors besides Loew's or M-G-M? A. Right.

Q. And account on that basis? A. Yes.

Q. Mr. Mills, have you also made a calculation for the purposes of this case to determine whether, taking the aggregate of these 100 theatres as far as you could determine, a computation on the basis of tenths, allocating both direct and overhead expenses on this basis of tenths, or a computation on the basis of gross receipts, which of them would be more favorable to the plaintiffs? A. I have made an estimate. 1460

Q. What was the result of that estimate?

Mr. Driscoll: Objected to as immaterial.

The Special Master: I should think that it was objectionable more on the ground that you ought to produce the analysis. 1461

Q. Did you take a number of theatres chosen from this list and make this analysis? A. Yes.

Q. Have you got the computation itself here? A. Not here.

Q. You have them up at M-G-M? A. Yes.

Mr. Pollak: If it will shorten this thing, and it may, we had just as soon do it on a tenth basis. I

62 think it might be less complicated. Is that agreeable to you?

Mr. Driscoll: No. We contend that you have no right to do it, on either basis. We contend your insurance premiums are no different for Saturday and Sunday then they are for Thursday and Friday and that your real estate taxes are no different, and that your interest on your mortgage was no different on those days; that your depreciation was no different. They are per diem items. You divide your year into 52 weeks. You can divide your week into seven days. This tenth thing is merely a formula that has

63 been set up to fix the rental of films, where a picture is rented out at a certain guaranteed figure and a percentage over and above the carrying charges of the theatre for the week. In order to boost the Sunday end of the week from the middle of the week they have adopted this one-tenth basis so as to carry against the picture that might be playing those three days the big end of the expense.

That is not a case of allocating profits or anything of the sort. It is simply a case of fixing the rental of films. Because that is the preferable part of the week, there is no question about it—but it does not change our situation.

64 The Special Master: They want to introduce evidence to prove that they have done that under the circumstances which you describe. They will argue from that that it should be done in this instance.

Mr. Driscoll: The fact is that that is done simply to fix rental on film for exhibition purposes. But they will spread it out and try to make it appear that they keep their books on this basis, that it is a well known custom in all the branches of the business. And it is not so.

Mr. Pollak: If it is not so you can produce wit-

nesses to prove it. To shorten this thing maybe we can agree on this, that while you press your general objection to any allocation of expenses either direct or overhead between the days, you have no specific objection to taking the same computation on the basis of tenths outlined by the witness instead of the mathematically more elaborate computation on the basis of the gross receipts. 1465

Mr. Driscoll: I don't know the meaning of that stipulation. It is not clear to me.

The Special Master: Does your examination show that that will be more favorable to Mr. Driscoll?

Mr. Pollak: The examination we have made tends to show that the system Mr. Mills has adopted, a more laborious one, probably more scientific, of taking the number of days that "Letty Lynton" did appear—that that system is a shade more favorable to the plaintiff than the rough figure of dividing the week into tenths. The tenths system was itself an outgrowth of the obvious fact that gross receipts are much heavier on Saturdays and Sundays, but does not exactly represent the ratio. Therefore, Mr. Mills has been working on a ratio of gross receipts. It would not be much of a job to check it on the basis of tenths. 1466

The Witness: No. 1467

Mr. Driscoll: What I say is this. They would be free to load it if "Letty Lynton" happened to be played on the week end. I admit that the week end is the better part of the week for theatre purposes. More people go to the theatre on Saturday and Sunday than they do the rest of the week. My position is that this system is used only for one purpose, and that is where you as exhibitor and I as distributor reach a contract whereby I will get a percentage in addition to the guaranty for my

1468 picture. But you say, "I have got to have my carrying expenses; I have got to have my ordinary running expenses; then we begin to divide on any basis." For that purpose and that purpose only, to fix that rental, that 1/10th thing or 2/10ths or 3/10ths, the formula was worked out, to establish a profit from that, in the use of that formula, that you are to pay me, we arrive at a certain figure where the split begins. It is not so carried on their books; they do not use it in any other way.

The Special Master: Do they use it in partially owned theatres?

The Witness: The same.

1469 Mr. Driscoll: If they are playing pictures from the outside on such a split above expenses they use such a formula; that is the only purpose of it.

The Special Master: When a theatre is 100 per cent owned they don't do it?

The Witness: It doesn't make any difference whether the theatre is 100 per cent owned or partially owned, the contract made with Metro or any other distributor, it does not matter who the stockholders are, they agree to show a picture three days, Saturday, Sunday and Monday and they agree that in arriving at the rental of this picture on what 1470 this picture is earning they shall take the gross receipts and they shall take six-tenths of the expense being the amount properly allocable to those three days, and that a certain percentage of the excess shall be used in arriving at the rental value of the picture.

By Mr. Pollak:

Q. And that is done by the wholly owned subsidiaries; yes or no? A. Yes.

Q. And also by the partially owned subsidiaries? A. Yes. 1471

Q. And it is done by the companies wholly owned in their contracts with distributors other than M-G-M, is that right? A. That is right.

Q. And it is done by the theatres partially owned in their contracts with distributors other than M-G-M? A. That is right.

By Mr. Driscoll:

Q. And in this particular case here, for instance, Lexington Treatre, such a formula was not used at all, because there was no split or percentage paid above the carrying charges? A. That is right. 1472

Q. It had no effect on this situation at all. Here was a place where they rented it out at a flat rental for three days, so they didn't have any use for the formula. It had nothing to do with their carrying charges or anything else because it is a formula that has been adopted to estimate rentals.

The Special Master: Isn't that probably true, Mr. Pollak?

Mr. Pollak: I say that is probably a correct statement of fact. I say it is used where contracts are made, where there was division, a profit-sharing basis, which is the best illustration that it should be used here. 1473

Mr. Driscoll: I venture the statement, without being able to check it up, that in any release or showing of "Letty Lynton" in all these 103 theatres they have listed in Exhibit L-1 there was not one of that type of contract, there was not one on that formula—and I have not seen their contracts yet

The Special Master: Do you wish to say something about that?

1474 Mr. Pollak: It happens that most of the theatres were on a flat rental basis as to this particular picture.

The Special Master: I can't stop you from putting in testimony to support the theory that it ought to be used in every case; but I should think it was pretty persuasive that it was not used in every case.

Mr. Pollak: Mr. Master, when contracts are not made on a profit-dividing basis this problem does not arise. Where there is a rental of $250 gross or some flat figure, no question of allocation arises. The fact that it was not used in those
1475 cases has absolutely no logical significance. It means that it could not be used. The contract was not written in there.

Mr. Driscoll: You forget what we are doing here under the order of the Court is taking an account of profits that were made in the showing of "Letty Lynton". What you want to do is to say, "Although it was not on a split basis or anything of the sort, we are entitled to treat it as though it was and thereby lessen our profits, simply because of the fact that such a formula has been used in the renting of films, and therefore we want to
1476 use it here to lessen the profits you fellows are going to get."

Mr. Pollak: What Mr. Driscoll has not refuted but confirmed by his own candid admissions is that, where a question of profits does arise as a matter of actual practice in the movie business, profits are computed in accordance with the principle of allocating expenses, both overhead and direct.

Mr. Driscoll: You put into my statement more than I put into it. I don't want that statement to go unchallenged.

Mr. Pollak: What Mr. Driscoll has not refuted but confirmed here is a matter of practice in the movie business where contracts are so written that the matter of profits becomes material, as on an accounting of profits it becomes material, then it is the practice to ascribe to the end of the week expenses, both direct and overhead in a ratio that corresponds to and reflects the known fact that receipts are much heavier in the latter part of the week. 1477

Mr. Driscoll: Kindly have the record show that Mr. Driscoll does not concede that to be the fact.

Mr. Pollak: As I understand, Mr. Driscoll concedes that where contracts are written on a profit-sharing basis they are written on a basis which gives two-tenths of the week to Saturday and three-tenths to Sunday and one-tenth to each of the other five days. 1478

Mr. Driscoll: I know of no such rule or custom in the business, except in the one instance and one branch of the business and that is in the renting of film where a film is being rented by a distributor to an exhibitor and there is to be a percentage split, in addition to the guaranty, over and above what it costs to run the theatre. In such a case, in order to arrive at a rental, such a formula is used. I know of no other case where it is used. 1479

Mr. Pollak: I should say it is exactly in connection with that particular problem that it does arise.

The Special Master: I think I have got it clear.

By Mr. Pollak:

Q. Is this formula of tenths to which you have made reference, is it itself an approximation of the gross receipts formula? A. It is.

80 Mr. Pollak: Do you wish to cross examine, Mr. Driscoll?

Mr. Driscoll: No, I think these exhibits speak for themselves. I do not think it is denied that insurance premiums are as expensive on Saturday and Sunday as on other days.

Mr. Pollak: Referring to Exhibit L-5, the computation of overhead of the Lexington Theatre, do you want any further evidence that these expenses were incurred, or do I understand that generally speaking you recognize these exhibits as prima facie establishing the expenditures?

81 Mr. Driscoll: I recognize these as establishing the facts prima facie, when you ask me do I want any further evidence—except I do not recognize the interest on net investment was an expense incurred; I do not believe that was paid out.

Mr. Pollak: You do not believe that it is a correct computation? That is a point of law.

Mr. Driscoll: I do not dispute that it is a correct computation. I do dispute that it was paid out.

Mr. Pollak: It was, of course, the computed interest on the investment. I think, Mr. Master, that is all we can offer at this time. We have picked out two theatres, one showing a whole
82 week's showing of the production and the other a part week's showing.

(Discussion off the record.)

(Hearing adjourned until Monday, June 21, 1937, 10 A. M. The following dates were fixed for further hearings: June 28, 29, 30, 1937.)

HEARING OF JUNE 28, 1937.

1483

New York, N. Y., June 28, 1937,

10 o'clock A. M.

JESSE T. MILLS, resumed:

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, have you had prepared under your direction a statement showing the profit or loss of theatres owned by corporations wholly owned by Loew's Inc. during the periods in which "Letty Lynton" together with other attractions was exhibited? A. I have. (Papers produced.) 1484

Q. That statement is on two sheets, is it not? A. Correct.

Mr. Pollak: I offer both sheets in evidence, if your Honor please, as one exhibit.

(The papers just offered were received in evidence and marked Defendants' Exhibit No. L-6, of this date.)

Q. The heading of the sheets is substantially the statement contained in my last question? A. Yes, substantially; you said "owned", and it is "operated" here. 1485

Q. The schedule is so carefully prepared that I think it substantially speaks for itself. The pay roll and Trade Bills, being the third column, the first after the name of theatre and the name of the corporation, represents actual cash disbursements of the week, is that right? A. That is correct, under that caption.

Q. Will you explain the fourth column, Overhead for Entire Week; how was that figure arrived at? A. I have made up another schedule showing the individual items that go to make up the net overhead expense of the theatre

1486 for the entire year, and on that schedule, which I understand it is proposed to submit, in the last column appears the 1/52nd of the total expenditure, and it is the net overhead expense applicable to each week in the year on a pro rata basis.

Q. That schedule lists the theatres in the same order, does it not, as the schedule, Exhibit L-6? A. It does.

Q. That schedule, by a good deal of grouping, you have managed to get into one sheet, have you not? A. Yes.

Mr. Pollak: You have a copy of that, Mr. Driscoll.

1487 Mr. Driscoll: Yes.

Mr. Pollak: I offer it in evidence.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. L-7, of this date.)

Q. That schedule is captioned, "Overhead Expense of Theatres Operated by Corporations Wholly Owned by Loew's Incorporated For the Fiscal Year Ended August 31, 1932?" A. That is correct.

Q. Am I right in this, Mr. Mills, that the breakdown figure at the extreme right of Exhibit L-7 is always the

1488 same figure appearing in the fourth column of Exhibit L-6 as overhead for the entire week? A. That is correct.

Q. The fourth column or the second monetary column? A. Yes.

Q. Speaking simply of monetary columns, which I think is the simpler way, and returning to Exhibit L-6, the third column shows the box office receipts of the entire period in which "Letty Lynton" together with other attractions was exhibited? A. That is correct.

Q. Is it true that in all these cases there were some attractions other than "Letty Lynton"? A. There were always some other attractions.

Q. Now; then, the fourth column in Exhibit L-6 shows the percentage of the week's receipts received during the period in which "Letty Lynton" together with other attractions was exhibited? A. That is correct. 1489

Q. The essence, I suppose, there is that in some instances "Letty Lynton" ran for a week in certain theatres? A. Yes. In that case it would be shown as 100 per cent.

Q. As an illustration, you might take the Newark Theatre operated by the New Broad Company. A. That is right.

Q. Now, then, going on to the fifth monetary column in Exhibit L-6, the pay roll and trade bills applicable to the period in which "Letty Lynton" together with other attractions was exhibited, how do you get those figures, Mr. Mills? A. By taking the total pay roll and trade bills for the entire week, the amount of the total pay roll and trade bills for the entire week and multiplying that sum by the percentage of receipts in that week received during the days on which "Letty Lynton" together with other attractions was exhibited. 1490

By Mr. Driscoll:

Q. In other words, the percentage that appears in the fourth column of figures? A. That is right.

Q. How do you synchronize the first column of figures with that? You have pay roll and trade bills. Taking the Astoria Theatre. Add up your trade bills and your pay roll; you have $1,185.65 trade bills and $849.50 pay roll, which together would seem to come to $2,035.15, and in the first column you seem to have $2,010.15. A. Because there has been income against that; the amount of miscellaneous income is deducted from the trade bills 1491

Mr. Driscoll: All right I just wanted to get it clear in my own mind.

1492 By Mr. Pollak:

Q. Now, passing on to the sixth monetary column in Exhibit L-6, Overhead Applicable to Period in which "Letty Lynton" together with other attractions was Exhibited, are the figures there obtained by applying the percentage given in the fourth column of figures to the total overhead for the entire period, for the entire week? A. That is the way it was arrived at.

Q. Now, the next column, the seventh column of figures, simply states the actual cost of the feature "Letty Lynton" to the theatre? A. That is the amount that was paid for the feature "Letty Lynton".

1493 Q. Similarly the eighth column shows the actual cost of other attractions to the theatre? A. That is right.

By Mr. Driscoll:

Q. Take that Astoria Theatre again, the cost of other attractions, $58, how do you get that? Do you take that percentage? A. No, it is our actual items for those three days.

The Special Master: The seventh column, as I understand it, has already been accounted for.

1494 Mr. Driscoll: That appears on the photostat in each case as the cost of "Letty Lynton".

The Special Master: But it has been reported as receipts?

Mr. Driscoll: Yes, in the other accountings.

Mr. Pollak: That is correct, sir.

By Mr. Pollak:

Q. The ninth column, Profit or Loss Applicable to Period in which "Letty Lynton" together with other attractions was Exhibited, how was that arrived at? A. That is

arrived at by taking the box office receipts appearing in 1495
the third column of figures as the income, deducting from that the total of the fifth, sixth, seventh and eighth columns, and arriving at the net profit applicable to the period in which "Letty Lynton" was shown.

Q. The next column, the tenth column, simply shows Loew's percentage of interest in the profit or loss? A. That is correct.

Q. Now, in some instances, as I understand from this schedule, as to companies whose stock is wholly owned by Loew's Inc., the percentage of interest in profit or loss does not correspond to 100 per cent; is that correct? A. That is correct.

Q. Whatever the proportion of interest in profit or loss 1496
is it is recited in that column? A. That is true.

Q. Now, then, the eleventh column, Amount of Loew's Inc. Profit or Loss during Period in which "Letty Lynton" together with other attractions was Exhibited, is simply arrived at by applying the percentage in the tenth column to the figure listed in the ninth column? A. That is right.

Q. And the twelfth and last column takes a two-third share of the eleventh? A. That is correct.

Q. Now, there have been offered in evidence as typical certain weekly reports of one or two particular theatres? A. That is correct; the Lexington and the Metropolitan, 1497
to be exact.

Q. In connection with those weekly reports was it not noted on the record that the amount there given as ove ead differs from the amount now computed as overhead on a 52-week basis? A. That is right.

Q. That it was different? A. Yes.

Q. Am I right in this, Mr. Mills, that this schedule, Exhibit L-6, is based on the weekly reports of each of those theatres therein listed, with a recomputation of overhead? A. That is correct.

98 Q. Now, Mr. Mills, is this correct: that a copy of the weekly statement of each of the theatres included in Exhibit L-6 has been given to Mr. Driscoll? A. That is correct.

Mr. Pollak: I should explain in that connection that the very exhaustive examination for two weeks that was made by Mr. Mills and his associates into this matter has revealed that Exhibit L-1, which listed theatres—your Honor recalls that —should be itself further subdivided and superseded in this respect, that the classification should be more precise. Some of the theatres, namely,
99 the ones that Mr. Driscoll has mentioned—do you mind giving the names?

Mr. Driscoll: Loew's Broadway, Freeman, Mount Vernon, Plaza, Prospect, Sheridan and Willard, the last seven appearing on the second sheet.

Mr. Pollak: —owned by the Marcus Loew Booking Agency, were as a matter of fact operated by the Marcus Loew Booking Agency, and we are preparing a new schedule showing all the classes of relationship borne by these companies.

I think there was also omitted from Exhibit L-1,
00 as was found by careful checking, a case of one theatre in Westchester County where there was an ownership of ten per cent. of the stock by Loew's Inc. But that schedule with those changes will be done over.

Q. Now, returning to Exhibits L-6 and L-7, I think I can have a yes or no answer to this question. As to these theatres operated by corporations wholly owned by Loew's Inc., am I right in this, that the weekly statements for the period in question as to each of these

theatres has been given to Mr. Driscoll? A. That is correct. 1501

Q. Now, returning to Exhibit L-7, in some cases I find that there was no rent. Will you explain how it came about, Mr. Mills? A. Because the theatre was owned in fee; the entire property was owned in fee and, therefore, no rent was payable to landlords.

Q. Where an item of rent appears it means in all cases the rent that was charged against the company for the year by the landlord? A. And was paid to the landlord.

Mr. Driscoll: What column was that?

The Witness: In the first column.

Mr. Pollak: The first column of figures on Exhibit L-7. 1502

Q. Now, the second column, the figure Insurance Premiums explains itself. It is the insurance premiums actually paid? A. It is the insurance premiums actually accrued, whether actually paid then or not.

Q. The same is true of real estate taxes and licenses; it represents the accrued obligation? A. That represents the amount paid.

Q. Actually paid whether accrued or not? A. Yes.

Q. Accrued interest payable, what does that interest represent? A. That speaks for itself; that is the accrued amount. 1503

Q. You mean, in cases where there were mortgages or other outstanding indebtedness? A. Yes.

Q. What does the item Investment Interest represent? A. Investment Interest represents six per cent. interest on the net equity of the corporation in the residual value of the fixed assets after allowing for any mortgages outstanding, and appears on the books.

Q. Those figures in all instances were derived from the books? A. They were.

1504 Q. By those figures I mean the figures under the caption Investment Interest? A. Yes.

Q. As to the column headed Depreciation and Amortization, how did you arrive at the figures and what do they represent? A. They represent in the main three per cent. depreciation on buildings, ten per cent. depreciation on equipment, and amortization in a very few instances of any leasehold interest, which may have been actually paid out and spread over the life of the lease.

Q. How did you compute that amortization? A. Based on the life of the lease.

Q. On the theory of its being a depreciating asset? A. That is correct.

1505 Q. You made those computations separately as to every one of the theatres involved in L-6? A. That is correct.

Q. What does the item Sundry Expense represent, in a general way? A. In a general way it represents comparatively small items of one and two hundred dollars of incidental expenses of the corporation which were not included in the weekly statement as a weekly expense, but was more in the nature of an annual—license fees or other expenses of various natures; and where the amounts are larger than that they represent in some cases the operation of buildings where there is quite a large number of tenants and require a certain amount of building expenses in the
1506 way of janitor services and cleaning and electric light in the building, and so forth. It also represents any franchise taxes paid by the corporation in the year. I think that covers the main items of the expenses included in that column.

Q. Rent Income, I take it, represents actual receipts from parts of the building not used for theatrical purposes? A. Actual receipts or good accounts represented at the end of the year; if they had not actually been received at the end of the year they were carried as income and collected the following year.

Q. Your items of Other Income, what kind of income 1507
did that represent? A. Other income would be what is known as candy privilege where we have a candy stand in the lobby, as distinguished from rent; water and light collected from tenants; where we have expense the corresponding item collected from tenants will be in the income column. In case there were any deposits on leases bearing interest on security, the interest received from that deposit will be credited in there as miscellaneous receipts.

Q. The column headed Total for Year, next to the last column on the sheet, that is a mere addition of all of the items of overhead expense, less items of income? A. That 1508
is correct.

Q. And, of course, the Per Week 1/52 divides it on that basis? A. That is correct.

Q. In the few instances stars appear in the column, the last column on the right? A. That is right.

Q. For istance, Atlanta, there is a note which says "41 weeks", and in the case of Wilmington Theatre it appears as "35 weeks". A. That is correct.

Q. What does that mean, Mr. Mills? A. That means that the overhead expenses listed here are not for a full year, but are only for 41 weeks—the theatres in the case of Atlanta the theatre was closed for eleven weeks of the year during some extensive alterations and the corresponding 1509
overhead items were capitalized in the cost for those weeks and not included in the overhead expense here. There was, therefore, total expense of only 41 weeks as distinguished from 52 weeks.

Q. In the Wilmington case it was the same idea? A. In the Wilmington case it was the same idea; it was not open the full year and the overhead expenses do not cover the full year.

Mr. Pollak: Mr. Driscoll, will you accept the schedules, Exhibits L-6 and L-7, together with the

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1510 weekly statements for the theatres therein represented, as prima facie showing, subject to cross examination by you, the income of the several theatres operated by companies wholly owned by the defendant Loew's Inc.?

Mr. Driscoll: Prima facie of what they are supposed to be.

Mr. Pollak: I think in the interest of clarity I will have Mr. Mills explain one thing. It appears on Exhibit L-6. There has been some allusion to it. If your Honor will turn to the third column from the right in L-6, I have already mentioned that in some instances as to wholly owned theatres the in-

1511 terest in profits or loss was less than 100 per cent., being 50 per cent. in the case of one theatre here.

By Mr. Pollak:

Q. Will you explain that in a general way, Mr. Mills? A. That is because the percentage of Loew's Inc. ultimate interest in these theatres is less than 100 per cent. represented by the stock ownership in that particular company, because that particular company has a sharing or pooling arraagement with the landlord or other operators of the theatre. An example of the first exception to that 100 per

1512 cent is the 42nd Street Theatre, where the percentage is shown, 50 per cent. There, 50 per cent. of the profits of that corporation are paid to the landlord as additional rent for the theatre.

Q. Is the same in principle true for all the other cases on L-6 where the percentage of profits is less than 100 per cent.? A. That is correct.

Q. Now, Mr. Mills, have you prepared a schedule showing the profit or loss of theatres operated by corporations partly owned by Loew's Inc., during periods in which "Letty Lynton" together with other attractions were exhibited? A. I have. (Papers produced.)

Q. That represents, does it not, the case of theatres where 1513
the ownership, though partial, is direct, the ownership of stock in the operating company? A. That is correct.

Mr. Pollak: I offer this schedule in evidence: Profit or Loss of Theatres Operated by Corporations Partly Owned by Loew's Incorporated During Periods in which "Letty Lynton" Together with Other Attractions was Exhibited.

The Special Master: Received.

(The paper just offered was received in evidence and marked Defendants' Exhibit L-8, of this date.)

1514

Q. Have you similarly prepared a schedule showing the overhead expense on these theatres operated by corporations partly owned by Loew's Inc. for the fiscal year ended August 31, 1932? A. I have. (Papers produced.)

Mr. Pollak: I offer this schedule in evidence.

(The schedule just offered was received in evidence and marked Defendants' Exhibit L-9, of this date.)

Q. And, of course, the corporations appearing in Exhibits L-8 and L-9 are the same in the two exhibits? A. They are. 1515

Q. And in the same order? A. They are.

Q. Am I right in this, that as to the corporations appearing in Exhibits L-8 and L-9, weekly statements have in all instances been given to Mr. Driscoll? A. They have.

Q. Is this correct, my understanding of it—I think it can be answered yes or no—is the principle on which these schedules L-8 and L-9 have been prepared exactly the same as the principle on which Exhibits L-6 and L-7 have been prepared, with the sole difference that as to these partially owned theatres they are computed at the proportion of

1516 profit or loss represented by the Loew interest, which in each case is less than 100 per cent.? Is there any other difference in principle between the two sets of schedules? A. There is no difference in principle as to them. They are both exactly the same in principle.

Q. In the case of the latter, Loew's interest in the profit or loss for the period during which "Letty Lynton" was exhibited would be 100 per cent. in most cases? A. That is true.

Q. It would not be in the exceptional cases you mentioned where special contracts give Loew's less than 100 per cent. interest? A. Both groups have been handled the same way.

1517 Mr. Pollak: I ask Mr. Driscoll whether he will accept Exhibits L-8 and L-9, subject to his cross examination, as proving prima facie the facts therein set forth in those two exhibits.

Mr. Driscoll: As they set them forth, yes.

By the Special Master:

Q. What is the theory under which this last column is made up, showing two-thirds share of profit or loss?

1518 Mr. Pollak: That is in accordance with the contention of ours at the last hearing, if your Honor please, that in view of the fact that "Letty Lynton" took up less than two-thirds of playing time of the theatre and in view of the fact that in all cases there were expenses for other attractions than "Letty Lynton", a minimum allowance of profit or loss to those other attractions, vaudeville or shorts, news, and so forth, would be on an average one-third. I think you recall that.

The Special Master: Was that in the previous testimony? I don't recall that.

Colloquy of Counsel.

Mr. Pollak: It is a point of law. Mr. Driscoll 1519
stipulated that we could call a witness who would testify that the attraction of the theatre included many other things——

The Special Master: Was there any other testimony of the one-third and two-thirds?

Mr. Pollak: At present there is no direct evidence of that particular contention. You asked me if I would be willing to stipulate that that would be our contention rather than introduce in every instance evidence on a fraction basis.

The Special Master: What did Mr. Driscoll say?

Mr. Pollak: Mr. Driscoll, if I am correct, thought 1520
I could produce a witness who would testify that the other attractions did have drawing power. He was not willing to stipulate that we could produce a witness who would testify that the other attractions account for one-third.

The Special Master: I remember it now.

Mr. Pollak: I think you will find in that connection that the tabulation of the cost of the other attractions is instructive. I think it shows that on an average the cost of the other attractions was slightly more than one-third of the total cost of other attractions and of "Letty Lynton" combined. I think the ratio is something like 36.64 per cent. 1521
Of course, it varies enormously at different theatres.

The Special Master: I understand.

Mr. Pollak: And also you understand that the ratio of the playing time of the other attractions is definitely more than one-third. It is either stipulated or testified without contradiction that the playing time of "Letty Lynton" was 84 minutes, and the total playing time of a movie house is ordinarily two and a half hours.

The Special Master: I don't remember that.

1522 Mr. Driscoll: They did, I think, but Mr. Mills testified that the ordinary playing time of "Letty Lynton" was 82 minutes, as I recall it.

Mr. Pollak: 84.

Mr. Driscoll: I am wrong.

The Special Master: Mr. Driscoll, if their theory on this accounting is correct do you make any point on the question of proper allocation of two-thirds of profit or loss to "Letty Lynton"?

Mr. Driscoll: My contention goes beyond the relation of the playing time of "Letty Lynton" to the rest of the attractions. We contend as a matter of
1523 law the profits made that week cannot be divided or allocated in any manner.

The Special Master: I understand that. But assuming that their contention was correct, do you make any point of the division?

Mr. Driscoll: No.

The Special Master: That is all I wanted here.

Mr. Pollak: You may cross-examine, Mr. Driscoll.

Cross examination by Mr. Driscoll:

Q. Mr. Mills, on Exhibit L-6, the first theatre that appears on there is the Astoria, and there "Letty Lynton"
1524 played two days, is that correct? A. Two days is correct.

Q. Now, those days were May 30th and May 31st? A. Right.

Q. And the receipts for those two days are set forth in detail in the photostatic copy of the box office statement which you have? A. That is right.

Q. Will you kindly produce that photostatic copy? A. I have it (producing paper).

Mr. Driscoll: I offer it in evidence.

Mr. Pollak: No objection.

(The photostat just offered was received in evi- 1525
dence and marked Plaintiff's Exhibit B, of this date.)

Q. Will you kindly produce the box office statements for all of the theatres on Exhibit L-6? A. These are all of the statements, weekly statements, listed on L-6 with the exception of the Metropolitan and the Lexington which are already in evidence.

(Papers produced by the witness.)

Q. And the Astoria? A. The Astoria I just presented to you.

Q. Then I assume you have in this bundle of box office 1526
statements that you have now produced here 45 different statements? A. There are slightly more statements—by statements we mean sheets of paper—than the number of theatres, due to the fact that in a few instances the picture was shown in two different weeks, the days ran from one week to the other, and in that case you will find two statements covering the operations for the period during which "Letty Lynton" was played at that theatre.

Mr. Pollak: Just one moment, Mr. Driscoll. As a mechanical matter, how should these be marked; as one exhibit?

1527

Mr. Driscoll: I care not. I would suggest that we mark them as one exhibit.

Mr. Pollak: Make these the same exhibit as the previous exhibit for the Astoria Theatre.

(The statements just offered were received in evidence and marked respectively Plaintiffs' Exhibit B-1 to Plaintiffs' Exhibit B-45, inclusive, of this date.)

Q. This overhead that appears on Exhibit L-6 is not based upon the number of days; it does not take as a basis

1528 the number of days that "Letty Lynton" played, for instance, at the Loew's Astoria, but takes as a basis the week that it played there? A. That is correct, the entire week.

Q. And when you figured the box office receipts you took the box office receipts only for the days that "Letty Lynton" played at that theatre? A. That is correct.

Q. And then in the next column of figures, the fourth column, you figure the percentage of box office receipts during the days that "Letty Lynton" was playing at the theatre, to the total box office receipts for the week? A. That is right.

Q. And you figured the payroll and trade bills in the same manner, you took the percentage represented by the
1529 number of days that "Letty Lynton" was playing at the theatre, which in turn was based upon the box office receipts for "Letty Lynton" during the days it played there compared with the week's receipts? A. That is correct.

Q. Now, it is a fact, is it not, Mr. Mills, that you have the same crew in the theatre on Sunday and Saturday, the same number of people that you do on Wednesday, Thursday and Friday? A. No, it is not true.

Q. What differences are there? A. The full crew is there on Saturday and Sunday certainly, and any time off is given off on the other days of the week.

Q. Are those hired on a weekly basis? A. They are hired
1530 on a week's basis, with one day's time off.

Q. In other words, all of your crew are hired on the basis of a week of six days? A. That is true.

Q. Now, is there any more tax paid for Saturday and Sunday than for Thursday and Friday? A. Ordinarily not.

Mr. Pollak: You don't need any evidence on that subject.

Mr. Driscoll: Mr. Pollak states on the record that we don't need any evidence on that subject.

Mr. Pollak: I so concede.

Q. Now, then, you carry over the figure that appears in 1531
the second column of figures on Exhibit L-6 into the last column on Exhibit L-7; that is, $1,781.71 for the Astoria Theatre, for instance? A. Yes.

Q. You carry that over into Exhibit L-7?

Mr. Pollak: Pardon me. In order to be accurate, it is brought over from Exhibit L-7 into L-6.

Q. Excuse me. Mr. Pollak is right as usual. You arrive at your week's overhead of $1,781.71 from the computation you make in Exhibit L-7, and carry it over into Exhibit L-6? A. That is correct.

Q. Now, then, turning to Exhibit L-7, in the case of the 1532
Astoria Theatre, for instance, you have accrued interest payable $11,687.50. Will you kindly give us the details of that? A. That is the actual interest accrued in the fiscal year ending August 31, 1932, on the mortgage and any other indebtedness in connection with the Astoria Theatre.

Q. The Astoria Theatre is owned by the Astoria Theatre Corporation? A. That is correct.

Q. Which in turn is owned by Loew's Inc.? A. That is right.

Q. Now, what interest was paid; what are the details of that interest item of $26,108.00? A. The investment 1533
interest.

Q. What were the investments? A. The investments were the investments of the corporation in the equity in the land, building and equipment of the theatre after reserve to date for depreciation, less mortgages against the property the interest of which had been included in the previous column.

Q. Can you give us a breakdown of that investment interest? A. I can't get it now. I haven't it here.

1534 By the Special Master:

Q. You passed that Accrued Interest Payable; you say that is an actual payment of interest on mortgages? A. That is true, or any other interest-bearing indebtedness.

Q. All those mortgages were held outside of Loew's? A. They were.

Q. And it was not paid to Loew's? A. That is correct.

By Mr. Driscoll:

Q. Now, Mr. Mills, I would like very much to have you produce here at the next hearing a few of these so that
1535 we might see what they are. Take the case of the Astoria Theatre. I think we ought to have certain further information, a breakdown of that accrued interest, what it is payable on, giving us the amount, and if on mortgages when the mortgages were made. Bring in the mortgages if you want.

Mr. Cohen: We wouldn't have those.

Mr. Driscoll: I would like full details of how, when and where that $11,687.50 was payable; I want to know when that mortgage was placed, to whom it is payable, and so forth.

1536 By the Special Master:

Q. Can you tell me the theory of that column? A. Assuming that the land, building and equipment of the theatre cost originally $1,000,000. Assume that we have depreciated to date $300,000. The net value of that property is now $700,000 on our books. Assume for the sake of argument that we have a $200,000 mortgage on the property. Subtract the $200,000 mortgage from the $700,000, and we have $500,000 net equity in the property which the corporation has put in of its own funds.

Q. And you allow them six per cent on that? A. That 1537
is right.

The Special Master: That is what I thought it was. I wanted to be sure.

By Mr. Driscoll:

Q. Mr. Mills, I don't want to make this burdensome to you, but I would like it if you had three or four theatres here on this Exhibit L-7, for instance, that you will bring to us the details of these various items that you have set forth here, in order that we may examine those as a sort of test for the rest of these properties. A. You are speak- 1538
ing now of the other columns?

Q. Take the entire thing right across. Take the Astoria Theatre; take the 86th Street Theatre; take the 116th Street Theatre; take the Kings Theatre in Brooklyn. A. There are four.

Q. Now, then, turning to Exhibit B, which is the box office statement of Loew's Astoria, you have, after you have taken from the receipts the expenses of the week, a balance of $3,583.56 before you take off overhead? A. That is right.

Q. That was checked out by the manager of the theatre by check No. 2861? A. Right. 1539

Q. To whom was that check made? A. To the Astoria Theatre Corporation.

Q. Let us understand how that is worked. Does the Manager maintain an account in his own name in which the daily receipts are deposited? A. No. The account is maintained in the name of the corporation under the special title of Loew's Astoria Theatre account, at a bank near the theatre, wherein the manager deposits the daily receipts either that night or the following day. He then draws checks as noted on this statement in various num-

1540 bers, paying the expenses, and draws a check for the balance as you have just indicated of $3,583.56 to the corporation operating that theatre, which in this case is the Astoria Theatre Corporation.

Q. And that check No. 2861 he sends to the home office of Loew's Incorporated? A. He sends to the home office of the Astoria Theatre Corporation.

Q. Where is the home office of the Astoria Theatre Corporation? A. 1540 Broadway.

Q. Where is the home office of Loew's Incorporated? A. 1540 Broadway.

Q. Is it in the same suite of offices? A. It is.

1541 Q. So that he does as a matter of fact send in his check to the home office? A. Sends it to the home office.

Mr. Driscoll: Will you kindly produce at the next hearing—take the Astoria Theatre—these checks that are mentioned in the box office statement, checks Nos. 2859, 2860 and 2861?

By the Special Master:

Q. May I ask a question? I want to get your theory as to why you put in this investment interest as a part of the overhead from an accounting standpoint. If I understand it correctly, it is really earnings. A. May I put it this

1542 way? We have two theatres. Assume they both have the same drawing power and they are comparable in size and capacity and located on opposite sides of the street or in different localities. They both are worth $1,000,000. They both have been depreciated $300,000 and now stand on our books at $700,000. On one we have a mortgage of $200,000, and we have $500,000 of our own money in it. On the other side of the street we might have a mortgage of $500,000, or we might have no mortgage.

It certainly is not fair to compare the operations of one theatre with another where in one case they have no mort-

gage and in the other case a large mortgage. Somebody 1543
has put the money into that theatre, into those fixed assets. Somebody is paying for it. We consider it the best of accounting practice to equalize those charges by charging to the operations of that theatre interest on this investment which the corporation has made in the theatre. Where we have another theatre of relatively the same size and class as that, which we do not own but pay on, everyone knows that in that rental payment that we are making to the landlord we are reimbursing him with six per cent, five per cent or seven per cent, whatever the rate may be, on his money that he has invested in it, apart from any profit he may make on that.

We think it is only fair that the investment in the prop- 1544
erties, which is very large, should be charged as an expense in arriving at the operating profit on that theatre. Otherwise, if you had half a million dollars invested in a theatre and charged no interest on it and you made $10,000 in the year on the theatre, you might think that was a profitable business, whereas as matter of fact we know we are losing considerable money.

We might find that the six per cent which we have fixed here as the rate is not high enough. In 1932 we were paying, Loew's Incorporated, the parent company, which supplied the money, was paying six per cent on a bond issue. There were other expenses which raised the effective rate 1545
and discount of that bond issue to six and a half per cent, and we were paying six and a half per cent dividend on the preferred stock, which money was poured into loans to these companies which owned the properties.

Q. In any isolated statement of affairs of any one of these companies, that investment interest would appear as net income, wouldn't it? A. It would appear as net income if they did not pay interest to Loew's Incorporated, the immediate parent, or other intercompany loan, or if they had a very large capital stock so that they did not require a loan. If it had a $500,000 capital stock, we con-

1546 sider that the interest on that $500,000 is a proper charge to theatre operations before we begin to make money on the theatre.

By Mr. Driscoll:

Q. Your investment is represented by stock, isn't it? A. Ordinarily the investment in the common stock is comparatively nominal, and the balance is made up of intercompany loans.

By the Special Master:

1547 Q. As a matter of fact and as a practical matter, take the Astoria Theatre, what does that balance sheet show? A. As I remember that company, it has a comparatively small capital stock, say, $10,000, and the balance of the money is loaned by Loew's Incorporated.

By Mr. Driscoll:

Q. The loan appears in the other column, accrued interest payable? A. The accrued interest is on mortgage and other interest bearing indebtedness due outsiders, and not to Loew's Incorporated. That corresponds in my hypothetical case to my $200,000 mortgage in my illustration
1548 here; that was a purely hypothetical case. My investment in the hypothetical case corresponds to the $500,000 equity which the corporation has put into the property in loans from Loew's Incorporated.

By the Special Master:

Q. Of course, I understand your theory, but a great deal would depend on how these various companies were set up individually, wouldn't it—I mean, if the interest of Loew's Incorporated was entirely stock of the company?

A. We would still be entitled to this return on the investment, from an operating standpoint. Somebody has got to pay for the use of this money. 1549

Q. I was just thinking that if you could assume that all of the Loew's investment in these companies was represented by stock, I should think that the investment interest would appear in the statements of those companies as net income applicable to dividends. A. Yes, but isn't it the financial income as distinguished from an operating income.

Q. If you disregard the corporate set-up.

Mr. Pollak: Only on the condition of disregarding the corporate set-up can the defendant Loew's be held liable. 1550

The Special Master: There is something in that, of course.

By Mr. Driscoll:

Q. Will you produce, also, Mr. Mills, the statement of Loew's Inc. for the fiscal year ended August 31, 1932? A. When you say "Loew's Incorporated", do you refer to it as a separate corporation, and not the consolidated report that is public?

Q. I don't know. I don't know what type of report you get out. I want to know how you show these various loans on which Loew's Inc. received interest from these various subsidiary corporations. I want to see how you carry them on the statement of Loew's Inc. A. I want to make one correction. I did not testify that Loew's Inc. received this investment interest. I said this was a proper charge on the books of the corporation to its operation. 1551

Q. Is it a fact that Loew's does not receive this item of interest of $831,720 appearing in the column headed Investment Interest? A. That exact amount they certainly do not receive.

1552 Q. It is a bookkeeping proposition? A. No, I think it is a proper financial proposition.

The Special Master: It certainly is a bookkeeping proposition. It may be proper. That is what is puzzling me a little bit.

The Witness: Will this statement clear it? Isn't it a fact that if the Astoria Theatre Corporation—even forgetting Loew's Incorporated, their relations to Loew's Incorporated—if the Astoria Theatre Corporation made no charge for this investment interest and, therefore, their $92,000 total expense which now includes that $26,000 investment interest, their ex-
1553 pense would then be $66,000—subtracting the $26,000 from the $92,000—therefore, you would have $66,000 expense, which would reduce the overhead per year by $26,000, which is approximately $500 a week. If that theatre, with only a $1200 a week overhead instead of $1700, had made $10 in that week, we feel that that would not be a fair statement of the facts to say that in the period that "Letty Lynton" was shown that entire week we will say for the sake of argument, that there was $10 profit in that week. We still say that somebody had to pay that $500, and there was actually a loss in that week of $490.

1554 By Mr. Driscoll:

Q. But it is a fact that the actual expense for that year was $66,000? A. It is a fact that the expenses paid out in connection with that theatre and the proper allowance for depreciation on the fixed assets was $66,000, plus any amount properly allocable as return on the capital invested in that theatre. In a great many instances these companies did pay to Loew's Inc. interest, sometimes approximating these amounts, sometimes more and sometimes less. Therefore, I say, the exact amount that you have quoted as the

total of that column, $831,000, that exact amount would 1555
not appear on Loew's Inc. statement as the amount of interest.

Q. By the same token you could have used 10 per cent as a fair return on the investment? A. We considered that six per cent was a fair return. It was under the actual cost of money in that year.

Q. So it sums up to the proposition of your allowing yourself six per cent on the earnings of that theatre? A. The exact cost of the expenses before earnings could be arrived at.

Q. As actual cost. You use the term actual cost. That does not mean money that you have paid out? A. As 1556
pointed out, if you are going to break down the corporate structure, it was money actually paid out, because Loew's Inc. paid it out on their $15,000,000 bond issue and their corporate stock. This is not something we imagine to arrive at the true expense of the organization.

Q. Assuming that this was fully paid-up stock and that Loew's ownership consisted of 100 per cent. of the stock. In that instance it would be earnings and nothing else. A. No, that is not true. You still have to pay your bondholders and your preferred stockholders; you have to find the money to pay them.

Q. Is the Astoria Theatre Corporation on those bonds? A. They were not.

1557

The Special Master: Is it practical to say that your position is, Mr. Pollak, that inasmuch as you are breaking down the corporate structure here you have got to take a matter of this sort into consideration as an expense rather than as earnings applicable to the stock interest?

Mr. Pollak: That is one aspect of our interest, sir. Also we make this contention: that supposing there were no question of breaking down the corporate structure, suppose even there were no cor-

1558 porations; as I understand the law, in determining what profits are earned there is always deducted from gross receipts an item representing the fair return on an investment, six per cent. in fact, because you could get six per cent. without going into business at all, and profits only begin, as I understand the theory of accounting, in patent and copyright cases profits only begin over and above the normal interest return on investment.

The Special Master: I am not necessarily sure of that, but if you did not break down the corporate structure and disregard the corporate entity, and
1559 if this investment that Loew's had in these various theatres was entirely represented by stock, then wouldn't normal accounting practices carry this item of investment interest into net income?

The Witness: Into net corporate income; it would of necessity mechanically; but we make this still an operating expense in corporate income.

Mr. Pollak: As Mr. Beatty suggests, suppose I take and operate a theatre; suppose I therefore had no rent to pay and suppose in fact I paid no interest to anybody because it was all my theatre and I put all the money into it; I would not be earning any profits until I had gotten back my normal six
1560 per cent. return on the million dollars that I had put into that theatre.

The Special Master: That is a different proposition, though.

Mr. Driscoll: You would be earning the six per cent. on the million dollars. And where Mr. Pollak is astray on the decisions is this: the decisions do not hold that a person who infringes upon a patent is entitled to charge against the owner of that patent a percentage of the investment in his entire business. For instance, if the United States Steel Corporation were to infringe upon a patent——

The Special Master: I understand that; that is another question. What I am trying to get clear, and I think you have got it fairly clear now by looking at your statements, that as a practical matter this item of $831,000 represented by investment interest is six per cent. on the amount of property after depreciation held by these companies, and after mortgages; which Mr. Mills says is a proper charge at six per cent. as an operating expense, and he does not contend or claim that that amount was actually paid to Loew's in the form of interest payments. 1561

Mr. Driscoll: That seems to be his statement.

By the Special Master: 1562

Q. Is that right? A. That is right, although some amounts were paid. By my theory it does not matter whether they were paid or not.

By Mr. Driscoll:

Q. Now, you have stated on direct examination that you showed in certain instances here a proportionate amortization of leases over and above the amount of yearly rental; in other words, that you have taken the charges, possibly of purchasing that outstanding lease, and amortized it over the remaining term of the lease? Is that right? A. Yes, in a very few instances of leasehold. I think I should state in explaining amortization that that includes mortgages, bond discount and expense where such conditions exist on the particular theatres; I want to add that. 1563

Q. That is in addition to the other charges that might have been incurred? A. In the word "amortization" there is more than the bond discount—actual expense spread out over the entire life of the bond issue or leasehold.

Q. I assume that some of those leases were secured in exchange for capital stock of Loew's Inc.? A. That is not

1564 justified. If there were any leaseholds paid for, they were paid in cash or its equivalent.

Q. That applies in every instance? A. That is correct.

Q. No stock issued in exchange? A. No.

Q. Take the Loew's Boulevard Corporation that you have here; you have a rental item of $30,166.66? A. Yes.

Q. By whom was that property owned? A. That was owned by a landlord entirely independent of Loew's Inc.—I don't remember the exact name—entirely outside of the organization.

Q. In that case you have a depreciation and amortization item, $5,487. A. That would be on equipment placed
1565 in that theatre; that would be on $54,000 of equipment, depreciation on that item.

Q. Will you bring in the breakdown on that item? A. Yes.

By Mr. Driscoll:

Q. I notice, Mr. Mills, that in each one of these instances there is an item on the box office statement of a booking fee. Take, for instance, Loew's Astoria.

Mr. Pollak: You are referring now to Plaintiffs' Exhibit B, is that right?

1566 Mr. Driscoll: Yes, this is B.

Q. Referring to Plaintiffs' Exhibit B, which purports to be a photostatic copy of the manager's statement for Loew's Astoria Theatre, City of Astoria, for the week ending June 3, 1932, there is a booking office fee of $200; and I find that in each one of these—B-1, which is the Century Theatre, $100,—down through, I think without exception—maybe there are exceptions; the next one is Loew's Avenue B Theatre, $125, and so forth. Will you kindly tell us what that booking office fee is? A. That is a charge made by the Marcus Loew Booking Agency for the overhead

expense of the main office at 1540 Broadway, of which 1567
we have allocated to each theatre an amount which, while it does not cover the entire office expense in connection with that theatre and the corporation which operates the theatre, was as fair a measure as we could arrive at to allocate the general office expenses caused by these particular theatres.

Q. So you allocated to Loew's Astoria Theatre a charge of $200 a week for the benefit of Loew's Booking Office? A. As a partial reimbursement of their office expense.

Q. You do allocate it? Can't you answer, yes or no? A. I can't say for the benefit of Loew's Booking office because the Booking Office still loses money.

Q. Can you say that you allocate it to the Loew's Book- 1568
ing Office? A. Yes.

Q. In the same way you allocate to the Century $100? A. Right.

Q. How do you arrive at $200 for Loew's Astoria and $100 for the Century? A. Based to some degree on the box office of the theatre and to some degree on the net profit realized by the theatre. These various amounts as fixed were not charged for any particular week, any individual week to the exclusion of other weeks, but were a uniform charge and in the judgment of the various operating heads and officials of the companies was the fair charge to that theatre, considering the various conditions and the work 1569
involved in connection with the theatre; some theatres having the same income or the same profit might entail much more work than another theatre. These amounts were arrived at in the previous September as being the proper amounts to charge these various theatres and in some cases were the subject of agreement with the cooperative interests where the stock of the company operating the theatre was not fully owned.

Q. There wasn't any agreement in the case of these 100 per cent. owned theatres, was there? A. There would

be agreements in the case of theatres operated by 100 per cent. owned companies where the landlord shares in a certain percentage of the results of the theatre operations as additional rent.

Q. You say one of the elements in fixing this charge was the amount of money the theatre made? A. That is one of the elements, yes.

Q. So that the more profitable the theatre, the more of a charge they paid? A. That is right; that is one of the elements by which we fixed the amount.

Q. That is what I expected you to say. In two cases you got this charge up as high as $450? A. Yes.

Q. What is the smallest charge you make against any of these theatres? A. I am not sure whether there was any theatre in this group under $100; I believe that $100 was the minimum.

The Special Master: Have you the answers to those questions, Mr. Mills?

The Witness: I have on London. These are approximate figures because he took them down in round figures.

Mr. Pollak: Go ahead and give them.

The Witness: $3,000 for provincial and dominion taxes; $3,000 for directors' fees and expenses; $3,000 for repairs and renewals; $1500 for the secretary's salary expense; $400 for the auditor's fees, for the certified public accountants; $1300 for license fees; $500 for transfer agent, the corporation having preferred stock outstanding. That makes a total of approximately $12,700 of these items as against the $12,900, the exact figures. If you would like the exact figures on the breakdown of this I can supply them at the next hearing.

I might say that in each of these companies there is preferred stock outstanding in the Canadian com-

pany and our interest is in the common stock, and 1573
in 1932 the operations of the company were carried on almost exclusively by the Canadian stockholders.

By Mr. Pollak:

Q. And the preferred stock was not held by Loew's? A. There were a very few shares of Toronto stock held by Loew's.

Q. In the common stock of London? A. In the London common stock.

By Mr. Driscoll:

1574

Q. Do you recall what the dividend on that preferred stock was, what rate was paid? A. On the preferred stock of the Toronto company?

Q. We are talking about the London Company. A. The London preferred stock rate is seven per cent. They were in arrears, however.

Q. Was it cumulative? A. Cumulative.

Q. What is the rate, if you remember, on Marcus Loew's Theatres Limited? A. Seven per cent., I think.

Q. What is the rate on Marcus Loew's Ohio Theatres, Inc.? A. My recollection tells me eight per cent. The original schedule carries that. I am quite sure that the rate on Loew's Ohio preferred stock was eight per cent. 1575

Q. There are two other issues of preferred stock that you have set forth in Exhibit L-1, one is Penn-Federal Corporation, $930,000. Do you remember the rate on that? A. Either six or seven; I am not positive

Q. And the State Theatre Company? A. Eight per cent., positively.

By Mr. Pollak:

Q. That is the State Theatre Company of Boston? A. Yes, the State Theatre Company of Boston.

Mr. Driscoll: That is all.

Q. Have you given the data for Toronto? A. Yes, I just gave it.

Mr. Pollak: Mr. Driscoll, do you recall that the data that have just been given in the London Canada Theatre were declared by Mr. Mills to be in round figures. He says the precise figures could be obtained. Do you care for those precise figures?

Mr. Driscoll: No.

The Witness: On Toronto, the sundry expense of $28,639.17 is broken down in round figures as follows: —

Mr. Pollak: Appearing on Exhibit L-9.

The Witness: —in round figures: $15,000 for provincial and dominion taxes; $7,900 for Canadian exchange in connection with bonds and coupons especially. My recollection is that that company's bond issue was payable in either Canadian or United States dollars at the option of the holder. $1,500 for directors' fees; $1,500 secretary's salary; $208 performance license; $500 theatre license; $350 auditor's fee; $500 transfer agency, making in all $27,458 of the total of $28,639.17, the discrepancy being due to the fact that we took the wrong figures.

Mr. Pollak: Do you want more precise figures than that, Mr. Driscoll?

Mr. Driscoll: No, that is precise enough.

Hearing adjourned to June 30, 1937.

HEARING OF JUNE 30, 1937.

1579

Mr. Pollak: If your Honor please, this list of corporations, engaged in one way or another in theatrical exhibition, has been put in as Exhibit L-1. I think I explained to you it has been carefully checked and rechecked and one or two minor omissions were found. What is more important is that they have now been reclassified, as some of these corporations are corporations in which the only relation of Loew's or any company connected with Loew's is that of Manager simply.

We have prepared a new Exhibit L-1, classifying 100 per cent. owned companies, the partially owned companies and the companies themselves held through intermediate stages of ownership, sometimes two or three and I believe in one instance four, and finally the companies in which the relationship is, as I have said, a managerial relationship only.

1580

The Special Master: Are you going to substitute that for old L-1?

Mr. Pollak: Yes. I think old L-1 can be physically withdrawn.

The Special Master: Have you a copy for Mr. Driscoll?

Mr. Pollak: Yes (handing paper to Mr. Driscoll).

1581

The Special Master: Do you want old Exhibit L-1 kept in, Mr. Driscoll?

Mr. Driscoll: I just want to compare them to see what the difference might be.

Mr. Schlosberg: The Willard and Conwall.

Mr. Pollak: Is that Willard Amusement Corporation which owns one or two theatres in Mt. Vernon the only difference?

Mr. Schlosberg: The Willard Amusement and also the Conwall Realty Corporation.

1582 Mr. Pollak: That is among the partially owned with an interest in each case of somewhat over ten per cent.

Mr. Schlosberg: On the large sheet we have taken off the Moredall.

Mr. Pollak: May we just withdraw the old L-1? There is no change at all in the wholly owned companies.

Mr. Driscoll: We have no objection to your withdrawing the old exhibit.

The Special Master: You will withdraw the old Exhibit L-1 and mark this Exhibit L-1.

1583 (The document just offered, consisting of four sheets, was substituted in the place of the exhibit previously marked Defendants' Exhibit L-1, and marked accordingly Defendants' Exhibit No. L-1, of this date.)

Mr. Pollak: If your Honor please, on Exhibit L-7, if you will recall, there was some reference to certain asterisks, and we have found by checking, what we believed at that time to be true, that the asterisk marks appearing under Sundry Expense several times should all be omitted. We can physically erase them for you.

1584 The Special Master: That is all right. (The marks indicated on Exhibit L-7 were struck out with a pen.)

The Special Master: The two that correctly appear are the two in the last column, Per Week?

Mr. Pollak: That is right.

IRVING SCHLOSBERG, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows: 1585

Direct examination by Mr. Pollak:

Q. Mr. Schlosberg, you are an accountant with the defendants herein? A. That is right.

Q. Associated with Mr. Mills? A. That is right.

Q. Certain schedules of profits obtained by corporations whose stock was held by corporations whose stock was held directly or indirectly by the defendant, Loew's Incorporated, and also schedules of profits of corporations whose stock was not so held by Loew's Incorporated but whose theatres were managed by Marcus Loew Booking Agency—were those schedules prepared by you in association with Mr. Mills? A. That is right. 1586

Q. Have you got those schedules here with you? A. Yes (producing papers).

Mr. Pollak: Please give a copy to Mr. Driscoll.

The Witness: These are the corporations which were partly owned by subsidiaries.

Mr. Pollak: I offer first in evidence the statement of profit or loss of theatres operated by corporations in which said corporations Loew's Incorporated had indirect stock interest whole or in part through one or more intermediate corporations during periods in which "Letty Lynton" together with other attractions was exhibited. 1587

Mr. Driscoll: Is that substituted for something you had before?

Mr. Pollak: No, it is a new one.

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-103 of this date).

1588 Q. Mr. Schlosberg, this Exhibit L-10 which has just been received in evidence has been prepared upon identical principles, has it not, with the exhibits already introduced showing the profit or loss of theatres owned by corporations whose stock was owned directly in whole or in part by Loew's Incorporated? A. That is right.

Q. Did you also prepare a schedule showing the overhead expense of theatres operated by corporations in which said corporations Loew's Incorporated had indirect stock interest in whole or in part through one or more intermediate corporations? A. I have. (Papers produced.)

Q. Those are the same corporations that have appeared
1589 in the Exhibit last offered, L-10, is that right? A. That is right.

Mr. Polkak: I offer that in evidence.

The Special Master: Mark it.

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-11, of this date.)

Q. Will you give me the schedule showing the corporations in which Marcus Loew Booking Agency has no stockholding interest, and acted in a managerial capacity?
1590 A. Yes (producing papers).

Q. In the case of these theatres, the only relationship was that of Marcus Loew Booking Agency under a managerial contract, is that right, Mr. Schlosberg? A. Yes.

The Special Master: These are the theatres mentioned on page 4 of Defendants' Exhibit L-1?

Mr. Cohen: That is right.

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-12, of this date.)

Mr. Pollak: I offer in evidence schedule of overhead expense of theatres listed in Exhibit L-12, managed by Marcus Loew Booking Agency. 1591

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-13, of this date.)

Q. Mr. Schlosberg, without undue repetition, if you can answer this in a generalized way do it. Have these two exhibits, L-12 and L-13, showing respectively the profit or loss for the weeks in question of Marcus Loew Booking Agency as manager of the theatres therein listed, been prepared on the same basis as the previous exhibits having to do with corporations owning theatres? A. They have. 1592

Mr. Pollak: Mr. Driscoll, do you accept these four exhibits, L-10, L-11, L-12 and L-13, as establishing prima facie, subject to your right of cross examination, the matters of fact therein set forth?

Mr. Driscoll: Establishing prima facie the matters therein set forth.

The Special Master: Does that complete the documentary evidence on this Loew's accounting?

Mr. Pollak: Yes, with the qualification that as you recall Mr. Driscoll called for certain matters to be investigated, and whether any of the answers to that are in a form that is documentary I do not know. 1593

The Special Master: Are you ready to have him cross examine, if he is ready?

Mr. Pollak: Yes, I am ready. Do you want to cross examine Mr. Mills first or Mr. Schlosberg?

Mr. Driscoll: It doesn't make any difference. I will take them both together if you want me to.

Mr. Pollak: Mr. Master, there should be added

1594 to Exhibit L-8 a further statement of profits of two more companies in which there was a partial stock interest. These two show an interest of about ten per cent., and a profit of $222.02 in the aggregate.

The Special Master: You want that added to Exhibit L-8?

Mr. Pollak: Yes.

The Special Master: We will mark it Exhibit L-8 plus.

(The schedule just offered was received in evidence and marked Defendants' Exhibit No. L-8+, of this date.)

1595

Mr. Pollak: May I have it on the record that no point is made by the plaintiffs that in respect to the three theatres, the Willard owned by the Willard Amusement Corporation, the Mt. Vernon also owned by the Willard Amusement Corporation, and the Plaza owned by the Conwall Realty Corporation—no point will be made of the absence of detail of computation of the overhead?

The Special Master: All right.

1596

JESSE T. MILLS, recalled:

Cross examination by Mr. Driscoll:

Q. Yesterday we produced here and offered in evidence the managerial or box office statements as to the theatres appearing on Exhibit L-6. They were marked Exhibit B to B-45 inclusive. Now, the next list of theatres, the list that appears on Exhibit L-8, have you the box office statements in a similar manner for those theatres appearing on L-8? A. Yes.

Q. Will you kindly produce them? A. Yes. (Photo- 1597
stats produced.)

Mr. Driscoll: I offer them in evidence.

(The photostatic copies of managers' reports were marked respectively Plaintiffs' Exhibit No. C to Plaintiffs' Exhibit No. C-23, inclusive, in evidence, of this date.)

The Special Master: Have you copies of those, Mr. Driscoll?

Mr. Driscoll: We have copies.

1598

Q. Now, the next list of theatres appears on Exhibit L-10. Have you similar box office statements for those theatres? A. Yes (producing photostats).

Mr. Driscoll: I offer them in evidence.

(The photostats just offered were received in evidence and marked respectively Plaintiffs' Exhibit No. D to Plaintiffs' Exhibit No. D-20, inclusive, of this date.)

Q. And finally, we have a list of theatres on the exhibit 1599
marked L-12. Have you similar statements for those theatres? A. Yes; there are eight altogether (producing photostats).

Mr. Driscoll: I offer them in evidence.

(The photostats just offered were received in evidence and marked respectively Plaintiffs' Exhibit No. E to Plaintiffs' Exhibit No. E-7, inclusive, of this date.)

1600 Q. Mr. Mills, I asked you yesterday to produce certain checks. Have you got those checks with you today? A. We have produced Alpine Theatre checks.

Q. Mr. Mills, I would like to ask you a question or two in regard to this Alpine Theatre. You have produced here four checks, three of which have been paid and on one of which the signature is destroyed, drawn on Loew's Alpine Theatre account. Those are the checks, I presume, that are referred to in the statement that has been marked in evidence? A. They are. Exhibit C.

Q. As Exhibit C. Just to find out how this is done, you have here first a check dated June 13, 1932, in the amount
1601 of $763.05 that is payable to M. Waldman, Manager, and that is in payment of the payroll for the week. A. The payroll and the petty cash item of $29.55 in the next column, also listed under check 1066.

Q. Waldman was the manager of the theatre? A. Yes.

Q. And the check was made payable to him and he cashes it and pays the employees? A. And the petty cash, the petty cash fund.

Q. The next check that you have is a check for $2,248.15; that covers the second column, which is headed Trade Bills, and the third column which is headed Films and Acts, I assume; they seem to total up to $2,248.15. A. Yes; that covers all the items in those two columns except the $29.55
1602 petty cash which is included in the check number 1066.

Q. That is, trade bills and films and acts? A. With the exception of the petty cash.

Q. That check is made to the Marcus Loew Booking Agency and seems to be paid to the Marcus Loew Booking Agency. In other words, the method used there was for the manager of the theatre to give to Marcus Loew Booking Agency a check to cover the items of trade bills and films and acts? A. That is right.

Q. And the Marcus Loew Booking Agency in turn paid these trade bills and films and acts? A. That is right.

Q. What was the interest of the Marcus Loew Booking 1603
Agency in the Loew's Alpine Theatre? A. Marcus Loew Booking Agency had no interest in the theatre; they merely acted as disbursing agents and purchasing agents.

Q. Was the same method followed out in regard to all of Loew's theatres? A. Yes.

Q. So that each manager of each theatre at the end of the week would draw a check from his theatre account to the order of Marcus Loew Booking Agency for the total amount, generally speaking—there might be an item missing here and there, but the joint amount of the column that appears on these exhibits headed Trade Bills and the column which is headed Films and Acts? A. That is right. 1604

Q. Each manager paid those two items or the total of those two items to Marcus Loew Booking Agency, and they in turn, for each one of the theatres, disbursed the money? A. That is correct.

Q. Was that method followed out where Loew's Incorporated owned the theatre 100 per cent.? A. Followed in all cases irrespective of whether they owned 100 per cent. or were simply disbursing agent and clearing house. Duplicate bills are rendered to the theatre so that he knows his full detail of all these items, but instead of paying the individual seller he pays the Booking Agency, which combines the items and makes one check for maybe 50 items, making a saving in writing a great many checks. 1605

Q. The only individual items that the manager pays are the payroll items, except for small petty cash? A. Except for small petty cash, this is correct.

Q. Now, in Exhibit 158 you have given us a statement of profit or loss of theatres owned in part by Loew's Inc.

Mr. Pollak: Pardon me; operated by corporations.

Q. Operated by corporations partly owned by Loew's Inc. A. Right.

1606 Q. Do I understand correctly that in one of the other exhibits that you have already given to us you show the interest of Loew's Inc. in those corporations that operate those theatres? A. That is correct.

Q. That appears in the substitution, in the new L-1. And in each case on Exhibit L-8 you have the name of the company that is operating the theatre, in the third column, and in the third column from the other end of the page you have Loew's interest in that particular operating company? A. Not Loew's interest in the particular theatre. You will recall it in the testimony I think that I gave the other day attention was called to the fact that sometimes
1607 these percentages varied from the stock ownership in the cases where we had pooling agreements.

Q. Does that apply to any interest in theatres where you had only a partial interest? A. It does.

Q. In other words, you might own 60 per cent. of the stock and only get 50 per cent. interest in the operation of the theatre? A. Yes. As a very clean example you will find some theatres 50 per cent. owned in our pool with some theatres of 100 per cent. owned companies, so that our eventual interest is 75 per cent.

Q. So that this third column from the right gives your percentage of ownership in the operation? A. Not the theatre.

1608 Q. And not the stock ownership? A. That is correct.

Q. Now, then, that brings us to L-10, and that purports to be a profit or loss statement of theatres operated by corporations in which said corporations Loew's Inc. have indirect stock interest whole or in part through one or more intermediate corporations. That is sort of involved and I am anxious to know just about what it means. A. I think that the schedule, that wide page schedule originally attached to L-1 clarifies that. That Bay Ridge Theatre, if you notice the first one on this list of L-10, you will notice by referring to the wider sheet of L-1 exhibit that that

theatre is operated by the Ridgebay Amusement Corporation, which corporation in turn is owned by the Diamond Amusement Corporation, and the Diamond Amusement Corporation is owned by Loew's Incorporated. 1609

Q. 50 per cent.? A. 50 per cent., that is right.

Q. Which amounts to Loew's having a 50 per cent. indirect—or what shall we call it?—through intermediate corporations, a 50 per cent. interest in the Bay Ridge Theatre? A. Yes, and it is so stated there.

Q. And in the case of the Canal Theatre, which is operated by the Ludlow Operating Corporation? A. Yes.

Q. And that is owned 100 per cent. by Loew's Theatre and Realty Corporation? A. That is right.

Q. And that is owned 100 per cent. by Loew's Incorporated? A. That is right. 1610

Q. So that Loew's Inc. has 100 per cent. beneficial interest in that particular theatre? A. That is right.

Q. Just so we understand what it all means. Now, then, that brings us to the list of theatres appearing on Exhibit L-12, eight theatres. I infer from that you have stated that in the instances of those eight theatres the Marcus Loew Booking Agency manages the theatres without an ownership interest in the operation? A. That is correct.

Q. On what basis does the Marcus Loew Booking Agency manage the theatres? Is it on a percentage basis? A. On a fee, measured by a percentage of the profits. They manage it for the account of the landlord. 1611

Q. And this statement in the third column from the right, does that purport to give Loew's percentage of interest because of its management of the theatre? A. That is correct.

Q. So that in the case of the Broadway Theatre it is managed by Marcus Loew Booking Agency and because of that management Loew's Incorporated received 50 per cent. in the profits of the enterprise? A. No; Marcus Loew Booking Agency:

Q. Then ought the column, the third from the right, be headed Marcus Loew Booking Agency instead of Loew's Inc.? A. Strictly speaking, it should.

Q. I want to find out if it should.

Mr. Pollak: We don't object to it. I think you are asking him for a mere characterization.

The Special Master: That is perfectly simple. This Marcus Loew Booking Agency is wholly owned by Loew's Incorporated?

The Witness: That is correct.

The Special Master: Then the heading is wrong really.

The Witness: In that case the heading is wrong on other exhibits preceding this.

Mr. Pollak: It comes out the same thing.

Q. Mr. Mills, in the cases of those eight theatres the show is booked by the Marcus Loew Booking Agency? A. As agent for the landlord.

Q. The Marcus Loew Booking Agency has the say-so in the making up of the show, operating the entertainment and booking the show? A. Yes.

By the Special Master:

Q. As with other theatres, the cost of the feature "Letty Lynton" has been accounted for in the other accountings? A. These theatres do not appear in any other schedule.

By Mr. Driscoll:

Q. It is true that as to these theatres that we have in all exhibits, wherever there has been a payment for the use of the picture "Letty Lynton" in any particular theatre for the time set forth in those schedules, that that payment has been accounted for in the accountings already in evi-

dence before the Special Master and the money accounted for by the Pictures Corporation or the Distributing Corporation? A. Yes. I did not understand the question. 1615

Q. That is true in every case? A. It is true in every case.

Q. Who hires the help for these various theatres, the manager of the theatre or the Marcus Loew Booking Agency? A. The manager of the theatre may hire certain classes of help, and Marcus Loew Booking Agency acting as agent for the landlord hired the higher paid help.

Q. The Marcus Loew Booking Agency would hire the more important help, like the treasurer? A. The treasurer, the manager, assistant manager and people like that.

Q. And the Marcus Loew Booking Agency would also, I assume, make up the programs? A. Yes. 1616

Q. If it involved vaudeville the Marcus Loew Booking Agency would book the vaudeville acts? A. Yes.

Q. Or if it involved an orchestra the Marcus Loew Booking Agency would book the orchestra? A. Yes, always acting as agent for the landlord.

Q. Is the Booking Agency in existence now? A. Yes, it is.

The Special Master: Any re-direct examination?

Mr. Pollak: I don't think so. Mr. Driscoll, on this Exhibit L-12, the third column from the right, which at present says "Loew's Inc. Percentage of interest", we think in the interest of clarity should be physically amended to read, "Compensation of Marcus Loew Booking Agency based upon the following percentage of profits". I ask your permission to mark it in ink on the original. 1617

The Special Master: That is all right so far as I am concerned.

Mr. Pollak: Similarly in the next column over, the words "Loew's Inc." will be erased and it will read "Amount of Profit or Loss".

1618 (The indicated changes were effected on Defendants' Exhibit L-12.)

The Special Master: I assume it is in the record that the Marcus Loew Booking Agency is the wholly owned subsidiary of Loew's Incorporated.

Mr. Pollak: I think it is, but at all events it can be stipulated on the record now.

The Special Master: You are finished on your cross examination on this case, Mr. Driscoll?

Mr. Driscoll: Yes.

The Special Master: And you are finished on your direct examination?

1619 Mr. Pollak: Yes.

ALEXANDER LICHTMAN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name, residence, and occupation? A. Alexander Lichtman, 101 Central Park West, New York City, Vice President of Loew's Incorporated.

1620 Q. Would you tell us in a general way your experience in the moving picture business? A. I have been in the motion picture business for 27 years in executive capacity with several companies over that period. I was in business for myself as a producer and distributor.

Q. What executive positions have you held? A. I was general manager in charge of distribution for Paramount for ten years, United Artists for about the same period, about ten years, and I have been with Loew's Incorporated since November, 1935. In the interim I handled, produced and distributed pictures for myself and partner.

Q. United Artists is the company that has my friend Mr. Driscoll as one of its important figures on the legal side? A. As counsel, with Mr. O'Brien. 1621

Q. Of course, you know Mr. Driscoll? A. Very well.

Q. Mr. Lichtman, your experience, I think you have already said, includes both production and distribution? A. Yes, sir.

Q. What were you doing in 1932? A. I was Vice-President in charge of distribution for the United Artists.

Q. I am going to put to you one or two questions that may be leading, and unless Mr. Driscoll objects I guess we can get ahead rapidly that way. Am I right in this, Mr. Lichtman, that in the case of a given motion picture the ratio of drawing power ascribable to the written material, as compared with the total drawing power, that that varies from picture to picture? A. Yes. 1622

Mr. Driscoll: I object to that as incompetent, irrelevant and immaterial and calling for a conclusion; on the further ground that it is about something that is not on trial or referred to the Special Master for decision. I move to strike out the answer.

The Special Master: Overruled.

Mr. Driscoll: Exception.

Q. Mr. Lichtman, is this true, that the better known the stars in a given picture are, other things being equal, the larger will be the ratio of attractive power ascribable to those stars? 1623

Mr. Driscoll: Same objection. I want to make it to all these questions if Mr. Pollak is to continue along the same line, and if it is understood that my objection applies to all of these questions I won't repeat it each time.

The Special Master: That is all right.

Mr. Driscoll: With an exception each time.

1624 Mr. Pollak: You may answer. (The preceding question was read by the stenographer.)

A. Yes.

Q. And is it also true that the more favorably known a given producing company is the larger will be the attractive power ascribable to the company? A. Yes.

Q. And similarly if a given producer is better known, the larger will be the ratio of attractive power ascribable to him; is that right? A. That is right.

Q. And similarly as to the director, I take it? A. Yes.

Q. Now, Mr. Lichtman, can you tell us from your knowledge of motion picture conditions as they were in 1932, 1625 whether or not at that time Miss Joan Crawford was a star of the first magnitude? A. She was.

Q. And can you tell us also whether at that time Mr. Robert Montgomery was a motion picture actor of distinction? A. Yes.

Q. What was the status in 1932 in reputation among producing companies of M. G. M.? A. The best.

Q. What was the reputation of Mr. Thalberg? A. The highest, as a producer.

Q. What was the position of Mr. Clarence Brown, as a director? A. He was one of the foremost directors.

Q. Now, are you familiar with the position of Mr. Stromberg at that time? A. Yes. 1626

Q. What was that position? A. One of the producers for M-G-M.

Q. Are you familiar with his general status and reputation in the movie world? A. He was considered one of the very best producers in the world.

Q. And was so considered at that time? A. Yes.

Q. Now, Mr. Lichtman, getting back specifically to the contribution to attractive power that the written material makes, am I right in this, that the contribution of the written material is greater, other things being equal, if

the picture as produced bears a name very well known in literature? A. That is right. 1627

Q. Taking as an illustration the name "David Copperfield or "Ben Hur", would the attractive power of the written material upon motion picture audiences be greater with such a production as that, or "Peter Pan", than with some picture bearing a colorless name? A. Varying in degree from "Ben Hur" to the highest degree, that would be considered the prime attraction. Naturally the finished picture would be enhanced if the players acting therein were the best known and popular, but "Ben Hur" would be, in the custom of our business, in the vernacular of our business, would be billed over the player. To a slighter degree the others that you mentioned, "Copperfield" and "Peter Pan", to a slightly less degree. 1628

Q. Am I right in this, that even in the case of pictures bearing very famous names, there is a contribution to their drawing power from the names and reputations of the stars and the director and the producer? A. Decidedly so.

Q. And, other things being equal, the contribution of stars and producers and directors and of the reputation of the producing company is the greater, the better and more favorably known they are; is that correct? A. That is correct.

Q. And, other things being equal, the contribution of the written material is greater if the written material is associated with some name famous in literature, for example, and less if the written material bears a colorless name? A. That is right. 1629

Q. Now, take a picture with Crawford and Montgomery as stars, Stromberg as producer, Brown as director, bearing a name not identified with any well known play or story, under conditions existing in 1932, what proportion of the gross receipts would you say was ascribable to the written material? Do you understand the question?

1630 Mr. Driscoll: Objected to. I object to the form of the question; objected to as incompetent, irrelevant and immaterial, not within any issues referred to the Special Master for trial here.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. I would consider the written material worth, against the total values in connection with the producer, directors, stars just mentioned, as being worth about, not more than ten per cent., and perhaps less, of the total.

1631 Q. Mr. Lichtman, passing to another aspect of this case, you are familiar, are you not, with the purposes and operations of the Hays organization? A. Yes.

Q. Could you tell us in general terms what the purposes and operations of the Hays organization are, and what relation it bears to the production and distribution of moving pictures?

Mr. Driscoll: I can't see what that has to do with it.

Mr. Pollak: I think there has been criticism made by you of the payments made to the Hays organization. If objection to that payment is withdrawn

1632 there is no use of this proof.

Mr. Driscoll: My contention is whatever you paid to the Hays organization is based on the gross receipts and therefore if you paid out that year or the next year a certain amount you are entitled to deduct it. I have made no objections to the payments made to the Hays organization.

Mr. Pollak: With your statement I think there is no need for pursuing this line of examination.

The Special Master: Are you ready for cross examination?

Mr. Pollak: Mr. Cohen properly reminds me of a matter that I wish to ask Mr. Lichtman about. 1633

Q. Are you familiar, Mr. Lichtman, with the practice of motion picture companies of having certain employees in reserve who may at a given moment be unassigned to any given work; are you familiar with that practice? A. Yes.

Q. It exists, for one thing, in relation to writers, does it not? A. I can best answer that that we produce about 52 motion pictures a year and we employ more than 100 writers continually on a permanent pay roll, in addition to which we employ special writers from time to time for special subjects. So that on the theory that it might take 1634 one man to write one story you can readily see that we employ more than one, we employ more than two per story. Often one writer may start one story and his work be not found satisfactory and his work be turned over to another, and the first writer may be idle until another assignment comes along.

Q. Mr. Lichtman, this you may answer yes or no. Is this practice of having unassigned authors general in the motion picture production business, or is it not?

Mr. Driscoll: Objected to as immaterial. 1635

A. It is general.

The Special Master: I think the witness has answered the question that you put. I don't think you need to go into it any further. I think you have made whatever point there is.

Q. It is a fact in the motion picture world, is it not, Mr. Lichtman, that a single producing company produces in the course of the year some scores of pictures? A. Yes.

Q. Mr. Lichtman, in your judgment if writers and actors

1636 were uniformly hired solely for a single production, would the cost be greater or less in operating a motion picture studio?;

Mr. Driscoll: I object to that. That has nothing to do with the issues here. We are not interested in the motion picture business beyond the taking of "Dishonored Lady" and making it into "Letty Lynton".

Mr. Pollak: That is a point of law, a point on which we naturally differ with you. We want the fact, Mr. Master, and I think we are entitled to have it.

1637 The Special Master: The trouble is that I thought we developed that angle completely out on the Coast. Go ahead and answer.

Mr. Driscoll: Exception.

(The pending question was read.)

A. I believe higher.

Q. Will you, in your own way, state your reasons for your conclusion?

Mr. Driscoll: Same objection made to that question.

1638 The Special Master: Go ahead and answer.

Mr. Driscoll: Exception.

A. Naturally, if offered employment for a period of time, which is the custom usually when an actor shows talent and promise, he is signed for several years, sometimes with options for one year and then options for seven years. Naturally under that arrangement his future for that period is secure and the publicity behind such a performer is valuable to him because if he is under a long term contract the company publicizes him, so that the compensation

in money would be smaller than if he were hired picture by picture or week by week. 1639

Q. Mr. Lichtman, in your experience in the motion picture industry, do you know of any case in which the author of a play or story or other written material himself produced a motion picture from that written material? A. I know of no single picture ever made——

Q. Mr. Lichtman, do you know of a single motion picture, consequential or inconsequential, which since the days of sound has been produced by the author? A. By himself?

Q. Yes. A. No.

Q. Or which has been produced otherwise than through a motion picture producing company? A. No, I do not. 1640

Q. And that applies, whether my question relates simply to an author or to any other copyright owner? Do you understand my question? A. Yes, I think I do.

Q. You know of no such case? A. No.

Q. You know of no such production since the days of sound otherwise than through a motion picture production Company? A. I would like to say that there may be some companies that are organized only to produce one picture and then cease to produce them. There are small companies in the business which may run a studio to produce a motion picture; but I know of no author alone who has taken his work and produced it into a motion picture; 1641 I know of none.

Q. From your experience in the motion picture business is it possible to produce a feature picture without the various departments contained in the M-G-M studio at Culver City, or substantially without those departments?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues that we are trying here in this accounting.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

1642 A. You could not make a motion picture of good quality without a studio containing all the necessary departments, substantially such as there is at the M-G-M studio.

Q. And that would be true, would it not, in 1932 as well as today? A. Yes, sir.

Cross examination by Mr. Driscoll:

Q. Mr. Lichtman, Mr. Pollak was asking you whether you knew any authors that produced their own pictures. There are and have been a number of independent productions, haven't there? A. I said yes, Mr. Driscoll.

1643 Q. Charlie Chaplin produces his own pictures, always? A. Yes.

Q. And Harold Lloyd? A. Yes.

Q. Fairbanks produced his own pictures? A. Yes.

Q. And Miss Pickford produced her own pictures? A. Yes.

Q. In fact, there have been instances of that type? A. Yes.

Q. Producing their own pictures and not going into production in a big way such as Mr. Pollak referred to? A. Yes.

1644 Q. You also testified, in response to Mr. Pollak's questions, or Mr. Pollak I think made the statement and you agreed, that the better the company the better chance the picture has of being good, and the better the producer the better chance it has of being good, and the better the director the better chance it has of being good; and I suppose the better the weather the better chance there is of having a good box office? All of these factors have to do with the amount drawn into a box office, don't you think so, Mr. Lichtman? A. Yes.

Q. You can't confine it to the making of the picture or the attractiveness of a picture or the box office there is in the picture or any one thing or any one element? A. Not any one element; it takes a great many elements.

Q. As a matter of fact, often what you expect to be a great big successful picture is often times a flop? A. Very often that happens. 1645

Q. Often times what you expect to be a very ordinary picture turns out to be a real moneymaker? A. Very seldom.

Q. But it does happen? A. Yes, it does happen, but very seldom.

Q. Speaking of Miss Crawford, Miss Crawford made "Rain" for Art Cinema in 1932, I think it was, and that was one of the flops, wasn't it? A. Yes.

Q. And Art Cinema was itself a producing company producing pictures under the leadership of one of the outstanding men in the business? A. Yes. 1646

Q. And Art Cinema was a flop? A. Yes.

Q. And they lost money? A. Yes.

Q. So that when all is said and done it is a combination of elements that tend to success or failure of any particular picture? A. That is right.

Q. Do you know what was paid for "Room Service"? A. Not direct knowledge; I heard of it.

Q. What was your information? A. I heard that 200 or $250,000 was paid.

Q. Or $245,000? A. I heard some such sum as that.

Q. So that if the material is only ten per cent. of the value of the picture you would have to have a picture there of approximately two and a half million dollars? A. Very often producers overpay. 1647

Q. For material? A. For material or actors or anything else.

Q. In addition to "Room Service" there are a number of outstanding illustrations. You take, for instance, "Abie's Irish Rose", they paid what for that; do you know, Mr. Lichtman? A. I don't remember that.

Q. Do you remember that it was $300,000 on a split? A. I heard some such large sum of money.

1648 Q. If it represented only ten per cent., they would have to make $3,000,000? A. It would be excusable for a producer to pay a large sum of money for a play that ran a large number of years, because it became as well known as any play that was ever produced. Sometimes you produce a play and pay a large sum of money because of the value of the play itself, because that was a very ordinary story, but because of the reputation it had gained for drawing value over those years; that is the reason they paid it.

Q. So that reputation and run of the play are among the other elements that have to be taken into consideration? A. They are very important elements as to value.

1649 Q. Very important elements? A. Very important.

Q. Let's see: "Dinner at Eight", Metro bought that, didn't it? A. Yes.

Q. How much did it pay for that? A. I believe about $160,000 for that.

Q. Ten times that would be $1,600,000, wouldn't it? A. When you said 10 per cent., gross or cost?

Q. I was taking your testimony. You understood, in answer to one of Mr. Pollak's questions you said that the written material represented not more than ten per cent., of what? A. Of the total cost of that picture; that would be at the outside, I would say.

1650 Q. If "Dinner at Eight" cost $160,000 for the written material, that would justify the cost of a picture of $1,600,000? A. I had in mind, Mr. Driscoll, this: you must distinguish between "Letty Lynton" and "Dinner at Eight". "Dinner at Eight" was a distinguished play of great reputation. It was treated accordingly. All of the great stars of M-G-M were placed in the parts and they made a great big super-colossal feature picture out of it and they grossed a great deal of money out of it.

Then you have stories which studios buy simply because they fit certain of their stars, certain featured stars can enact those roles well. They may be of ordinary value.

They try to buy them as cheaply as they can. They have no particular drawing value. You could have called it "Letty Smith" and it would have been the same for box office value, or "James Smith" or some other title, so long as it is not degrading to a girl of Joan Crawford's fame. You must distinguish there. 1651

Q. Now, taking your testimony, Mr. Lichtman, when you paid $160,000 for "Dinner at Eight", you did not know that the picture was going to take in this great big box office? A. No, you never know.

Q. So that the great big box office has nothing to do with it, except it might raise your expectations with the price that you pay for a play? A. You approach it in every department with an air of importance. You take greater care in production. You appropriate larger sums of money to produce a thing as good as that than you would something that was just a good story. 1652

Q. When you go out to buy a play of distinction, Mr. Lichtman, you don't say, "Well, we could get this for $100,000, but we will pay $150,000 because we are going to put in some outstanding stars rather than some ordinary people"? A. No.

Q. So when you go out to buy a play you get the play as cheaply as possible? A. Yes.

Q. The fact that you paid $160,000 for "Dinner at Eight" was not affected at all by the players you put in it or the box office looked attractive? A. No, the consideration of doing that is because the play had been established as an outstanding success and it seemed to the producers that it should make a good motion picture and, therefore, it might be well to meet the competition, because competition runs up that price. 1653

Q. Exactly. Isn't it true, Mr. Lichtman that you paid $160,000 for it because you couldn't get it for less? A. Naturally.

Q. So with "Ben Hur", how much did you pay for "Ben Hur"? A. An enormous sum of money.

1654 Q. It was much over that? A. Yes.

Q. Wasn't it over half a million dollars? A. It was a participating agreement.

Q. And they are still sharing? A. If there is still income there; if the picture is showing. That was a distinguished work, one of the greatest in the world.

Q. It is also true that the value of a piece of literary material or any other piece of motion picture property varies with the individual that wants it? There isn't any standard on any piece of property? A. No, no standard.

Q. You might be willing to pay $160,000 for "Dinner at Eight" when another producer might be willing to pay $175,000? A. Yes, and another one wouldn't give you $10.

1655 Q. Do you know how much was paid for "You Can't Take It with You"? A. Yes, I think so.

Q. How much? A. $200,000. I wouldn't give you $50 for it.

Q. Do you recall how much was paid for "Way Down East"? A. I think 150.

Q. Thousand? A. Yes.

Q. There are many elements, as you said before, are there not, that enter into the success or failure of a picture at the box office? A. That is right.

Q. And in so far as business is concerned, the success or failure of a picture is measured by its success at the

1656 box office, is that correct? A. Yes.

Q. You don't care how artistic, how much of a success it is artistically, if it does not bring in success at the box office? A. You judge a picture two ways. You judge a picture from the artistic standpoint, and you judge it from a commercial standpoint. From the commercial standpoint you judge it by what it brings in at the box office. For instance, we have a motion picture today, called "Captains Courageous". We get great satisfaction out of that picture because it is a fine spiritual work, and we consider it a credit to the company and to the industry as a whole;

and although we will make no money out of it, we are satisfied. 1657

Q. If you lose money on it you will not be satisfied. A. We will lose money on it, but we are satisfied because we consider it a contribution to the industry.

Q. Isn't it also true that a picture, or play for that matter, may succeed in one city and fail in another city? A. Yes.

Q. It is part of the exigencies of the business? A. Yes.

Q. In addition to the story, the plot, the dialogue, the characters and the development of the plot and the other elements of the play that enter into the success or failure of a picture, there are many other things that enter into the success or failure of a picture, aren't there? A. Yes. 1658

Q. And it is a fact, however, that all of those things do enter in, that is, the story, the characters in the story, the plot, the dialogue, its development, all of those things enter in? A. Yes.

Q. They are intangible; you can't say how far they enter in, but they do enter in? A. When you are doing a thing for a great many years, your experience sort of gives you an instinctive sense of value about these things. For instance we can tell by looking at a motion picture what it will gross. That comes from experience. We can look at what appears to be a very good picture and we will say, "This picture will not please the public. They will not come in to buy it." We may not be able to give the reasons why but our experience tells us it will be a flop, for one reason or another. 1659

Q. That is why you are in the business, isn't it? A. You acquire that, the same as in your profession your experience gives you the feel of things.

Q. And with that acquired skill you are not able to tell with any degree of certainty what element is responsible for the success or failure of a picture? A. In a degree you can.

1660. Q. I said, any degree of certainty. A. With perfect certainty, no; but with a sufficient degree to enable you to make a decision, yes.

Q. Now, outside of the actors and the acting and the direction, there are a great many outside elements that enter into the success or failure of a picture, aren't there? A. Yes. For example, Mr. Driscoll, you are speaking of this particular star, Joan Crawford. This picture was successful. The one you mentioned, produced by Art Cinema, was a failure. I happen to have been very close to that picture; you know I distributed it and I was very close to it. The producing company looked to me for advice about many things.

1661 We know that "Rain" was a successful play. It had been produced as a successful motion picture, silent, with Gloria Swanson as the star. Joan Crawford was about Miss Swanson's drawing power and popularity at the time she made "Rain" and the time Miss Crawford made the same story. But the spirit of "Rain" was not in the adaptation of the talking version. It was lost in the adaptation. It was not in the direction. The director, who dominated the whole production, who was also the producer—there was no producer over him—Milestone was the name—did it in such a way that the spirit of "Rain" was no longer in that thing. They spoke the lines that were

1662 written by the author, but you couldn't get the feel out of it. The picture had to appeal to the emotions. They couldn't get it over. But Crawford was not a failure in the next picture.

Q. The emotion you speak of, that is one of the intangible things you can't put your finger on? A. I think it is pretty tangible for those who have the decision to make, for those who have to decide whether to use Crawford again for that type of play or whether you use Milestone again as a director for that sort of picture. It is tangible enough. It is to the profession, although it might not be to the layman.

Q. When they put it together they didn't know it was going to lack the spirit of "Rain"? A. No, of course not. It cost a fortune. 1663

Q. That was one of the chances of the business; they missed fire? A. That is true; they missed fire.

Q. In addition to that there are many outside things that will influence the success or failure of a picture, such as the change in public sentiment towards a particular type of picture? A. That is possible, yes.

Q. For instance, the springing up of Legions of Decency will change the trend of pictures, and the aspect of a particular picture? A. Of a particular picture possibly, not the trend of pictures; that is too broad.

Q. A picture that might have a prospect of success but for the activities of the Legion of Decency? A. I wouldn't go so far as to say that, Arthur. There were a few pictures that were objected to by the Legion of Decency at the time of that activity on their part, which I think had to be altered before they were ultimately released. 1664

Q. Do you think it has affected the marketability of Mae West's products? A. Up to the time that Mae West apparently lost her popularity her pictures were doing a terrific business.

Q. She lost her popularity just about the time the Legion of Decency started activities, didn't she? A. About; just a little before that, I should say. 1665

Q. Another element that comes into the situation is an element of competition. If you have a particular type of musical, if a number of them came into the field at the same time the chances of success are thereby lessened, aren't they? A. No. There was a time before the talking pictures were perfected to their high degree of efficiency. At about that time there were a number of musicals made very badly and the people became tired of them and wouldn't buy them. But later, when the musicals were made very much better, you can't give them enough, because they have learned now how to make them.

1666 In the early days they did not know how. At first people went to them because they were novel and different and the market was flooded with them, and they were pretty bad, and they just stayed away. It was later, just about two years thereafter, they perfected them and they are the most popular pictures today.

Q. Isn't it a fact that when you have a picture any way out of the ordinary at all that you frequently race to get your picture released if you suspect or hear or think that another company is going to produce the same type of picture? A. Type? In such a broad category as musicals? No. But if, for instance, we were producing, Mr. Driscoll,

1667 a story of Napoleon and we heard that another company were also producing a story of Napoleon, we certainly would try to get out first.

Q. Mr. Lichtman, take a picture like "Room Service"; assume that it cost $245,000 or $250,000 for the motion picture rights of that picture, isn't it a fact that no producing company could afford to make a picture of that costing two and a half million dollars? A. I wouldn't think so, but sometimes we do.

Q. You do foolish things? A. Sometimes we intend to make a picture to cost a million dollars and end up spending two and a half.

Q. If you spend two and a half million dollars in making

1668 a negative from the start, how much would you have to gross to get your money back? A. You would have to gross about $4,000,000.

Q. That is a whale of a lot of money, isn't it? A. Yes.

Q. How many pictures have grossed $4,000,000? A. Quite a few, but not as many as we would like to—in the world, I am speaking of.

Q. What percentage of the total output would you say had grossed $4,000,000? A. The whole motion picture output?

Q. Yes. A. Let us see. About 700 pictures made—oh, not more than 1½ per cent., two per cent.

Q. One and a half in a hundred? A. One and a half per cent.; one and a half in a hundred. 1669

Q. Do you know of any $4,000,000 gross last year? A. Yes.

Q. What was it? A. "The Great Ziegfeld" grossed more than $4,000,000, in the world.

Q. In the world, yes. A. Let me see. I know that one definitely. There are several in distribution now, possibly two or three of our company that may reach close to that figure.

Q. The leading producing companies today pay fairly large salaries to the writers of their literary material, don't they, Mr. Lichtman? A. Yes.

Q. How high do those salaries run? A. The writers under permanent arrangement, do you mean? 1670

Q. Let us take them first. A. They run as high as $3,000 a week.

Q. $150,000 a year? A. Yes. Seldom are they employed 52 weeks a year. They are usually employed for 40 weeks.

Q. When you hire a writer for a particular picture, for a particular subject, you make a special contract with him for that? A. Yes.

Q. And that is likely to run as high as $250,000 for a subject? A. I don't know of any that high.

Q. How high would you say it would run? A. Most of them are hired for so many weeks for so much a week. The highest I know of was $5,000 a week on a special job for a limited number of weeks. 1671

Q. There are a great many producing companies that have started in the business and that have gone under? A. Yes.

Q. In fact, there are big companies—there are only six or seven big producing companies in the business today, isn't that true? A. Yes.

Q. I suppose it would be fair to say that several hundred have started in the business from time to time? A. Yes.

1672 Q. Those companies have gone under because they have not made a success of the business, isn't that correct? A. Yes.

Q. They have produced pictures that have not brought back sufficient to give them their costs out of it? A. Very likely.

Mr. Driscoll: That is all.

Re-direct examination by Mr. Pollak:

Q. Mr. Lichtman, I have only a few questions. In the first place, as to these independent companies, the pro-
1673 ducing companies that you mentioned, I suppose when Charley Chaplin produced a picture he starred himself in it, is that correct? A. Yes, except one. He produced one without himself; "Woman of Paris".

Q. Generally speaking, he starred himself? A. Yes.

Q. He had been for years a person experienced in the motion picture world, had he not? A. Yes.

Q. And Mary Pickford, when she produced pictures did she star herself? A. Yes.

Q. And Harold Lloyd, when he has produced pictures did he star himself? A. Yes.

Q. And these persons were themselves producers, among
1674 other things? A. Each of them, I think, had a big staff of people.

Q. And they had, all these, complete studios? A. Yes. Mary Pickford and Douglas Fairbanks jointly owned a studio. Chaplin owns his own studio.

Q. Mr. Lichtman, is this true, that when Charley Chaplin produces a picture in which Charley Chaplin appears, the attraction of Charley Chaplin as the star is a very great source of drawing power? A. Practically the whole drawing power.

Q. And in greater or less degree does the same go for Mary Pickford? A. Yes.

Q. And for Harold Lloyd? A. Yes. 1675

Q. Now, returning to these cases that Mr. Driscoll cited of large sums paid for motion picture rights, is this correct: that where a large sum was paid for "Ben Hur" it was after the book "Ben Hur" had established a world-wide reputation under that name? A. Not only the book, but the play, for years.

Q. It was a famous play? A. Yes.

Q. Is the same true of "Dinner at Eight"? A. It was a great play.

Q. Is the same true of "Room Service"? A. "Room Service" is comparatively new. It started off with a very successful play.

Q. But the payment in each case was made for the motion picture rights after the reputation of the book or play or book and play had been established, is that true? A. Yes. 1676

Q. Is it true of every one of those cases that Mr. Driscoll alluded to by name? A. Yes.

Q. Now, Mr. Lichtman, Mr. Driscoll has put you some questions about the ratio of cost in particular cases between the written material and the total cost. I want to ask you this: taking now, not the cost, but the attractiveness of the picture to the public will you forget about cost for the moment its drawing power, which I suppose is best represented by gross receipts taking the gross receipts and not cost, and taking a picture not bearing the name of any well known play or book but having M-G-M production, the direction of Clarence Brown, the immediate production of Stromberg and the supervisory production of Thalberg, and Joan Crawford as a star and Robert Montgomery as co-star, under conditions prevailing in 1932, what proportion of the gross receipts would you ascribe to the written material? 1677

Mr. Driscoll: I suppose you are asking him as Vice-President of Loew's Incorporated?

1678 Mr. Pollak: I am asking him as an expert in the movie business.

A. I assume a very small percentage there.

Q. Put an outside figure. A. In 1932 I suppose a picture of that type should gross in the world about one million three or four hundred thousand dollars, and the rights to the story without adaption would be worth approximately $25,000, and the adaption might bring it up to a total of 45 or 50 including the adaption; in other words, the second play. So that $50,000 of one million three or four hundred thousand dollars—what percentage is that?

1679 Mr. Driscoll: $100,000 would be ten per cent. of a million; $50,000 would be five per cent. of a million.

A. (Continued.) It would be about 3½ per cent.

Q. Will you explain—forgetting for a moment any question of cost—what proportion, among the influences that induce persons to go to see that picture, what proportion you would ascribe to the written material?

Mr. Driscoll: Is this on the assumption that he has interviewed every one who has gone to see it?

The Master: I think he has testified to that be-
1680 fore.

Mr. Pollak: I am asking now how much—I don't care how much the cost was, for the present.

A. I understand.

Q. I want to know what the proportion of the drawing power of the picture upon the public, in your opinion, is at the time, in the case of a picture as I have described it, a picture produced in 1932 with Joan Crawford and Robert Montgomery as the stars, under the direction of Clarence Brown, with Stromberg as the immediate producer and

with Thalberg as the supervising producer, and as an M-G-M production; I ask you how much of the drawing power of the production, in your view, at the outside, is ascribable to the written material. 1681

Mr. Driscoll: Objected to, of course, unless the witness can say that he has interviewed on a number of occasions all of the people attending a production and definitely ascertained on more than one occasion what the drawing power of the written material was. Otherwise he cannot qualify as an expert or prove what drew them into the theatre.

The Special Master: We will have to take the testimony for what it is worth. He doesn't pretend to have made that kind of investigation. 1682

A. I will answer it in this way: that in my opinion a picture based on a book or play, in which appear glamorous and popular stars, produced by a favorably known company by expert producers and director, that I am inclined to appraise that picture, I would place the value of that picture upon the value of those stars and direction—because you could not say that John Smith, a ticket buyer at the Capitol Theatre in New York, would value anything that he had not heard about. If "Jane Smith" was the title of the play and "Jane Smith" was the title of a book on it, it certainly means it was a picture with Crawford and Montgomery and Clarence Brown in an M-G-M picture. 1683

Q. When you say very little, would you give your own best judgment of an outside percentage? A. I would give it nothing.

(Discussion off the record.)

Q. You have testified, I think, that the proportion of pictures that have grossed over $1,000,000 is, in your

1684 judgment, not more than one and a half per cent.? A. That is right.

Q. What proportion of pictures is there with respect to which as much as $240,000 has been paid for the motion picture rights; what percentage of plays? A. I would say one-quarter of one per cent.

Q. And was the percentage any higher in 1932? A. I don't think it was any higher.

Q. Do you know what the highest price was in 1932 for the motion picture rights? A. I do not.

1685 HEARING OF JULY 6, 1937.

DANIEL JAYCOCKS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Will you kindly state your full name and present address? A. Daniel Jaycocks, 155 Highland Avenue, Montclair, New Jersey.

Q. Mr. Jaycocks, what is your present occupation? A. I am general manager of Warner Brothers Theatres in

1686 New York.

Q. You have been connected with the motion picture business for a good many years? A. About eighteen years.

Q. I think once, many years ago, you were connected with the old Metro company? A. Yes, about sixteen or seventeen years ago.

Q. You are not now connected with any of the defendants in any capacity? A. No.

Q. Mr. Jaycocks, what was your occupation in 1932? A. I worked for Fox West Coast Theatres as assistant to the general manager.

Q. And your experience, among other things, is in the exhibition of pictures, is that right? A. Yes. 1687

Q. And was in 1932? A. Yes.

Q. Now, did the West Coast Theatres in 1932 exhibit among other attractions "Letty Lynton". A. Yes.

Q. How many theatres, in 1932, were comprised in the West Coast chain? A. Over 400.

Q. In how many of those theatres was "Letty Lynton" exhibited? A. I should say approximately 300.

Q. From your experience in the exhibition of motion pictures can you form an estimate of the portion of the drawing power of an attraction and of the gross receipts of an attraction ascribable, generally speaking, to the stars? You might just answer that question yes or no, whether you can form an opinion as to the stars. 1688

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, and nonsensical.

The Special Master: Overruled.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. I would like you to ask me once more.

Q. (The preceding question was read by the stenographer.) A. I can form a general opinion.

Q. Is it your opinion, yes or no, that generally speaking the largest element in the attractive power of a production is the star? 1689

Mr. Driscoll: Objected to as leading, telling the witness what to testify to. I object to the form of the question. I object to it as incompetent, irrelevant and immaterial.

The Special Master: Objection as to the form sustained.

Q. Mr. Jaycocks, we will try it a little differently. I suppose some part of the attractive power of a production

1690 is due to the direction, is it not? A. A small part of the box office value, I should say.

Q. Some part is due to the name of the producer, is it? A. I should say a small part.

Q. And is some part ascribable to the company which is known to be the producing company? A. Yes, a small part, if it is an outstanding company.

Q. Is some part also ascribable to the written material or story? A. Yes, a small part.

Mr. Driscoll: I want to record my objection to this entire line of testimony. Evidently the purpose
1691 for which this witness has been called is the same purpose for which one or two witnesses have been called here before, namely, an offer to prove something that is not before the Master for determination.

I object to that as incompetent, irrelevant and immaterial, not before the Master for determination; and on the further grounds that no witness is competent to testify as to such as speculative matter as the portion of attraction due to any element of a picture. The Court of Appeals of the State of New York says nobody can tell what it would be. I don't see how this witness can set himself up as
1692 better than the Court of Appeals of the State of New York.

The Special Master: We will take the testimony over objection and exception.

Mr. Driscoll: Exception.

Q. What was the reputation of Joan Crawford in 1932?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Same ruling?

Mr. Driscoll: Exception.

A. She was an outstanding box office star. 1693

Q. We really know what the terms mean, but just to get the record perfectly clear what do you mean by an "outstanding box office star", Mr. Jaycocks? A. Over a period of years the larger part of the pictures she played in have always met with public appeal through the box office.

Q. What was the position of Mr. Robert Montgomery in 1932?

Mr. Driscoll: Some objection to that question.

The Special Master: Same ruling and exception.

Mr. Driscoll: Unless it is *understood that my objections* go to all this line of questions, it will be necessary for me to note my objections to each question. 1694

The Special Master: I take it your objection runs through the whole of this testimony, with the same ruling; and you may have an exception.

A. He had a public appeal, not as great as Joan Crawford, but good box office value.

Q. What was the reputation of M-G-M as a producing company in 1932? A. They had been then and still are for several years the outstanding producers of motion pictures in the country.

Q. What was the position of Mr. Thalberg in the motion picture business? A. He was the outstanding producer. 1695

Q. Have you heard of one Mr. Stromberg? A. Yes.

Q. What was his standing in 1932? A. Always been known as a good producer.

Q. You have heard of Mr. Clarence Brown, a director? A. Yes.

Q. What was his standing in 1932? A. For many years he has been known as a very fine director.

Q. And had been so known in 1932? A. Yes, and before then.

1696 Mr. Driscoll: Is it the position of the defendants that because these people were well-known they are to be absolved for taking this play in 1932?

Mr. Pollak: I think we have made our position pretty clear, but it will be made plainer in the findings.

Q. Take a picture with Crawford and Montgomery as stars, produced by M-G-M, with Mr. Thalberg as supervisory producer, Mr. Stromberg as producer in direct charge of production, with Mr. Brown as director, bearing a name not identified with any well known play or story, under conditions existing in 1932, what proportion of the
1697 gross receipts was ascribable to the stars?

Mr. Driscoll: I object to the form of that question, incorporating a lot of facts that are not in the record and, therefore, unknown to either the witness or counsel on the other side.

The Special Master: I think that is objectionable as to form.

Mr. Pollak: All this has been testified to before.

Mr. Driscoll: The conditions that existed in 1932 have not been testified to, and you have put them in your question.

1698 The Special Master: I think the question is a little broad, Mr. Pollak, don't you?

Mr. Pollak: It is the same question, except that we have substituted "stars" for "story", that has been in this record repeatedly.

The Special Master: Go ahead and answer it.

Mr. Driscoll: Exception.

(The pending question was read.)

A. On account of the cast I would attribute about 75 per cent to the cast and about 25 per cent to the balance, the people that you name such as director.

Mr. Driscoll: I move to strike out the answer as not responsive to the question. 1699

The Special Master: Read the question and see if you can't answer it a little more specifically.

Q. (The pending question was read.) A. Instead of the cast, stars 75 per cent.

Q. What do you mean by "cast"? A. I mean Crawford and Montgomery, their box office values.

Q. And you assign the remaining 25 per cent to the other factors mentioned, is that right? A. To the director, to the producers, to the fact that the Metro company was behind the picture, that Thalberg oversaw the production of it, which generally meant a good picture, and those other factors bring it up. 1700

Q. What portion, taking if you will an outside percentage, would you ascribe to the story?

Mr. Driscoll: Objected to on all the grounds stated before and several others.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. It is rather hard to state a percentage. The only thing that I can tell you in that connection, we generally buy a program of pictures, 48 in a year, and the stories have very little to do with our deciding the value of the program. It is generally made up of the stars and the producers. 1701

Q. Take a picture with Crawford and Montgomery as stars, Thalberg as supervising producer, Stromberg as producer in immediate charge of the production, Brown as director, produced by the M-G-M companies, bearing a name not identified with any well known play or story, what proportion of the gross receipts would you say was ascribable to the story? A. Oh, about five per cent.

1702 Q. Now, Mr. Jaycocks, you have already told us that your company, the West Coast, bought this picture "Letty Lynton" for about 300 theatres? A. That is right.

Q. Did you personally have to do, Mr. Jaycocks, along with other things, with the acquisition for the West Coast chain of "Letty Lynton"? A. I was very active in the purchasing of all films for that year.

Q. Including "Letty Lynton" among them? A. Yes.

Q. Can you tell us on what basis the purchase of the Metro pictures for the West Coast chain was made in 1932?

1703 Mr. Driscoll: Objected to; no basis laid for the question. He might have been active running around the hall greeting visitors.

Q. You were the assistant to the general manager? A. Yes.

Q. In that capacity what did you do in connection with Metro pictures? A. The Metro pictures were purchased from the general sales manager of Metro, who was Felix Feist at that time. We held many meetings in Los Angeles and several meetings in New York before we completed the deal.

Q. Was the personality and position of Joan Crawford
1704 a factor in the acquisition of this picture?

Mr. Driscoll: Objected to. This witness cannot testify whether or not it was a factor except from his personal opinion. To say it was a factor with every one in the West Coast is trying to give this witness a little more power and authority than facts warrant.

The Special Master: Let him tell what considerations did arise in their minds in the purchase of the pictures.

Q. What considerations were in your mind in the acquisition of the Metro pictures in 1932? A. Primarily the fact that they had collectively a majority of the outstanding stars in the motion picture industry, and that they were a large organization who over a period of years had consistently delivered box office attractions. 1705

Q. Did those considerations apply among others to the picture, "Letty Lynton"? A. I doubt at the time if we even thought of anything more than the stars and the organization in purchasing them.

Q. But Joan Crawford was one of these outstanding stars, was she not? A. Yes.

Q. If you recall, did you know when you purchased "Letty Lynton", the Joan Crawford picture, what picture it would be? A. I doubt it very much. 1706

Cross examination by Mr. Driscoll:

Q. As a matter of fact, your method of purchasing pictures from Metro at that time was to purchase them en bloc, wasn't it? A. Yes.

Q. You purchased in this particular instance 18 pictures? A. I imagine so, about that number.

Q. And that was perhaps the entire output of Metro for the year? A. Yes, unless they had some special attractions. 1707

Q. As a matter of fact they released 11 pictures of their own that year, so that I think that includes Cosmopolitan, so that you purchased the entire output of Metro? A. Yes.

Q. So that it was not the case of the purchase of a single picture on its merits; you were purchasing the entire Metro output? A. Yes.

Q. And you relied a good deal upon the Metro name, didn't you? A. On their performance, yes, and name.

Q. Performance, name and reputation? A. Yes.

1708 Q. You knew they were very good pickers of material? A. Yes.

Q. And that included literary material as well as other things? A. Yes.

Q. And you relied more upon their name and reputation and their ability to produce good material than you did upon the reputation of the stars, didn't you? A. No.

Q. You take Crawford, for instance, did you know in that very year she had a failure? A. I knew for many years she had been an outstanding box office attraction.

Q. Did you know that very year she had a failure? A. I can't remember.

1709 Q. Did you know she did "Rain"? A. I didn't know it was that year.

Q. It was that year 1932, and did you know that "Rain" was a failure? A. It was a pretty good picture.

Q. Did you know it was a failure, a box office failure? A. No, I did not.

Q. For your information, it was a decided one. A. No, I didn't know that.

The Special-Master: Did West Coast have a contract to take Metro pictures extending beyond a year?

1710 Q. You might answer that, Mr. Witness. A. At that time, no.

Q. You limit it; you say "at that time". Was there a time when they did have? A. I believe they now have.

Q. In making the contract for 48 pictures with Metro for that year, it was all done in one contract? A. I don't remember the details. I presume——

Q. I thought you were active in the details?

Mr. Pollak: The answer is not finished.

A. I presume, as is the usual procedure in contracts of that kind, that we made out delivery sheets for each situation, and attached those delivery sheets to our master contract. 1711

Q. The master contract covers the 48 pictures? A. Covers the procedure under which they are to be played and the delivery of the prints and the payment thereof and all of the legal details.

By the Special Master:

Q. Did they, as a matter of fact, take all the output of Metro-Goldwyn-Mayer? A. Yes.

Q. They must have taken it under a contract, then; it may not have been a continuing contract, but it must have been a contract. 1712

Mr. Pollak: I think he has explained it.

A. Do you want me to review it?

Mr. Pollak: State it in your own way.

A. We take up what we call in our business star delivery sheets, an agreement for one theatre to play 48 pictures for certain terms. We attach each one of those delivery sheets to a master agreement—what we call a master agreement, or the original contract which covers all of the ramifications in connection with the delivery of prints, the payment for them, the damage to prints, and all the other rules in connection with the delivery to the exhibitor. 1713

Q. The net result of that was that West Coast had an obligation to take the output of Metro-Goldwyn-Mayer for that year, good or bad, whatever it was? A. That is right.

Mr. Driscoll: That is all.

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Daniel Jaycocks—for Defendants—Redirect.

1714 Redirect examination by Mr. Pollak:

Q. Mr. Jaycocks, were you obligated by your agreement to take 18 pictures . . you did not wish to?

Mr. Driscoll: Objected to as not the best evidence; the contract itself is the best evidence.

Q. Where is the contract? A. The contract, I presume, is out in California today.

Q. Now I repeat my question.

Mr. Driscoll: I repeat my objection.

1715 The Special Master: Objection sustained.

Mr. Pollak: The best evidence rule, as I understand it, is not applicable where the document is out of the country, the jurisdiction.

The Special Master: I don't think you ought to do that, Mr. Pollak. I think, Mr. Pollak, if you want to make any point of that you ought to prove it in a different way than by this witness.

Mr. Pollak: Mr. Driscoll started this inquiry, if your Honor please. The whole thing doesn't seem to be very important.

The Special Master: I think I got a very clear categorical answer to my question. As a practical 1716 matter West Coast took all the production of M-G-M during the year, good, bad or indifferent. If you want to go into the exact contract under which they took it I think you really, in fairness ought to produce the contract. Don't you think that is right?

Mr. Pollak: I think the facts are quite simple and are familiar to Mr. Driscoll who is experienced in this business. As I stated before, I think Mr. Driscoll's position is technically unsound in view of the fact that the document is out of the jurisdiction.

Mr. Driscoll: Only one copy is proven to be at

the West Coast. There are presumed to be two copies. How can you say that Metro's copy is out at the West Coast? 1717

Mr. Pollak: If you insist upon our producing a copy, we will.

Mr. Driscoll: If you are going to prove those facts, I insist upon my objection on the record.

Mr. Pollak: I wanted simply to show, if your Honor please, that they did not have to purchase all of the 48 pictures if they did not think they were good.

(Witness excused.)

1718

GEORGE P. SKOURAS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your name? A. George P. Skouras.

Q. What is your present occupation? A. President of Skouras Theatres Corporation.

Q. Which exhibits motion pictures? A. Yes, sir.

Q. How long have you been in the motion picture industry? A. Twenty years. 1719

Q. Were you in that industry in 1932? A. Yes, sir.

Q. What were you doing in 1932? A. I was president of the same corporation.

Q. You are not now connected with M-G-M in any way? A. I was never connected with them.

Q. Or with Loew's? A. No, sir.

Q. Mr. Skouras, take a picture not bearing a name of or identified with any well known story or novel, produced by M-G-M Company, with Thalberg as supervisory producer, with Stromberg as producer in immediate charge of produc-

1720 tion, with Brown as director, with Joan Crawford and Robert Montgomery as stars, what proportion of the gross receipts of the picture would you say was ascribable to the stars?

Mr. Driscoll: I object to that on the ground that there is no basis for it; incompetent, irrelevant and immaterial.

The Special Master: You haven't established the basis for it.

Q. Just a moment, Mr. Skouras, before answering that question. Are you familiar with the position that Joan
1721 Crawford held in the movie world in 1932? A. Yes.

Q. What was that? A. She was one of the top stars.

Q. Are you familiar with the position that Mr. Robert Montgomery occupied in the movie world at that time? A. Yes.

Q. What was that? A. He was one of the top stars in the movies.

Q. Are you familiar with the position Mr. Thalberg held in the industry in 1932? A. Yes.

Q. What was that position? A. He was considered the best in the business.

Q. Are you familiar with the position that Mr. Stromberg
1722 held? A. Yes.

Q. What was that position? A. As one of the leading directors and producers in the business.

Q. Are you familiar with the general reputation of M-G-M as a producing company in 1932? A. Yes, I am.

Q. What was that position? A. They are the best in the business for the last five years, seven years.

Q. Including 1932? A. Yes.

Q. How about Mr. Brown, Clarence Brown, the director? A. I have great respect for his ability. He has always held a high position as director.

Mr. Pollak: Now, please repeat the question which Mr. Driscoll objected to. 1723

Q. (The preceding question was read as follows: "Mr. Skouras, take a picture not bearing the name of or identified with any well known story or novel, produced by M-G-M Company, with Thalberg as supervisory producer, with Stromberg as producer in immediate charge of production, with Brown as director, with Joan Crawford and Robert Montgomery as stars, what proportion of the gross receipts of the picture would you say was ascribable to the stars?")

Mr. Driscoll: Same objection. 1724

The Special Master: Same ruling. You may answer.

A. I would give a very small percentage, about five or seven per cent. if the stars were not in, if the director was not in the picture—without any story at all? I believe I did not understand the question.

Q. What proportion would you say was ascribable to the stars? A. If a picture was produced by these people?

Q. Yes. A. I would say about 90 per cent. was in the stars.

Q. Ascribable to the stars? A. Yes. 1725

Q. And the remaining ten per cent was ascribable to the other factors? A. Mr. Pollak, a star combined together with a good leading man, with a director the kind Mr. Brown is, with Thalberg and Stromberg producers altogether, make a great selling argument for the public and a great box office value. If they had a good story with it it makes it that much better. If they have a bad story all the box office goes to these other factors.

Q. What do you mean by a good story? A. By a good story I mean a well known book or a famous play.

1726 Q. Could you give us examples of that? A. Take a story that will make a great picture, is "Gone With the Wind"; a play, "Tovarich" I think will make a great box office.

Q. In other words, by a good story or play you mean a story or play already bearing a distinguished name? A. That is right; they are big sellers as books or big box office as plays.

Q. Now, this will sound almost exactly like the question I have put, but listen to it attentively and you will see there is a change. Take a picture not bearing a name or identified with any well known literary work, produced by M-G-M, with Thalberg as supervisory producer, with
1727 Stromberg in immediate charge of production, with Brown as director, with Crawford and Montgomery as stars, how much of the gross receipts would you say was ascribable to the story, at the outside?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, no basis for it, not within the issues referred to the Special Master for trial, not within any issue that has been raised here in this accounting.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

The Special Master: You may answer.

1728 A. I believe that the story itself is of no value without these people.

Q. With those people what would you say was its attraction in the aggregate?

Mr. Driscoll: Objected to as leading.

The Special Master: Objection sustained. He has answered.

Mr. Pollak: I will put the original question.

The Special Master: I think he has answered. He understood your question.

Q. How many theatres, by the way, is your company 1729
operating? A. 54 theatres.

Q. What was the number in 1932, if you remember? A. 50 theatres.

Q. About the same? A. Yes.

Q. Now, did you personally have to do with the purchase of the picture "Letty Lynton" for those theatres in 1932? A. I did.

Q. Will you tell us what were the considerations that were in your mind in purchasing that picture, with Joan Crawford as star?

Mr. Driscoll: I object to the question as immaterial, and I object to it as leading, and on the further ground that it is not within the issues referred to the Special Master or any issue raised in this accounting. 1730

The Special Master: Why?

Mr. Driscoll: Because he suggested to him that Joan Crawford was the star and that is why he purchased the picture.

(The pending question was read by the stenographer.)

The Special Master: Cut out, "with Joan Crawford as star". Same ruling and exception.

Mr. Pollak: Now, read the same question without 1731
"with Joan Crawford as star".

Mr. Driscoll: If the witness does not know what is expected of him now——

Q. (The pending question was read by the stenographer, omitting the words, "with Joan Crawford as star".) Will you tell us what were the considerations that were in your mind in purchasing that picture "Letty Lynton"? A. The stars, the director, and the producers.

1732 The Special Master: Well, let me ask that question I asked before. Did Skouras company have a contract with Metro-Goldwyn-Mayer that they would purchase their output for that year?

The Witness: I don't understand. That I would purchase in advance?

The Special Master: That you would buy the output of Metro-Goldwyn-Mayer that year?

The Witness: We did.

Q. Where, physically, is your contract for 1932 with M-G-M, Mr. Skouras? A. I believe, if it is not destroyed already, it is here in my office.

1733 Q. In what City? A. In New York City.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. As a matter of fact, Mr. Skouras, there are a great many things that cause people to go to a motion picture show, aren't there? A. But mainly to see the pictures.

Q. Some of them, however, go in because it is air-conditioned, as a matter of fact? A. No.

Q. You never heard of any of those? A. I don't believe, if you have a theatre without pictures, anybody will

1734 go in. I am sorry to disagree with you.

Q. Let us assume that they go into the theatre to see pictures. There are many elements that attract the patrons into that theatre? A. Whether the weather is bad or good.

Q. Does the weather make any difference? A. In the particular seasons, yes; in winter time when snow is on the ground people who want to go to theatres do not go because of the inconvenience. In the summer time when the weather is hot people prefer to go to the beaches to swim; they don't go to the movies.

Q. So the weather makes a difference? A. Yes, in the two seasons. 1735

Q. Did you ever hear of a case where the patron is attracted to the performance or the showing of a picture simply because certain stars appear on the marquee of the theatre? A. Have I ever heard of a case?

Q. Yes. A. Without stars there wouldn't be any business; without stars and personalities there wouldn't be any business.

Q. As a matter of fact, patrons frequently go into a theatre without knowing what is showing at all, except a certain star is showing? A. Most of the patrons are well informed, either by newspapers or by previous previews when they were in the theatre before. 1736

Q. As a matter of fact, aren't there certain patrons that go regularly on certain nights every week to the theatres? A. No; I am sorry to tell you that time has gone.

Q. That has gone? A. Yes. We used to have nights when our customers came regularly, but since the talking pictures that is eliminated.

Q. You haven't any of those now? A. That is my experience.

Q. They don't exist? A. I don't think they exist.

Q. If a person goes to see Clark Gable, that person goes to the theatre; if the story is not one that the person likes, does that affect the business of that particular feature? 1737
A. The admirers of Clark Gable are going to see that picture. After they see the picture they are going to express their objections to that story, but they go to see the picture.

Q. Then, isn't the effect of that that they go out and see their friends and tell them that the picture is lousy? A. Sometimes it hurts.

Q. It only hurts sometimes? A. Sometimes.

Q. So that it doesn't make a difference always whether the picture gets the name of being lousy or not? A. If a

star is outstanding and is on top, I see very very little difference it makes.

Q. Does it make any difference what reputation the picture gets? A. The reputation that a picture gets that has a star like Gable, unless he is on the downgrade period and he is losing out on his popularity, it will make very little difference.

Q. It wouldn't make any difference to have the reputation get around that it is not a good picture? A. I don't know of stars like Crawford that go in bad pictures.

Q. Isn't it a fact that in 1932 Joan Crawford had a failure? A. I don't know of it.

Q. Did you see Joan Crawford in "Rain"? A. I did not.

Q. Do you know how much business "Rain" did, in 1932? A. I couldn't tell you.

Q. And "Rain" was one of the outstanding shows produced on the stage some few years prior to that? A. Yes.

Q. Jeanne Eagles had appeared as the star in it? A. Yes.

Q. And it had had a very long run? A. Yes.

Q. And it had played on the road? A. Yes.

Q. It had a good reputation? A. Yes.

Q. Do you still say it doesn't make any difference whether it is a good story, if the star is outstanding? A. May I answer your question about "Rain"? "Rain" was not practical for pictures; it should never have been made. It was not a subject for movies.

Q. If the literary material does not make any difference, what difference did it make in "Rain"? A. Because a famous book or famous play has the same difference; when it is good it is very popular with movies, and when it is itself bad it brings the opposite result.

Q. So that literary material and reputation of literary material does make a difference? A. If it is well known.

Q. It only makes a difference if it is well known? A. Yes.

Q. If it is not well known if does not make any difference at all? A. That is right. 1741

Q. So that if you went to a showing of a motion picture and you found a story—I won't say "you"—I withdraw that question. Is it your testimony that a patron coming into your theatre to see an outstanding star who finds a story that is disconnected and very bad in every respect, that that makes no difference whatever in the reputation of the picture star? A. I don't get your question. If that picture is disconnected, doesn't make any head or tail, of course people go out and say there is no use to see this star because the picture is absolutely worthless.

Q. When you answered these hypothetical questions put to you by Mr. Pollak, you have taken into consideration all you have stated to me, that no outstanding star has been put into a picture of that kind? A. Taking into consideration that no outstanding star has ever been put into a disconnected, absolutely worthless to review picture. 1742

Q. You are also taking into consideration certain other facts and knowledge of the business acquired by you over that twenty years' experience? A. I am always speaking from my experience.

Q. You took those things into consideration when you answered that question, facts that did not appear in the question, gained from your experience? A. Yes.

1743

Mr. Driscoll: I move to strike out the answer, because he took into consideration things that did not appear on the record at all. I move to strike it out. He may not take into consideration anything that is not in the hypothetical question.

Mr. Pollak: All expert questions test the knowledge of the witness.

Mr. Driscoll: He may not take into consideration any single fact that has not been elicited. He has testified that he has taken his experience as a basis.

1744 He has taken as a fact that no star, according to the witness, has ever been put into a picture of that sort, that is, a disconnected worthless picture; he took that into consideration.

Mr. Pollak: He has answered the hypothetical question, your hypothetical question.

Mr. Driscoll: I just want my objection on the record, that the question and answer is improper under the circumstances. You can't have a hypothetical question answered that is not confined strictly to the facts set forth in that hypothesis. And once a witness admits that he has taken into consideration facts outside of the question it is

1745 improper.

Mr. Pollák: If your Honor please, the witness has to give the answer within the limitations of the question. He has, however, in giving the answer not only the right but the duty, being an expert, to formulate his answer pursuant to his general knowledge of the field in which he is an expert. If a single specific fact color the answer, as for instance the assumed fact, just hypothetically, that there was some other star in the production not mentioned in the question, if such a fact entered into the reply then a different question would arise. There is

1746 not the least suggestion that any such specific fact entered into his reply. I submit it would be clear error to strike out his testimony.

The Special Master: What is Mr. Driscoll moving to strike out; the questions that he asked?

Mr. Driscoll: No, the hypothetical questions asked by Mr. Pollak.

The Special Master: I think Mr. Driscoll is technically right.

Mr. Pollák: He is not, in my opinion. The witness has not said he took anything into con-

sideration except his general knowledge of the movie business. 1747

The Special Master: He said that he knew that there had never been a picture which was an absolute flop from the standpoint of literary character, produced with any outstanding stars.

Mr. Pollak: If your Honor please, what has that to do with it? He is asked by my question to consider simply the fact that it is a picture not bearing the name of any well known play or story. Mr. Driscoll tries to oppose his conclusion by pointing out, if it is a fact, that there might be hypothetically as Mr. Driscoll agrees, and only hypothetically, cases in which there is a miserable story. 1748 Even Mr. Driscoll's hypothetical question does not in the least invalidate the answer that has been given, nor as showing, if it be a fact, that "Rain" was a failure; no witness has testified that every production with a star is a success and my question does not assume that it is a success. My question is, what proportion of the receipts, whether it is a success or a failure, is ascribable to the star? Take "Rain", for instance, there is no surety that 90 per cent of the receipts were not due to Joan Crawford. It might have been a much more egregious failure without her being in it. 1749

The Special Master: I don't think it serves to discuss this any further. I will overrule the objection, with exception to Mr. Driscoll. Any further questions?

By Mr. Driscoll:

Q. Mr. Skouras, did you buy shorts that year from Metro, too? A. Yes.

Q. Do you recall how many shorts you bought? A. No.

Q. Would it run into 20 or 30? A. More.

750 Q. Would it be a hundred? A. About 50. I say that because I usually buy that amount.

Q. Those were bought on the same contract with the others? A. Not in the same time, not simultaneously. We make a deal for the features first, and then shorts.

By the Special Master:

Q. Mr. Skouras, you are not a producer, are you? A. I am not.

751 The Special Master: The impression I get from this testimony is that distributors come here and they, generally speaking, buy the product of these big movie producers.

Mr. Pollak: You mean the exhibitors?

The Special Master: Yes, exhibitors. That is their business. They are not at all concerned in the production of those pictures.

Mr. Pollak: I think that is right. They are concerned with the general reputation of the company, of course.

Q. They play the ones that are generally the winners; is that right, Mr. Skouras? A. We are concerned with the price we pay for those pictures. The stars, the directors, the producer, are all concerned in the price we 752 pay. We pay different prices for different producers.

By Mr. Pollak:

Q. And you pay different prices for different productions of the same producer? A. That is right, much different prices.

Q. Are those prices largely governed by the stars in a given production? A. Yes.

Mr. Driscoll: I object to the form of the question, as leading. 1753

The Special Master: Overruled.

Mr. Driscoll: Exception.

Q. Mr. Skouras, are the prices of the productions which you take from a given producer affected by the presence or absence of stars in a given production? A. Usually they are. As I said before, if a famous book——

The Special Master: Mr. Pollak, really Mr. Driscoll is beginning to object on the ground of leading. You are asking him what considerations he had in mind. 1754

Mr. Pollak: I think the question "affected by the presence or absence"——

The Special Master: That is leading.

Q. What considerations do you have in mind in determining the price for a particular production? A. Metro-Goldwyn Company comes this year to sell us pictures. We find out first what pictures have the best stars, the best directors, and those are the pictures which usually we buy and pay the highest prices. The pictures which have not got outstanding stars or they are not directed by outstanding directors or produced by outstanding producers we pay the lesser prices. 1755

By Mr. Driscoll:

Q. You take in the case of "Gone With the Wind" that you mentioned here a short time ago, the name of "Gone With the Wind" would receive serious consideration by you, wouldn't it? A. Yes, regardless of the stars.

Q. You would buy that on the name of the book? A. Yes.

1756 Q. Now, as a matter of fact, any name that has today sufficient favorable publicity, whether it is the name of a literary product, the name of an actor, the name of a director, the name of a company or the name of the theatre itself, is of value in producing box office, isn't it? A. I don't know of any theatre making a success without pictures; I don't know of any.

Q. You mean, you can't expect— A. I mean, a certain amount of showmanship on the part of the theatre manager to continue to satisfy the customers is always attractive, and but I think the pictures and the box office that they have make the difference between success or failure of a theatre.

1757 Q. All of the elements are important, aren't they, Mr. Skouras? A. It is important to operate the theatre properly.

Q. Aren't all the elements important, the literary material, the management of the theatre, all of those things are what make the success of a theatre, aren't they? A. Mr. Driscoll, all of the elements have a value.

Q. They all have a value? A. Yes.

Q. Of course they have. Then when they pay $200,000 for "Gone With the Wind" they pay it because they think it has that value? A. Yes.

Q. And when they pay $160,000 for "Dinner at Eight",
1758 they pay it because they think it has that value? A. Yes.

Q. And they wouldn't pay it if they did not think it had that value? A. That is right.

Mr. Driscoll: That is all.

By Mr. Pollak:

Q. Mr. Skouras, take even a book with a famous name, like "Gone With the Wind", in that instance would it make a difference in box office value if some very famous

star or stars, for example, Clark Gable or Greta Garbo, appeared in it? A. It guarantees success. 1759

Mr. Pollak: That is all.

By Mr. Driscoll:

Q. "Birth of a Nation" was one of the outstanding motion pictures of all time, wasn't it, Mr. Skouras? A. Yes.

Q. And "Birth of a Nation" did not have any big star in it; it had featured players. It was the first epic that was produced in the motion picture industry; it was popularized for months before it was released or even produced. The public was excited and waiting for it. I don't think there can be any comparison with big pictures like "Birth of a Nation", "The Big Parade", "Ben Hur"; I don't think it makes any difference. 1760

Q. The public remembers those pictures by the name of the pictures and not by the stars that played in them. A. That is not true.

By Mr. Pollak:

Q. Of those? A. Of those pictures.

Mr. Pollak: May we have a stipulation that the price paid for the motion picture rights of "Gone With the Wind" was $50,000 or in the neighborhood of that sum? 1761

Mr. Driscoll: You may have a stipulation that the only information we have is that it was about $50,000. Beyond that I won't go. And by the same token, my information is that "Room Service" received $255,000. May we have a stipulation on that?

Mr. Pollak: I don't know anything about that.

1762 Mr. Driscoll: But you are asking for a stipulation as to prices; let us have all of them.

Mr. Pollak: In the question Mr. Driscoll put to Mr. Skouras he assumed something that was not the fact. That is why I want the stipulation.

Mr. Driscoll: "Abie's Irish Rose" sold for $255,000; "You Can't Take It With You" sold for $200,000.

Mr. Pollak: Who is testifying now? The point of it is simply this. I wanted to correct a question put on cross examination by Mr. Driscoll. The proper way, if it is the fact, to show these prices

1763 is by testimony that they were the prices. Now, I don't happen to know anything about these matters except as to "Gone With the Wind", as to which I have some information, information that Mr. Driscoll presumes. Mr. Driscoll is prepared, in order to avoid bringing in testimony to destroy the assumption of one of his questions, to concede that his assumption is mistaken. The problem has not arisen, except as to the assumption in a question put on cross examination, which was mistaken. I understand it was in this instance; I don't know whether they were in the other instances or not.

1764

JOHN M. BENAS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Benas, what has been your connection in a general way with the movie industry? A. I have been operating and running theatres.

Q. For how long? A. Thirteen years.

Q. Were you doing so in 1932? A. Yes. 1765

Q. Are you connected in any way with M-G-M? A. No.

Q. Or with Loew's? A. No.

Q. And never have been? A. Never have been.

Q. Mr. Benas, how many theatres were you operating in 1932, in the chain you are connected with? A. About ten.

Q. Were you in 1932 familiar with the general reputation of M-G-M in the movie world? A. Yes.

Q. What was that reputation? A. The best in the business.

Q. Were you familiar with the reputation of Mr. Irving Thalberg? A. Yes. 1766

Q. What was that reputation? A. The wizard of the business.

Q. Were you familiar with the reputation of Mr. Stromberg? A. Not as well as with the others.

Q. But you did know about him? A. Yes.

Q. What would you say his reputation was? A. Very good producer.

Q. Were you familiar with the reputation of Mr. Clarence Brown? A. Yes.

Q. What would you say his reputation was? A. First class director, at that time the best director M-G-M had.

Q. Would you also say that you were familiar with the 1767
reputation of Mr. Robert Montgomery in 1932? A. Very well.

Q. What was that reputation? A. Good man star.

Q. Were you familiar with the reputation of Miss Joan Crawford in 1932? A. The top star of the business, with the exception of Norma Shearer.

Q. Now, take a motion picture, not bearing a name identified with any well known book or play, produced by M-G-M, with Thalberg as supervisory producer, with Stromberg as producer in immediate charge of production,

1768 with Clarence Brown as director, with Robert Montgomery and Joan Crawford as stars, what proportion of the gross receipts would you say was astribable to the stars?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not bearing on any issue referred to the Special Master for trial and not having to do with any issue that has been raised by this accounting proceeding.

The Special Master: Same ruling.

Mr. Driscoll: Exception. May I assume that my objection goes to this entire examination of this witness, or shall I continue to object to the testi-

1769 mony?

The Special Master: The same objection will be understood to go against all of it. You may answer.

A. Almost 100 per cent. I would like to answer that question in my own way.

Q. Answer the question in your own way, and give your reasons. A. I am not a big operator like Mr. Skouras. I am not interested in any way. When I buy pictures from Metro, Metro was the only company, until 1936-1937, at which time they changed their policy, which was not selling pictures as the other companies do. When you buy pictures from Paramount or R-K-O you buy the total output.

1770 Paramount has been selling us for years their pictures and you don't know who is in. On separate bulletin they tell us you will have Claudette Colbert or Fred MacMurray, but they don't specify. Metro started to do the same thing in the fall of 1936-1937. Prior to that Metro was always selling star series, two Norma Shearer, three Joan Crawford, two Clark Gable, and two Greta Garbo; that was about 1932 to 1936 pictures. At the end they had what they call marquee pictures. In other words they sold us twelve or thirteen marquee pictures, small pictures.

Now, I as an exhibitor was buying their output on account of the 1932 to 1936 star series. I was not interested in the marquee pictures. I was willing to give them back to them as a present. I show you how they were selling. Two Norma Shearer, they had put a number, 201, 202; three Joan Crawford, No. 203, 204, 205; three Clark Gable, 6, 7, 8—they never gave us picture names or anything else, the writers, nothing else, nothing at all; they would give them in a bulletin; probably the same as the others gave us title information, the Metro gave us the stars. We were buying the output on account of the stars. To buy Norma Shearer I didn't know what the Norma Shearer would be called; I wanted the picture that would be with Norma Shearer; that is all I was interested in. If they had in there small pictures, they used to call them marquee pictures, they would be in there. The small players would be in the marquee pictures. But I know Metro was going to give me two Norma Shearers, three Joan Crawford, three Clark Gable, and so on down the line. I wasn't interested in anything else. 1771 1772

Q. Can you give us the considerations that were in your mind in buying the picture "Letty Lynton"? A. I never knew the "Letty Lynton".

Mr. Driscoll: I object to that.

1773

Q. Did you buy it under that name? A. No, I never bought it under that name; I never bought "Letty Lynton".

Q. Mr. Benas, are you familiar with the considerations that operated with other exhibitors of motion pictures?

Mr. Driscoll: In the minds of other motion picture exhibitors? I object that this witness is not qualified to testify what operates in the minds of other individuals.

The Witness: I can; there is a reason for it.

1774 Mr. Driscoll: Objected to. I ask that the witness's statement be stricken from the record.

The Special Master: Just as a preliminary question, why does he think he is competent to answer that?

The Witness: I will answer that.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: We won't pass on his question yet.

Mr. Driscoll: I want to object to it. You have my objection on the record.

1775 By the Special Master:

Q. Tell us why you think you are so competent to tell us what is in other people's minds? A. There are two or three big exhibitors' organizations in the United States in which mostly the small exhibitors like I are members. Warner's, Skouras, Loew's are not members of those organizations. Some of those organizations have as many as 1,000 theatres as members and I am very active in those organizations. I have been for several years head of exhibitor film buying committees, so I am in a position to know how exhibitors buy, not only in New York but in the United States.

1776 Mr. Driscoll: I think on the statement of the witness that it is quite evident that he does not know and that he is not competent to answer. I think on that ground and on all the grounds given before he should not be permitted to answer.

Mr. Pollak: It is exactly the way testimony as to a condition is proved. I can get authority on it right in the Federal Court. The witness has now testified that he belongs to organizations concerned

with these matters and is active in those organizations. 1777

The Witness: Chairman of the film buying committee.

The Special Master: But that does not mean that he knows just exactly how X, Y and Z buy their pictures.

Mr. Pollak: He can testify whether or not it is a general practice common to many theatres.

Mr. Driscoll: I still submit that he cannot testify as to what acts on the minds of other exhibitors.

Mr. Pollak: I think the Master should receive the evidence, as the effect of excluding it would be to prevent presenting it to the Court. I think the evidence is important and should be received. 1778

Mr. Driscoll: I think it is not important and should not be received. I think too much of that type of evidence has been given here.

The Special Master: I think if you want to bring on some other witnesses here to testify that they do business exactly the way this witness described, all right; but I do not think I will let this witness go into a discussion as to how other people do business.

Mr. Pollak: You might let him testify whether or not the practice he has described is general in the trade, without mentioning any individual cases. 1779

The Special Master: You say, "generally in the trade"; I don't know; I don't think that is good testimony. I don't see how any witness can testify that considerations that operated in his mind in matters of this sort were in the minds of other people.

By Mr. Pollak:

Q. Have you discussed it with other individuals in the exhibiting industry?

1780 Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; hearsay.

The Special Master: I don't think it is the best evidence of what is in the minds of the other people.

Mr. Pollak: There is no other way; otherwise we will have to call hundreds or thousands of them.

The Special Master: I don't think that is the way to prove this. You have just had another witness testify, who is a large purchaser of film; he testified practically contrary to this witness.

Mr. Pollak: I don't think he did.

The Special Master: He had an entirely different story.

1781 Mr. Pollak: He said the stars were the dominant consideration, except in the case of a prominent book or play.

The Special Master: This witness testified that he runs a business of ten theatres, and his testimony is very clear as to how he runs those theatres. That is all he can testify to.

Mr. Pollak: You may cross examine.

Mr. Driscoll: No cross examination whatever.

Mr. Pollak: May I make a formal offer of proof?

The Special Master: I can't stop you from making an offer of proof.

1782 Mr. Pollak: The testimony of persons in the motion picture business that the general practice of exhibiting theatres is to buy attractions in prime reliance upon stars appearing in them. That is all I want, really. That is all I want from this witness along that line.

The Special Master: What effect does an offer of proof have?

Mr. Pollak: If it is overruled, it avoids the calling of witnesses, it shortens the proceedings.

The Special Master: I can't stop you from call-

Colloquy of Counsel.

ing witnesses to show how they run their business. The only objection I have is that the operator of ten theatres has told us just exactly how he buys, very clearly. Mr. Skouras told us how he buys. There was another gentleman here before, Mr. Jaycocks, and he told us how he buys. There are differences in the testimony of each one. Most marked, to my mind, is the difference between the testimony of this witness and Mr. Skouras. I don't see why we should assume that all theatre exhibitors, some with twenty or forty theatres, or five theatres or one theatre, that they are in exactly the same class as these other people and that they are actuated by the same considerations. 1783 1784

Mr. Pollak: I would be surprised if they were. It would reflect upon their testimony if it was so.

The Special Master: That is what you are trying to show.

Mr. Pollak: Not that they are universal in the trade, but that they are common considerations—by expert opinion.

The Special Master: That testimony that you are speaking of I do not think is competent evidence in the case.

Mr. Pollak: Exception.

(Thereupon a recess was taken until two o'clock of the same day.) 1785

AFTER RECESS.

1786

SAMUEL RINZLER, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your residence and occupation? A. Residence, 2015 East Third Street, Brooklyn.

Q. And your occupation? A. Exhibitor, theatre operator.

Q. With what concern are you connected? A. Rand Force Amusement Corporation.

1787 Q. Were you connected with the same concern in 1932? A. Yes.

Q. What is your position with that concern? A. I am an officer of that corporation, and film buyer.

Q. Which officer are you? A. Vice-President.

Q. Were you an officer in 1932? A. Yes.

Q. That concern operates how many theatres? A. About fifty.

Q. And was the number roughly the same in 1932? A. About the same, with the exception of a few.

Q. You are not connected with the defendants in any way? A. No, sir.

Q. And never have been? A. No, sir.

1788 Q. Mr. Rinzler, are you acquainted, however, with the reputation and standing that M-G-M held in the motion picture world in 1932? A. Yes.

Q. And what was that reputation? A. Foremost position.

Q. Are you familiar with the position that Mr. Irving Thalberg held as a producer in 1932? A. Yes.

Q. What was that position? A. He was about the greatest producer we ever had.

Mr. Driscoll: Assume my objection to all this line of testimony. 1789

The Special Master: Same ruling and exception.

Q. Are you familiar with the position of Mr. Stromberg in 1932? A. I am, yes.

Q. What would you say as to his position? A. He was considered a great producer.

Q. Are you familiar with the position of Mr. Clarence Brown, a director, as it was in 1932? A. Yes; an outstanding director.

Q. Mr. Rinzler, of course you are familiar with the position of Miss Joan Crawford in 1932? A. Yes.

Q. What was that position? A. She was a star then; she is a star now. 1790

Q. Would you like to classify her among stars, in 1932? A. Yes.

Q. What would you say was her position among stars? A. An A star.

Q. Are you familiar with the position of Robert Montgomery in 1932? A. He was a good actor at that time.

Q. Was he known? A. Yes, he was known.

Q. Mr. Rinzler, take a picture, not identified by name with any well known book or play, produced by M-G-M, under the general supervisory production of Mr. Thalberg, under the immediate production of Mr. Stromberg, with Clarence Brown as director, with Miss Crawford and Mr. Montgomery as stars, what proportion of the gross receipts would you say was ascribable to the stars? 1791

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; objected to as not proper expert testimony, not for expert testimony. I object to it on the ground that it is not within the issues referred to the Special Master for decision here and not within the issues that are raised in the accounting by the defendants.

1792 The Special Master: Same ruling and exception.

Mr. Pollak: You may answer. Perhaps you had better have the question read.

(The pending question was read by the stenographer.)

A. I would say that the stars and the director are at least seventy-five per cent of the receipts; but I am afraid that I do not really understand the question properly, but the stars should be at least seventy-five per cent of the receipts.

Q. And would the remaining twenty-five per cent be spread or split up among the other things? A. Yes.

1793 Q. Including the director, the producers, the general reputation of M-G-M, and the story? A. That is right.

Q. What proportion would you ascribe to the story, of the total gross receipts, with reference to a picture not identified by name with any well known book or play, produced by M-G-M under the general supervisory production of Mr. Thalberg, under the immediate production of Mr. Stromberg, with Clarence Brown as director, and with Miss Crawford and Mr. Montgomery as stars; what portion of the gross receipts, what percentage, would you ascribe to the story?

1794 Mr. Driscoll: Same objection to that question.

The Special Master: Same ruling and exception.

A. I would not give it any more than ten per cent.

Q. Mr. Rinzler, will you tell in your own way what were the considerations that operated in your mind in 1932 in the selection of pictures for exhibition in your theatres?

Mr. Driscoll: Objected to as immaterial.

The Special Master: Same ruling, and exception.

(The pending question was read by the reporter.)

A. Of course, the stars were the way they sold the pictures at that time, that is, the stars' pictures were always at the top for the larger amounts of money; at the bottom they had the smaller rental value. 1795

Q. Did you exhibit "Letty Lynton", if you know, in your theatres? A. I remember that I did.

Q. Will you tell us the considerations that operated in your mind in selecting "Letty Lynton" for exhibition?

Mr. Driscoll: Objected to as immaterial.

The Special Master: Overruled.

Mr. Driscoll: Exception.

A. I don't think they sold me "Letty Lynton". They sold me two or three Joan Crawford pictures and they were signified by numbers, Joan Crawford No. 1, Joan Crawford No. 2 and Joan Crawford No. 3; maybe there was a fourth one, but I don't remember. That is the way they sold pictures in those days. 1796

Q. Did one of those Joan Crawford pictures afterward turn out to be "Letty Lynton"? A. Yes, sir.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. Mr. Rintzler, it is a fact, is it not, that there are a great many elements that enter into the success or failure of a picture? A. Oh, yes. 1797

Q. And one of those elements is the story, is that right? A. In a picture your story has a certain element.

Q. You are familiar with "Parnell"? A. Yes.

Q. Who produced "Parnell"? A. M-G-M.

Q. That is generally acknowledged to be a failure? A. Not that I know of.

You hadn't heard about that? A. No.

1798 Q. Have you played "Parnell"? A. No, I am waiting for my date.

Q. You have not played it, that is right? A. Yes.

Q. "Parnell" has Gable and Loy? A. Yes.

Q. Two outstanding stars? A. Yes.

Q. You haven't heard it is a failure? A. No.

Q. You consider it one of the big pictures of the year? A. Absolutely.

Mr. Driscoll: That is all.

1799 NATHAN J. BLUMBERG, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name? A. Nathan J. Blumberg.

Q. What is your residence? A. 50 Central Park West.

Q. And your occupation? A. Vice-President and General Manager of theatre operators, R-K-O Corporation.

Q. What was your business in 1932? A. Same as it is now—no, wait a minute; in charge of the eastern operations of the company.

1800 Q. You have been connected with the motion picture industry how long? A. Twenty-five years.

Q. How many theatres, by the way, does R-K-O operate? A. With their partnerships, about 132.

Q. What was the number, approximately, in 1932? A. They had about 160 at that time.

Q. Mr. Blumberg, are you connected in any way with the defendants? A. The Loew company?

Q. The Loew company or the M-G-M company? A. Not at all.

Q. Mr. Blumberg, are you familiar with the position of M-G-M and its reputation from 1932 as a producing company? A. I am. 1801

Q. What would you say that reputation was?

Mr. Driscoll: Same objection I assume stands?

The Special Master: The same objection and the same ruling.

Mr. Driscoll: And exception.

A. They were the outstanding producing company in 1932.

Q. Were you familiar with the reputation that Mr. Irving Thalberg had in 1932? A. I was.

Q. What would you say about that reputation? A. The best producer in the entire motion picture industry. 1802

Q. Are you familiar with the reputation of Mr. Stromberg in 1932? A. I am.

Q. What would you say about that? A. He was one of the outstanding producers.

Q. Are you familiar with the reputation of Mr. Clarence Brown in 1932? A. I am.

Q. What would you say concerning him? A. A very able director.

Q. Are you familiar with the position of Mr. William Montgomery in 1932? A. Robert Montgomery?

Q. Robert Montgomery. A. Yes; I would classify him as an A star in 1932. 1803

Q. Are you familiar with the position of Miss Joan Crawford in 1932? A. I am.

Q. What would you say concerning her position? A. Double A star.

Q. Now, take a picture not bearing a name identified with any famous book or story, produced by M-G-M, with Mr. Thalberg as supervising producer, with Mr. Stromberg as producer in immediate charge of production, with Clarence Brown as director, with Robert Montgomery and

1804 Joan Crawford as stars, what proportion of the gross receipts of the picture would you say was ascribable to the stars?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; I object to the form of the question; I object to it on the ground that it is not within any issue that is referred to the Special Master for trial or within any issue that has arisen in connection with the accounting of the defendants in this action.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

1805 Mr. Pollak: You may answer. Do you want the question re-read?

The Witness: Yes.

(The pending question was read by the reporter.)

A. Seventy-five per cent. of the gross.

Q. What proportion of the gross receipts, under those conditions, would you say was ascribable to the written material or story?

Mr. Driscoll: Same objection as to that question.

1806 The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer.

A. Ten or twelve per cent. of the gross.

Q. Mr. Blumberg, did your theatres, the R-K-O chain, exhibit "Letty Lynton"? A. We did.

Q. In practically all of the 160 or so theatres? A. No; I would say in about 30 per cent of our theatres. There were certain territories we did not have the Metro product.

Q. Did you have to do with the booking of that picture? A. The booking of it? Yes.

By the Special Master: 1807

Q. What do you mean by the booking? A. The buying or the booking? Are you confining the question to the booking, I mean?

By Mr. Pollak:

Q. The buying. A. The buying, yes.

Q. You had to do with the buying? A. Yes.

Q. Would you state what considerations were in your mind in buying the picture "Letty Lynton"?

Mr. Driscoll: Objected to as immaterial. 1808

The Special Master: I think you had better let him tell anything he can about the purchase of it.

Q. Will you please tell us in a general way your recollection of the purchase in 1932 of "Letty Lynton", in your own way? A. I did not buy "Letty Lynton". I bought a Joan Crawford-Robert Montgomery picture under a number. "Letty Lynton" never even entered into any consideration so far as the buy was concerned. It was just a number. The name came later. Any terms that we paid for that picture was based upon Montgomery and Crawford.

By the Special Master: 1809

Q. At that time were you purchasing the Metro-Goldwyn-Mayer output for that particular district that you operated? A. Yes; we all sat in on the buy at that time.

By Mr. Pollak:

Q. By what considerations would the price that you pay for any particular picture be determined?

1810 Mr. Driscoll: Objected to; no foundation laid for it. He did not testify that he bought a particular picture; he bought the output.

Q. Was there a price for the different pictures in the output?

Mr. Driscoll: Objected to.

A. They were priced.

Q. Will you tell us what considerations determined the prices that you were willing to pay for a particular picture? A. The star value; the percentage of that picture was
1811 based upon the fact that we were buying a Crawford and Montgomery picture.

Cross examination by Mr. Driscoll:

Q. Did your contract cover a number of pictures? A. Yes.

Q. How many? A. Offhand I don't remember; it was the entire output; probably with some eliminations.

Q. Some 40 pictures, possibly? A. Possibly forty.

Q. Some of those were percentage pictures? A. Yes.

Q. Were the percentage pictures designated in advance, or were they designated afterwards? A. Offhand I don't
1812 know; I would have to look at the contract.

Q. Your contract would show all that? A. Yes; our contract would show all that.

Q. Is it not a fact, Mr. Blumberg, that when they start to make a picture with a star, the bigger the star the better they try to make the picture? A. Yes.

Q. They usually try to give their leading directors to the leading stars? A. Yes.

Q. And they try to get the best material they can, the best books, the best stories they can, for them? A. Yes.

Q. And try to give them the best sets they can? A. Yes.

Q. So that taken as a whole, when they start in to make 1813
a picture with a star, they try to give it the very best they can, story, direction, scenario, costumes and all? A. That is correct.

Q. So that when you are buying a picture of a leading star you expect all those things as part of that picture? A. We hope to.

Q. You expect it, isn't that so? A. Yes, we expect it and hope that it will come true.

Q. When did you first learn that you were going to be a witness in this case, Mr. Blumberg? A. I think about three or four weeks ago.

Q. Who asked you to testify? A. Mr. Cohen called me. 1814

Q. Did he tell you what you were going to testify to? A. No. He asked me if I would be available to come down here. I said I was leaving for the Coast but when I would return I would be very happy to come down.

Q. You didn't have any idea of what you were going to be called upon to testify to? A. Not until the little conversation I had with Mr. Pollak in the other room.

Q. Did he tell you that he was going to ask you these questions? A. Yes.

Q. About the percentage you would allocate to the stars? A. Yes.

Q. And the percentage you would allocate to the story? A. No. 1815

Q. Did he tell you what the other witnesses had testified? A. No, he did not.

Q. Can you tell me whether or not you played "Letty Lynton" on a percentage basis? A. No, offhand I couldn't tell you that. I imagine we did because it was one of the top pictures.

Q. You do business with Metro now? A. We do; yes.

Q. You buy their product in a great many situations? A. Yes, we do.

Mr. Driscoll: That is all.

1816 Re-direct examination by Mr. Pollak:

Q. Mr. Blumberg, in one small respect I would like to correct you, if I may, with regard to the conversation that you and I had. I think you testified that I had not told you what the fractions or percentages that other witnesses had ascribed were. A. That is correct.

Q. I think after you had said 75 I said that other witnesses had given the same percentage that you ascribed. A. I don't recall that.

Q. Or don't you recall that? A. No.

Q. Will you explain what you mean when you said that your contract had certain eliminations in it?

1817

Mr. Driscoll: He did not say that.

Mr. Pollak: Yes, he did. This is clarifying what you brought out on cross examination.

Mr. Driscoll: Will you permit me to finish my objection. I object to that; I object to the question on the ground that it is not the best evidence of what the contract provides.

Mr. Pollak: This is in reply, sir, to what has been brought out on cross examination.

The Special Master: I don't remember the witness's saying anything about elimination.

1818 Mr. Pollak: As I recall it, he did so testify. (To stenographer.) Would you read the third or fourth question and answer on cross examination?

(The following questions and answers, appearing at page 903 of the minutes, were read by the stenographer:

"Question: Did your contract cover a number of pictures? Answer: Yes.

"Question: How many? Answer: Off hand I don't remember; it was the entire output, probably with some eliminations."

Mr. Driscoll: That is the entire testimony of the witness. My opponent insists that if the witness uses a word the entire parole rule of evidence is thrown out of the window. I submit that is not so. If they want to show the contents of that instrument they should bring it here. 1819

The Special Master: What about the idea that you delved into this contract?

Mr. Driscoll: I have not delved into the contract: I am not asking him about the terms of the contract. I am asking him for certain direct information. I have a right to do that. They want to prove the contents of the contract. I can go into the terms of the contract on cross examination without putting it into evidence. But when they want to take advantage of that to prove the instrument, it is in violation of the rule of parole evidence. 1820

The Special Master: What do you say to that?

Mr. Pollak: In the first instance, Mr. Driscoll's evidence, whether they bought the entire output, obviously opened the door as to the agreement whereby it was bought. It would have to be bought by some agreement. Secondly, I say that the parole evidence rule, which alone Mr. Driscoll has cited, is absolutely inapplicable except between the parties to a contract in a litigation between the parties to a contract. Thirdly, I say that neither the parole evidence rule nor the best evidence rule can be applicable to an issue which on its face is one of elimination, that is on its face an issue as to matters not in a contract but excluded from it. 1821

The Special Master: What is the question?

Mr. Pollak: What he means by "elimination". First, I will put this simple question.

1822 Q. Mr. Blumberg, what do you mean by "elimination"? A. Why, all companies' pictures that we contract for, we always have what we call an elimination clause, which gives anyone the right to select fifty per cent. of the product up to 100 per cent., sometimes lower than that.

The Special Master: As a practical matter, they purchased this picture, didn't they?

Mr. Pollak: Yes, and a great many others.

The Special Master: I don't see that it is very important. Let it go at that.

Mr. Pollak: I will just get this in——

1823 The Special Master: I don't want to get in a lot of stuff about this contract without putting it in evidence.

Mr. Pollak: Would it be possible to get in a definition of "elimination"?

The Special Master: No, I don't think so.

Mr. Pollak: All right. That is all.

LOUIS NOTARIUS, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

1824

Direct examination by Mr. Pollak:

Q. What is your full name? A. Louis Notarius.

Q. Residence? A. 2544 Valentine Avenue, New York City.

Q. Occupation? A. I am broker and reviewer for the Paramount organization.

Q. What was your occupation in 1932? A. Practically the same thing.

Q. How long have you been connected with the motion

picture industry? A. I started with Paramount in 1924; it was the first organization I worked with in the moving picture industry. 1825

Q. You have never been connected with any of the defendants in any way? A. No, sir.

Q. Mr. Notarius, are you familiar with the position that M-G-M held in the motion picture world in 1932? Just answer yes or no. A. Yes, I am.

Q. What would you say that position was? A. Well, it was the outstanding position in the industry in 1932.

Q. Are you familiar with the reputation of Mr. Thalberg at that time? A. Yes.

Q. What was his reputation? A. He had a very fine reputation; he was one of the foremost producers in the business. 1826

Q. And Mr. Stromberg? A. The same thing.

Q. And Mr. Clarence Brown? A. He was always considered a fine director.

Q. And Mr. Robert Montgomery? A. Well, he was a good leading actor.

Q. And Miss Joan Crawford? A. Joan Crawford was a leading female star of the time.

Q. Now, take a picture produced by M-G-M, with Thalberg as supervising producer, with Stromberg in immediate charge of production, with Clarence Brown as director, with Joan Crawford and Robert Montgomery as actors and stars, the picture not bearing the name of any well known book or play, what proportion of the gross receipts would you say was ascribable to the stars? 1827

Mr. Driscoll: That is objected to. It is objected to as to form, calling for a conclusion. I object to it on the ground that it is incompetent, irrelevant and immaterial, not within any of the issues referred to the Special Master for hearing or any

328 of the issues that have been raised by the accounts of the defendants in this action.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

Mr. Pollak: You may answer. Do you want the question read to you?

A. I think I know what the question is. I have heard it several times. I am inclined to believe that all combined, the stars, director and producers, should receive 90 per cent. of the credit at least.

Q. By the credit you mean 90 per cent. of the gross receipts? A. That would be the drawing power of the 329 picture.

Q. How many theatres were in your chain in 1932, Mr. Notarius? A. Well, I handled personally about forty theatres. However, I had contact with theatres throughout the country in that I advised them of the caliber of pictures and so on; I was in contact with them in that way, which consist of over a thousand theatres.

Q. Did those theatres or some of them, I ask first of the forty, exhibit "Letty Lynton"? A. Yes.

Q. Did some of the thousand exhibit "Letty Lynton"? A. Some of the thousand? Yes.

Q. Do you happen to know about how many of the 330 forty exhibited "Letty Lynton"? A. I couldn't say that off hand; after all, it happened four or five years ago, but I imagine every first run situation in every town played "Letty Lynton".

Q. And that applies also among the thousand, is that right? A. Yes. I want to explain something with reference to that. You may have a thousand theatres; however you can only play "Letty Lynton" in one theatre in a situation. A situation may consist of five or six theatres, so that you will only be able to play that first run in one theatre out of those six in a particular town. While

you may have a thousand theatres, you may perhaps only play the picture in 30 per cent. 1831

Q. That is the point. A town, for illustration, has about six thousand people. You would exhibit the picture in only one theatre; is that right? A. That is right.

Mr. Driscoll: It would not be confined to a town of 6,000. It might be the same in a town of 60,000. You should let the witness testify.

Q. In a given area with a limited population, a single exhibition is all that that area and population will stand? Is that the point? A. Not exactly. If you limit me to population, I can't answer yes or no. 1832

Q. You tell it in your own way. A. However, in small situations the picture will usually only play once in a theatre. In a larger situation, say in a town that has a population of 60,000 people, you may have a first, second and third run, and the picture will get three runs in the particular town, depending on the drawing power in the town.

Q. Now, will you tell us in your own way what were the considerations that operated in your mind in the selection of pictures for exhibition, in 1932?

Mr. Driscoll: Objected to on the ground that the mental considerations of this witness are not material to the issues being tried here before the Special Master. 1833

The Special Master: Did this witness testify that he bought pictures?

Mr. Pollak: Yes; that he had to do with it.

The Special Master: Just let him tell how he bought pictures from Metro-Goldwyn; let us keep it down to that.

Mr. Pollak: I withdraw the question.

1834 Q. How did you buy pictures from Metro-Goldwyn? A. With Metro-Goldwyn we bought pictures on the basis of star values.

Q. That was true in 1932? A. Yes, sir.

The Special Master: Did this witness testify that he ran the theatres of the Paramount?

The Witness: I did not run the theatres. I help buy, book and review the pictures.

Q. For the Paramount chain? A. For the Paramount theatres.

1835 The Special Master: Did you buy the output of M-G-M for the year?

The Witness: For certain situations.

The Special Master: For certain situations as you have described?

The Witness: Yes.

Q. Would you explain what you mean by "star values", Mr. Notarius? A. Any picture in which there is a personality upon which the theatre depends for its drawing power——

Q. —has star value, is that right? A. —that is the star value in the picture.

1836 Q. Would you say that Joan Crawford had star value in 1932? A. Definitely.

Mr. Pollak: That is all.

Cross examination by Mr. Driscoll:

Q. There is considerable difference between buying and booking, isn't there, Mr. Notarius? A. Well, while in the physical operation the procedure is different, but I think they are both intertwined. You can't tell one from the other.

Mr. Driscoll: Will you read the answer? 1837

(The preceding answer was read by the reporter.)

The Witness: I didn't say you can't tell one from the other. You can't very well buy pictures unless you know how to book them. Because you have to know the value of pictures before you can buy them, and in order to know the value you must have experience as a booker.

Mr. Driscoll: I move to strike out the statement of the witness as not responsive to my question. I asked this witness a simple question as to the terms "buying" and "booking".

The Special Master: Strike it out. 1838

Q. Now, Mr. Notarius, isn't there a difference between buying and booking? Yes or no. A. I say you can't answer that with yes or no. I said they are combined.

The Special Master: You answer yes or no, and he will ask you what is buying and what is booking.

Mr. Pollak: He says that he can't answer yes or no.

Q. Are booking and buying the same thing? A. No.

By Mr. Pollak: 1839

Q. Will you tell us what buying is?

The Special Master: I know what buying is.

Q. Will you tell us what booking is? A. Do you really want me to tell you what that is?

Mr. Driscoll: That is why you were asked.

Mr. Pollak: I think I was asking the question.

1840 Q. Mr. Notarius, what is booking? A. Booking is the operation of placing pictures into theatres particularly.

Mr. Pollak: That is all.

By Mr. Driscoll:

Q. As a matter of fact, you buy your pictures on contract just the same as you buy the output of Metro, isn't that correct? A. You buy your pictures on contract?

Q. Yes, you buy the output? A. You buy either the output, or—

Q. Or selected pictures? A. Yes.

1841 Q. At the time you buy them they are not booked? A. No.

Q. The booking is putting in your dates for exhibition at different times? A. Yes.

Q. So that the two things are entirely separate and distinct, buying and booking, isn't that right? A. No, not necessarily.

Q. All right; never mind. A. If you want me to explain it I will.

Mr. Driscoll: I don't want you to explain anything, Mr. Notarius.

The Special Master: I suppose what the witness

1842 meant to say was that he would not buy unless he knew where to book them.

The Witness: You have to know that when you buy.

(The witness was thereupon excused.)

Mr. Pollak: May I recall Mr. Notarius?

(The witness resumed the witness chair.)

By Mr. Pollak:

Q. Mr. Notarius, I think you wanted to add something to your testimony?

1843

Mr. Driscoll: I would like to have the record show that after Mr. Notarius quit and left the stand he held a conference with Mr. Cohen and then announced his desire to resume his testimony.

Mr. Pollak: The record may show that.

A. I have no desire to resume the testimony. You are asking me to resume it.

Q. Did you want to explain something about these theatres? A. No, I did not want to explain anything. I told you that one of the functions I performed for the Paramount theatres was to write a review of pictures after seeing them to give the men in the field an idea as to the box office of the picture. I wrote such a review in 1932 about "Letty Lynton". 1844

By Mr. Pollak:

Q. Did that go to your thousand theatres?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; not within the issues being tried here; not within the issues that have been referred to the Special Master for trial; not within any issue that has arisen here on this accounting proceeding. 1845

The Special Master: I think you have gotten the testimony you wanted from your witness anyway.

Q. Approximately how many theatres did that go to?

Mr. Driscoll: I make the same objection to that question. I don't think we are at all interested that he sent out some communication to a thousand theatres.

1846 Q. Is the communication in writing? A. It is a short review. I do it for every picture of consequence. I did at that time and we still do it.

Q. Have you got that with you? A. Yes, I have a copy in my pocket. (Producing paper.)

By the Special Master:

Q. Does this refer to "Letty Lynton"? A. Yes.

Mr. Pollak: I offer it in evidence.

Mr. Driscoll: I make the same objection to that as having nothing whatever to do with the issues

1847 here.

The Special Master: I am going to let it go in over your objection.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. 26, of this date.)

WILLIAM YOOST, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

1848 Direct examination by Mr. Pollak:

Q. What is your full name? A. William Yoost.

Q. What is your residence? A. 175 Riverside Drive.

Q. And your occupation? A. Theatre owner.

Q. What was your occupation in 1932? A. Theatre owner.

Q. Of what theatres are you the owner, or with what owning company are you connected? A. In 1932 I operated personally seven theatres in Manhattan and was associated with others.

Q. Now how many do you operate? A. Directly six theatres, and associated in many others. 1849

Q. About how many? A. Maybe twenty-five.

Q. Mr. Yoost, how long have you been connected with the motion picture industry? A. Since 1912.

Q. By the way, are you connected with the defendants or any of them, Loew's Incorporated or the M-G-M companies? A. No.

Q. Have you ever been? A. No.

Q. Mr. Yoost, are you familiar with the reputation that M-G-M enjoyed in 1932—just yes or no? A. Yes.

Q. What was that reputation? A. The best in the industry.

Q. Are you familiar with the reputation of Mr. Thalberg in 1932? A. Yes. 1850

Q. What was that reputation? A. The highest.

Q. And the reputation of Mr. Stromberg? A. Very good.

Q. And the reputation of Mr. Clarence Brown? A. Good.

Q. And the reputation of Mr. Robert Montgomery? A. A very good drawing card, a good star.

Q. And the reputation of Miss Joan Crawford? A. At that time she was the best in the business.

Q. Now, Mr. Yoost, the success of a given motion picture, I suppose, depends on a number of factors, does it not? A. It does.

Q. Other things being equal, does the contribution of the star increase if the star is famous? A. It certainly does. 1851

Q. Other things being equal, does the contribution of the story increase if the story by its name is associated with a famous production? A. It certainly does.

Q. For example, if it bears the name of a famous play? A. Yes.

Q. Or a famous novel? A. Yes.

Q. And similarly does the contribution become less if the star is not well known, other things being equal? A.

1852 It certainly does. They break stars that way, by giving them a very inferior book or play to do.

Q. And suppose you have a picture without a well known book, does the contribution of the star add to the total? A. The star is the outstanding value.

Q. Now, take a picture produced by M-G-M, not bearing a name identified with any famous book or story, under the supervisory production of Mr. Thalberg, under the immediate production of Mr. Stromberg, with Clarence Brown as director, with Miss Crawford and Mr. Montgomery as the stars, what proportion of the drawing power would you say was ascribable to the stars?

1853 Mr. Driscoll: I object to the question on the same grounds mentioned before: I object to the form of the question; I object to the question as incompetent, irrelevant and immaterial, not bearing on any issue referred to the Special Master for trial, not within any issue which has been raised upon this accounting proceeding.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Mr. Pollak: Do you want the question read?

The Witness: If you will.

(The pending question was read by the reporter.)

1854 A. I would say in an instance of that kind, from a ballyhoo or advertising standpoint, we would advertise the star, and I would attribute 95 per cent.—in our type of theatre, where the book or vehicle is not outstanding we would not even mention it; it is the star we advertise.

Q. Mr. Yoost, did any of your theatres exhibit "Letty Lynton" that you recall? A. Yes.

Q. Now, did you personally have to do with the buying of "Letty Lynton"? A. Yes, I buy all of our pictures.

Q. And did in 1932? A. Yes, I did in 1932.

Q. Will you tell us how you bought "Letty Lynton" in 1932? 1855

Mr. Driscoll: I object to the form of that question. It might call for anything. It is direct examination, not cross examination. It is impossible to see what the answer is going to be or what it is leading to.

The Special Master: Go ahead; tell the circumstances at the time; tell about buying "Letty Lynton".

Mr. Driscoll: I object, and note my exception.

A. I did not buy "Letty Lynton". 1856

By the Special Master:

Q. What did you buy? A. I bought the stars.

Q. Perhaps we can shorten it. Did you take Metro's output? A. The entire output for that year.

Q. And "Letty Lynton" happened to be one of the productions? A. It was not so mentioned. We bought the Joan Crawford; we bought the contract more on the strength that we were getting the Joan Crawford pictures, not a particular vehicle she might appear in. It was the star that interested us.

Q. But you did buy the M-G-M productions for that year? A. We bought the entire output. 1857

By Mr. Pollak:

Q. Did you buy "Letty Lynton" by name? A. No, that would not mean very much to us. It was the star that we bought—in our particular theatres, anyway.

Q. Do you know how the picture was described in the sales bulletin? A. As a Joan Crawford, without the mention of any title.

Mr. Pollak: That is all.

1858 Cross examination by Mr. Driscoll:

Q. When you bought the star you knew that she was going to have one of the leading directors? A. Well, the Metro company——

Q. You assumed that she was? A. We take Metro by its reputation. They have for years been the outstanding producing company in the field, and are today.

Q. And now, coming back to my question again, I will ask you to follow my question and see if you can't answer that, without telling me what Metro is or is not. I asked you, when you bought Crawford as the star you expected she was going to have one of the best directors? A. Why,

1859 yes, I would look for that.

Q. As a matter of fact, they give to the best stars the best directors, don't they? A. Not always.

Q. Usually don't they try to? A. I suppose it depends upon the circumstances. I have seen stars made and unmade.

Q. As a matter of fact you have stated that they can break stars by giving them an inferior book or material? A. Yes.

Q. That frequently happens, doesn't it? A. Sometimes.

Q. So that the book is important? A. If they gave her another "Letty Lynton" they would break Joan Crawford.

1860 Q. You didn't like it? A. No. That is what brought the charges into the field of criticism of their motion pictures; that was a terrible picture.

Q. How about "Rain" that she was in that year, too? A. No, "Rain" didn't do the industry any good.

Q. So that she had two terrible pictures that year? A. From the standpoint of the good of the industry.

Q. Now, to come back to where we started, can you give me a instance where one of the leading stars was given other than a leading director? A. I can't right off the minute; I would have to look it up; if you give me a little time I may pick it up quick.

Q. As a matter of fact, don't they try, when they pick 1861
a leading star, to furnish that leading star with the best material, the biggest director, the best costumes, the best sets, the best production, they can get for her? A. That has been the Metro's reputation for years.

Q. Isn't that your business, Mr. Yoost? A. That is the business of the producer. What is their business——

Q. —you are not interested in? A. Sometimes much to our sorrow.

Q. You say that is the producer's business, not your business? Is that your testimony; is that what you mean? A. As far as supplying material.

Q. What is your answer, please? A. As far as supply- 1862
ing material and producing the pictures, that is the producer's problem, not ours. We buy the pictures on reputation. It is a blind book to us, and we expect when we do buy that we get good pictures. We don't always get them.

Q. So that the entire thing is a gamble to the exhibitor? A. So far as we are concerned, we depend upon stars to pull us out. Out of a group of 48 pictures we might get ten or fifteen percent good pictures, and it is the stars that help us, because it is a terrible proposition.

Q. Out of 48 pictures you get 10 or 15 per cent. good pictures; that might be six or seven good pictures? A. Yes, outstanding pictures. 1863

Q. The rest are mediocre or failures? A. Good, bad or indifferent.

Q. And you can't tell anything about it? You take your chances and abide by the results? A. And through ballyhoo we try to put it over.

Q. You build it up all you can? A. We build it up all we can.

Q. Even though you think the picture does not deserve it? A. That is a part of our business which we often have to go into because of our programs.

1864 Q. To get them in there? A. Right.

Q. And that is why you have bank nights and double features? A. Yes.

Q. And Screeno and all those things, to get the people into the theatre? A. Yes.

Q. And that applies even when you have the big stars? A. No, when we have the stars we get away from that thing. We reserve those nights when we don't have to give anything away.

Q. You don't have to give anything away when you have stars? A. No.

Q. Even with stars only ten or fifteen per cent. of the
1865 pictures are real outstanding pictures? A. About that, yes.

Mr. Driscoll: That is all.

Mr. Pollak: That is all.

(Discussion off the record.)

Mr. Driscoll: That brings us to the proposition of the showing of the picture. Counsel for the plaintiffs understands that counsel for the defendants proposes now to adjourn to the projection room of Metro-Goldwyn-Mayer and have Metro-Goldwyn-Mayer screen "Letty Lynton" for the benefit of the Special Master. To that we say that it is entirely outside of the issues being tried before the Special
1866 Master. We object to it as incompetent, irrelevant and immaterial and not within any issue that has been referred to the Special Master for hearing and decision.

The Special Master: I will take the same attitude towards that as I did towards walking through the studio, that is, that the Special Master does not recognize it as evidence; the Special Master recognizes it as possible help to understand evidence. I don't see how you can take any other point of view on it. I haven't any jurisdiction here to pass on any

other subject except the accounting between these plaintiffs and defendants. 1867

Mr. Pollak has a theory, which Mr. Driscoll strongly contests, as to what the proper method of accounting ought to be, and he has introduced a lot of oral testimony over the objection of Mr. Driscoll. And it cannot be denied that I walked through the studio at Culver City. So in my opinion it has been possible for me to understand the testimony that is adduced before me. I do not expect to be able to mirror to the Court my walk through the studio or to mirror to the Court the showing of this picture. If the Court wants to see it——

1868

Mr. Cohen: It may do so.

The Special Master: I am frank to say that the only reason I am going to see the picture is because it is conceivable that it might—though I don't exactly see how—it might help me make my report possibly more intelligible to the Court.

Mr. Pollak: In order to be perfectly clear about our position, as Mr. Driscoll objects to your going to see the picture, I want to object to any ruling that it is not evidence; I think that it is.

The Special Master: What is the reason for my seeing that picture?

Mr. Pollak: For this reason, if your Honor please. 1869
In our view the prime issue in the case is whether or not plaintiffs are entitled to all of the profits of this motion picture. That issue runs, as we believe, through every issue and phase of this case, its production, distribution and exhibition. We say, as you know, that what they are entitled to is the ratable proportion of the total production ascribable to their contribution. That would be at the outside the ratable proportion ascribable to the written material and it would be less than that, for these

1870 reasons: that as was seriously noted in the opinion of the Circuit Court of Appeals some part of the plaintiffs' own production is not original and is not copyrightable, being based upon matter in the public domain, namely, the trial of Madeline Smith. As was also noted in the opinion of the Circuit Court of Appeals, a very large part of the defendants' picture was not taken from the plaintiffs' play. As one inclusive item, the dialogue in the picture is admittedly original.

Now, on the issue of the contribution of other arts than that of writing to the production, to the picture that was produced, distributed and exhibited,

1871 we do think that the actual showing of the film is the best representation of the contribution of the arts and sciences, the costuming, scenario writing, sound production, and many others. We did expect not only to have your Honor see the picture but to have the District Court and the Circuit Court as well see it.

Mr. Driscoll: They did see it, both of them.

Mr. Pollak: They have not seen it from this view.

The Special Master: I am going to see the picture.

Mr. Driscoll: I simply want to record an objection and exception to the theory at this time.

1872 (Thereupon further taking of testimony was adjourned until Friday, July 9, 1937, at 10 A. M.; and the Special Master, attended by counsel, proceeded to the offices of M-G-M at 1540 Broadway, New York City, for the purpose of viewing the motion picture "Letty Lynton".)

1873

The Special Master: Mr. Driscoll, will you agree to state what your position is in reference to Defendants' Exhibit L-7?

Mr. Driscoll: I just don't understand your question.

The Special Master: I mean, are you taking it in whole or in part. In other words, assuming that Loew's must be forced to account for this, do you claim that the Per Week profit on these theatres is too low?

Mr. Driscoll: Oh, yes.

1874

The Special Master: As to all items or as to any particular items?

Mr. Driscoll: I think, as a matter of fact, to be perfectly frank with you, that most of this overhead can go out of general expense; I don't think there is any justification for it.

The Special Master: What is your argument on that? You don't mind telling me now, do you?

Mr. Driscoll: I don't mind telling you at all. The set-up there is not affected in any way by the exhibition of "Letty Lynton". The theatre was in existence, the mortgages were in existence, the interest was paid, the taxes went on whether "Letty Lynton" was shown there or not. The only thing that is affected by "Letty Lynton" is the operating charges for the theatre; this corresponds to the proper charges in the making of the picture. If the house was dark, as some of their houses are, their taxes and other expenses of that type would go on just the same.

1875

The Special Master: Your position is that the only thing they are entitled to credit for was ordinary operating expenses during the period that "Letty Lynton" was showing there?

1876 Mr. Driscoll: That is right. If this was a theatre that was built to show "Letty Lynton", it might be a different proposition.

The Special Master: Is there any particular significance in your examination of these particular statements, these particular items?

Mr. Driscoll: No; I just want to check on one or two of these theatres. I just wanted to get their set-up on these things. I think I ought to have a fairly intimate idea of how they set this thing up. I am not quarreling with Mr. Mills or his figures here. I am just trying to learn what it is all about, more than anything else. I think that is all I wanted 1877 to know about that. Weren't there some other items we wanted to get from Mr. Mills? Have you the information in regard to the shorts and the features, and so forth? You gave it to me over the phone. Mr. Cohen stated to me over the telephone that the number of feature pictures distributed over that year, actually sold, was 41.

Mr. Cohen: I find that in addition to the 41 feature pictures which were distributed during the motion picture season of 1931-1932, there were two re-issues of pictures also distributed that year. I don't know, of course, whether you would constitute 1878 that a release or not. But as a matter of fact there were two re-issues of old pictures, one I believe was "Ben Hur", and "The Big Parade"; those are feature pictures, the income of which, of course, is reflected in the gross receipts.

Mr. Driscoll: In addition to that, how many shorts were distributed?

Mr. Clarke: In order to refresh your recollection, Mr. Cohen, you said you distributed 43 two-reel shorts and 41 one-reel shorts.

Mr. Cohen: If those are the figures I gave you

over the wire, they are correct; approximately 84. 1879
If I should find there is a variance in a picture or two, I will let you know.

Mr. Driscoll: That makes 41 new pictures that were made and distributed that year, two re-issues and 84 shorts.

Mr. Cohen: 84 more or less; don't hold me too close on that.

Mr. Driscoll: That is for the record; if there is a correction you can change it later on. I assume that among the 84 were your news reels and things of that type?

Mr. Cohen: No, your assumption is not correct. 1880
In addition to the shorts there were, of course, news reels, which were not gotten out by Metro or by Loew.

Mr. Driscoll: But distributed by the Distributing Company?

Mr. Cohen: Yes.

Mr. Driscoll: And they were how many a week?

Mr. Cohen: Two a week.

Mr. Driscoll: Making 104 news reels.

Mr. Cohen: Making 104 news reels.

Mr. Driscoll: I want to know if that, in substance—I don't want to be picayune about it—but in substance is that the entire product that was handled by the Distributing Company for the fiscal year? 1881

Mr. Cohen: I understand there was nothing else.

Mr. Driscoll: What I want to do is to clear up the business of the company as comprehensively and briefly as we can do it. I think the record shows to a great extent the difference between release and distribution. It is a fact and I think it might be put here in a simple statement. If you don't agree with me, you can correct it.

Before a picture is made it is actually being distributed. Contracts are being made by the distribut-

1882 ing company before the exhibition of that picture, before it is made or released. After the picture is made the release date is set. The release date is approximately the first date that it is exhibited to the public. Just after release the distribution continues, that is, the sale of the picture, so that actual distribution of a picture might take place for six months before release and six months after release.

The Witness: I wouldn't say distribution takes place.

Mr. Clarke: The distributing company is functioning as a sales organization.

1883 Mr. Cohen: That happened in this particular case with "Letty Lynton"; contracts were entered into long before the release date.

Mr. Driscoll: The first contracts were made in May, 1931; and the first release was in May, 1932.

Just before leaving this, might I just add one other fact. This business handled domestically by the Distributing Company within a certain year is generally handled to about the same extent by the foreign distributing organization the next fiscal year.

Mr. Cohen: Except this, Mr. Driscoll, that we take an average of the features that were distributed in parts of the world other than the United States for the year 1932-1933 and we find that no such number as 41 or 43 was shown in these parts; we find the 1884 average, so far as we can tell at that time, was 33 in 1932-1933.

Mr. Driscoll: When you say an average of 33 was shown, you mean, do you not, that taking all of the foreign offices practically no one foreign office outside of Great Britain would show all of the 41 features distributed that year, but the total features of all foreign offices did average 33?

Mr. Cohen: That is right.

Mr. Driscoll: But it is a fact that Culver 1885
dled all 41 features, whether it was able to distrib
them in every country or not?

Mr. Cohen: I believe that is correct.

Mr. Driscoll: Culver handled the entire output?

Mr. Cohen: Yes.

Mr. Driscoll: How about the shorts for foreign distribution; they are distributed in about the same way?

The Witness: The ordinary shorts would be in about the same proportion. Certain ones would be eliminated from certain countries and the general average should be about the same. The ones released, of course, should be different. You appre- 1886
ciate that from the nature of it.

Mr. Pollak: I think we can add this: in general the news reels are not distributed abroad.

Mr. Driscoll: I think we are finished with that.

The Special Master: Are you finished with your examination of these financial matters?

Mr. Driscoll: Yes. I think that completes everything down to the schedule of officers and directors.

The Special Master: Yes. That is to be marked Plaintiffs' Exhibit M when furnished. It is to be sent to me.

The Witness: You asked for some checks of the 1887
Astoria Theatre Corporation, which I have here. (Papers handed to counsel.)

Mr. Driscoll: I would like to have noted on the record that the checks produced from the files of the Astoria Theatre Corporation, show a check $923.63 made to the order of Harvey Everett, Manager, $2,600.81 is made to the order of Marcus Loew Booking Agency and the check for $3,583.56 is made to the order of Astoria Theatre Corporation. They are all dated in June, 1932.

1888 Mr. Pollak: In order to avoid any question, I would like to ask a question of Mr. Driscoll. It is not contended that the checks in any way are inconsistent with the testimony given by Mr. Mills?

Mr. Driscoll: No; that is not my purpose. If you want to know my purpose, it is that one check was made to Marcus Loew Booking Agency. I think the testimony took care of that later (see footnote).

Mr. Pollak: At page 37 of the prior printed record I read the following from the testimony of the plaintiff, Margaret Ayer Barnes.

Mr. Driscoll: This, of course, is taken subject to
1889 my objection as incompetent, irrelevant and immaterial, having nothing to do with any of the issues referred to the Special Master for trial and report and having nothing to do with any of the issues that have been raised by the accounting.

Mr. Pollak: This testimony shows when "Dishonored Lady" ran. It is peculiarly valuable as showing the value of motion picture rights.

The Special Master: Technically isn't all this in anyway?

Mr. Pollak: I don't think it is; and besides it is vastly more convenient for any Court to have a record limited the way we are now limiting it.

1890 Mr. Driscoll: That objection will go to all that is offered.

(In ensuing hearings before the Special Master, the testimony of various witnesses at the trial, contained in the prior printed record (hereinafter for brevity, referred to by the abbreviation "P.P.R." and also called Proceedings before Accounting) as well as certain exhibits admitted at the trial and also contained in such prior printed record were admitted in evidence before the Special Master. In most all cases the testimony and exhibits were not actually copied in the Accounting Record, but were incorporated therein only by reference to such prior printed record, and in each case were given a reference number. In the case of the exhibits there were super-added exhibit numbers in this proceeding viz "R-1, R-2" etc. Such testimony, for the most part, and exhibits have not been actually printed, as part of this record, but, by stipulation of the parties are incorporated in this record only by reference to the prior printed record.)

The Special Master: Yes. Objection overruled. Your exception is noted. 1891

(Nine following extracts from testimony of Mrs. Barnes called "Reference 1".)

Mr. Pollak (reading): "'Dishonored Lady' played in Los Angeles September 8th to 20th, 1930. It closed in New York the end of May and Miss Cornell took a two months vacation, and it went into rehearsal again in August for the road and opened, I think, immediately in Los Angeles. At any rate it ran from September 8th to 20th.

"'Dishonored Lady' was written in the years 1927 and 1928 and copyrighted January 18, 1930, in accordance with the certificate that has been offered 1892 in evidence here. It was produced on the road. We ran it two or three times on the road in January, 1930, and it opened in New York at the Empire Theatre February 4, 1930, and ran in New York until, I think, May 24th, the end of May of that year, 1930. It was produced in London in May of that year, the 7th or 8th it opened with Miss Fay Compton in the title role, and it played in Los Angeles in September from the 8th to the 20th, 1930, then it went on the road. It came East and it played in Boston and in Philadelphia and in Baltimore and in Chicago and ended just about Christmas of that year, in time for Miss Cornell to pick up 1893 'The Barretts of Wimpole Street' in February. Then it closed in New York in 1931, approximately New Years of 1931."

I read from page 40 of the prior record the testimony of the plaintiff, Margaret Ayer Barnes, as follows, at folio 119:

"'Dishonored Lady' had its initial conception in the record and history of a famous English murder trial which took place in Glasgow, Scotland, in 1857, namely, the trial of Madeleine Smith."

1894 I read at page 44, folio 131, from the testimony of Mrs. Barnes, as follows:

"The novel 'Letty Lynton', as was our play 'Dishonored Lady', was based upon the Madeleine Smith trial."

At page 50 I read further from the testimony of the plaintiff, Mrs. Barnes, folios 150-152. Simply in the interest of clarity I ask that there be a stipulation, because it begins with a pronoun, that "he" refers to Mr. Sheldon.

"In the case of 'Dishonored Lady' it was his suggestion that we do it. I had never heard of the Madeleine Smith trial, but he had. Of course, having been a dramatist all his life he was interested in anything that might make for drama. He had heard a good many trials at one time or another, long before. Perhaps five or six years previous he had read the Madeleine Smith trial and he had it in mind that it would make a good play, and it was his idea that we do it. I was in New York back and forth two or three weeks and I would give him time in the evenings and we discussed the action and the dialogue and the dramatic and scenic structure of the play, and then, of course, as I live in Chicago, with a husband and three children, when I went back I wrote it on the typewriter and prepared the script of the scenes that we had described in the form of dialogue and sent them back as they were written, act by act, and they were read to him by his secretary, and he would propose cutting or enlarging them a little. The inspiration was his originally, his idea of the Madeleine Smith case."

1895

1896

I now read at page 43, folio 127, and ask for a stipulation that the statement, "we did have a scene", refers to the plaintiffs' play "Dishonored Lady".

Mr. Driscoll: Yes.

Mr. Pollak (reading): "We did have a scene that indicated sexual intercourse in our play 'Dishonored Lady' as the curtain drops. We intended the audience to understand that those two people were having sexual relations. 1897

"That scene was worked up to create the impression upon the mind of the public and upon the mind of the spectator that the relations between that man and that woman were illicit relations.

"There were two scenes in our play where the actions between the heroine and her lover are worked up to a point where they retire to a room to commit sexual intercourse. The inference after the curtain dropped was that they had met as lovers. Their relations between them, as they played it, were such as to convey the impression to the spectator that those two people are ready to have sexual intercourse." 1898

Mr. Driscoll: I think it only fair to state that the statement by the plaintiff Barnes is a summary statement of the testimony of Mrs. Barnes under cross-examination by the attorney for the defendants.

Mr. Pollak: This is testimony of Mrs. Barnes given under oath.

Mr. Driscoll: It is not question and answer. It is a summary statement of the testimony given by Mrs. Barnes under cross-examination. 1899

Mr. Pollak: By summary statement it is meant that in accordance with the practice in preparing a record on appeal the questions are sometimes but not always omitted.

Mr. Driscoll: In this case the questions were omitted.

Mr. Pollak: I want to add that the record on appeal was prepared by the plaintiffs and stipulated by them as correct.

1900 Mr. Driscoll: By counsel for the plaintiffs. The questions and answers are omitted here. This is testimony developed on cross-examination by counsel for the defendants.

Mr. Pollak: In narrative form.

Mr. Driscoll: We do not want it to have an ugly look that it does not deserve.

Mr. Pollak: I don't suppose it is suggested that the witness would testify any differently if questioned by one counsel or the other.

I read from page 47, folios 440, 141 (reading):

"Question: In the first place, you did have such a scene with the players retiring to a room and in-

1901 dulging in sexual intercourse?"

"Answer: Well, the curtain drops. That is the ent. act.

"Question: But the scene was intended to convey that those two persons were retiring to indulge in sexual intercourse?

"Answer: Yes.

"The Court: Is that the last act that is referred to?

"Mr. Burkan: Yes. There are two scenes and that is in the last act.

"Question: Now, as a matter of fact, this iden-

1902 tical scene is repeated twice in the play, is it not, Mrs. Barnes?

"Answer: Why, on two occasions. Of course, obviously the identical scenes are not repeated in any plays, but the two actions in the play show Madeleine Carey in the arms of Jose Moreno, the first time to become his mistress and the second time having become his mistress. There is that similarity."

I now read from page 45 at folios 133-134:

Mr. Driscoll: What does all this prove, Walter? That they had sexual intercourse?

Mr. Pollak: I think I must answer that, obviously certain portions of the plaintiffs' play were not available for the movies. 1903

Folios 133-134, page 45—I will explain that this is quoted from an affidavit Mrs. Barnes had previously executed and read into the record once before.

(Reading:) "In our play 'Dishonored Lady' when the menace takes her in his arms, the physical contact, the passion of Madeleine is so great that she succumbs to Moreno's embraces and they go to his bed room and indulge in sexual intercourse."

I read from page 50, folio 148, from the testimony of Mrs. Barnes (reading): 1904

"I hoped very much we would make the sale and the play would be changed."

(The following papers were designated Reference No. 2 and marked in this proceeding as "Defendants' Exhibit R-1".)

I now read from volume two of the prior printed record, which contains exhibits, and I offer Plaintiffs' Exhibit 8 which is printed at page 788 and consists of two documents headed "Proposed contract for purchase of motion picture rights of 'Dishonored Lady' by Metro-Goldwyn-Mayer Corporation." It extends 1905
from page 788 through page 803. I don't think it is necessary to write them into the record.

Mr. Driscoll: I just want to record my objection again.

The Special Master: Overruled and exception.

Mr. Pollak: I want to read, because of its great importance, the first one of these documents. It is in the form of a letter signed by Guthrie McClintic, Charles Frohman Inc., James F. Reilly Secretary, and Margaret Ayer Barnes, under date of

Exhibit Read into the Record.

1906 April 15, 1931, addressed to Metro-Goldwyn-Mayer Corporation, 1540 Broadway, New York City, and Joseph E. Bickerton, Arbiter, 220 West 42nd Street, New York City. (Reading:) "Dear Sirs: We are executing the contracts for sale of motion picture rights in 'Dishonored Lady' to Metro-Goldwyn-Mayer Corporation, with the understanding that this sale is contingent upon their being able to secure the approval of the Hays office of their use of this play for picture purposes,

"Our assignments are therefore delivered to Mr Bickerton with this understanding, which is that
1907 Metro, if it obtains this approval within thirty days, will on its part then sign the contracts and pay Mr. Bickerton the $30000 therein provided, but Metro is not obligated to take the rights unless within thirty days it secures such approval of the Hays office, and if it does not so secure such approval then the contracts now signed by us and deposited with Mr. Bickerton will be returned to us by Mr. Bickerton."

I call for a stipulation in that connection that Guthrie McClintic is and was at this time the husband and manager of Miss Cornell.

Mr. Driscoll: He was supposed to be the husband.
1908 I don't know; I was not there myself. I could not really say that he was the husband. Unless you say he was the husband. If you say he was the husband I will take your word for it.

Mr. Pollak: Is there any dispute about it?

Mr. Driscoll: I wouldn't dispute that he was the husband.

Mr. Pollak: Subject to correction.

I call for a further stipulation that Charles Frohman Inc. is a theatrical corporation having an interest in the play "Dishonored Lady".

Mr. Driscoll: No, no such stipulation. 1909

Mr. Pollak: I call for a stipulation that they produced the play.

Mr. Driscoll: Well, that either Frohmaft or Guthrie McClintic did. I have been informed that it was not Frohman but Guthrie McClintic produced the play.

Mr. Pollak: Do I get a stipulation that they were a theatrical corporation?

Mr. Driscoll: Charles Frohman, Inc.? Yes.

Mr. Pollak: That suits me. The long formal contract, Mr. Master, I will not read.

(The following was designated Reference No. 3.)

I read from the testimony of Mr. Lasky at pages 146-148 of the record, folios 438 to 444 (reading): 1910

"My name is Jesse L. Lasky. My residence is 609 Ocean Park, Santa Monica, California. My occupation is a motion picture producer. I was an officer of Paramount-Publix Corporation. I was the first vice-president in charge of production until about three months ago, and have been since about 1915. The business of that corporation is the production of motion pictures.

"Charles Frohman Inc. are producers of legitimate plays. They are a subsidiary of Paramount-Publix Corporation, which owned their stocks. 1911

"Charles Frohman Inc. produces plays. Some of the plays Charles Frohman Inc. has produced in the past few years, in which Katherine Cornell has taken the leading part, are 'Dishonored Lady', and a play before that of which I don't recall the title. I think it is 'Casanova'. She has also appeared in 'The Barretts of Wimpole Street.' At the present time I do not recall all others.

"Charles Frohman Inc. in 1930 produced a play 'Dishonored Lady', in which Katherine Cornell took the leading part.

1912 "The Motion Picture Producers and Distributers of America Inc. is an association of the leading producers and distributers in the motion picture industry. The president is Will H. Hays. The Paramount-Publix Corporation is a member. Its purpose is to advance the interests of the motion picture industry in its various branches and to exercise a watchful eye over the type of play that is selected for production on the screen. The Motion Picture Producers and Distributers of America, Inc. took action with reference to the play 'Dishonored Lady' as to its fitness or unfitness for motion picture screening. Through the president, Will H. Hays, all the companies were notified that they did not consider the subject matter of 'Dishonored Lady' fit or safe for motion pictures. That was within a few weeks after the play was produced.

1913 "In the spring of 1931 Metro-Goldwyn-Mayer Corporation was interested in purchasing the motion picture rights to the play 'Dishonored Lady'. Through one of their officers, Mr. Rubin, they took up with me personally the question of purchasing the play. The Paramount-Publix Corporation did have a financial interest in the sale of the motion picture rights to Metro-Goldwyn-Mayer Corporation or others of the play 'Dishonored Lady'. The Paramount-Publix Corporation were interested and would have received for its subsidiary, the Charles Frohman Company, whatever amount the play was sold for less half of the amount which would have gone to the author.

1914 "I had several discussions with Mr. Will H. Hays about June 1, 1931, regarding removing the so-called ban on the play, in which I told him that I thought the play should be produced for pictures, but he refused the consent of the Motion Picture Producers and Distributers. He did not comply with the request, and stated that it was almost the unanimous

opinion of the members that the play was not safe or fit material, and that he saw no reason or nothing had transpired to make them change their minds, and refused to consent to let it be produced." 1915

(The following described book was designated as Reference No. 4 and marked in this proceeding as Defendants' Exhibit R-2.)

I offer in evidence the original "Trial of Madeleine Smith". It appears in the trial record as Defendants' Exhibit E. It was not physically printed, and a copy will be handed to your Honor. It is a bound book, appearing in "Famous English Trials", or something similar to that. 1916

Mr. Driscoll: I want to make the same objection, and renew my objection to that exhibit.

The Special Master: I don't know exactly what the point is.

Mr. Pollak: As to that exhibit, sir?

The Special Master: Going back to the trial.

Mr. Pollak: The point is specifically based on the proposition enunciated in Judge Hand's opinion in the case, that so much of the plaintiffs' play as was based upon the Madeleine Smith trial is not copyrightable material. It is connected with the testimony I have already read to your Honor, given by Mrs. Barnes, that the inspiration of the plaintiffs' play was the Madeleine Smith trial. 1917

The Special Master: It is accepted, with the objection and exception.

Mr. Pollak: It is related, specifically, if your Honor please, to the authorities I cited in my memorandum holding that an improver in patent cases, one who merely improves, does not create the new object and gets as against the infringer only a share

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1918 of the profits ascribable to the infringement. The same principle obviously holds in the field of copyright law, the analogy being to the patents.

(The manuscript of the play "Dishonored Lady" was designated Reference No. 5 and marked "Defendants' Exhibit R-3".)

I now offer in evidence from the prior record Plaintiffs' Exhibit 1, the manuscript of the play "Dishonored Lady", printed at pages 237 to and including page 494.

1919 Mr. Pollak: We should get up a series of exhibit numbers when this is arrived at. Of course, the exhibit system is not applicable to extracts from the testimony.

I do not plan to read this long exhibit to you. I do want to read exactly two folios at the beginning (reading):

"'Dishonored Lady'. A play in three acts, by Margaret Ayer Barnes and Edward Sheldon. 'Dishonored Lady'. The authors salute with gratitude Miss Madeleine Smith of Glasgow, whose conduct in 1857 suggested to them this play. Accordingly they make a friendly and admiring bow to her across

1929 the years."

The Special Master: Will that be all, Mr. Pollak?

(The following continuity of the motion picture "Letty Lynton", actually printed in P.P.R., pages 495-622, was designated Reference No. 6 and was marked "Defendants' Exhibit R-4".)

Mr. Pollak: If your Honor please, I am going to put in one of the two continuities of the picture that were put in evidence at the prior trial. There

is no need of putting in both. But I have no such familiarity with the facts of the case as to decide offhand which to put in. Have you any particular objection to both being put in? 1921

Mr. Driscoll: I am very familiar with both of them as a matter of fact. The one continuity is one from which the picture was made, and the other was made from the picture.

The Special Master: We will consider one of them marked. You can decide which one later.

Mr. Pollak: This exhibit will be supplied.

(The following novel "Letty Lynton" was designated Reference No. 7, was marked "Defendants' Exhibit R-5".) 1922

I offer in evidence the novel "Letty Lynton" by Mrs. Belloc Lowndes, received as Defendants' Exhibit C at the last trial. That is also a printed book. It is not printed in the record.

(The following assignment was designated Reference No. 8 and was marked "Defendants' Exhibit R-6".)

I offer in evidence assignment of motion picture rights of the novel "Letty Lynton", appearing as Exhibit D in the prior record and printed at page 826, from folio 2477 to folio 2484. We can supply that. 1923

The reading of the testimony that remains, some of it, will take some time. It is about 30 pages.

The Special Master: Don't you think you might identify it and not read it, because I will have to read it anyhow?

Mr. Driscoll: Wouldn't we save a lot of time if he offered both volumes in evidence?

1924 The Special Master: I think we would save a lot of time if he will get them up in a series of exhibits and put it in, with your objections and exceptions noted.

Mr. Pollak: There are not many more items but I think as to the remaining items I could save some space and time by not physically reading all of the testimony of these witnesses I had in mind, but marking them for you. I will do that.

The Special Master: Do that. Besides that what have we got to do?

(Informal discussion off the record.)

1925 (Thereupon further hearing was adjourned to a date to be fixed by the Special Master.)

HEARING OF AUGUST 11, 1937.

ARTHUR M. LOEW, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

1926 Q. Mr. Loew, what is your full name? A. Arthur Marcus Loew.

Q. And your residence? A. Glen Cove, New York.

Q. And your occupation? A. I am Vice-President of Loew's Incorporated.

Q. Did you at any time hold a position with the Culver Export Corporation? A. Yes, I did; I was President of that Corporation.

Q. Were you president in the years 1932 and 1933? A. I was.

Q. And putting a more personal question, how old are you? A. Thirty-nine.

Q. Mr. Loew, had you been President of Culver Export Corporation for a number of years before 1932 and 1933? A. Yes, I had. 1927

Q. Approximately since its organization; is that right? A. Yes, that is right.

Q. When was that? A. 1925, I believe.

Q. In 1932 to 1933 did you hold any other position with any of the different companies besides President of Culver Export Corporation? A. Officially I was a Vice-President of Loew's Inc.

Q. Also in 1932 and 1933? A. Yes.

Q. Did you draw any salary from any corporation other than Culver Export Corporation? A. No.

Q. Mr. Loew, will you tell us in your own way what in general were the duties and activities of the President of Culver Export Corporation in the fiscal year 1932 to 1933? A. The Culver Export Corporation at that time had entire charge of the marketing of M-G-M pictures outside of the United States and Canada, and the President himself at that time supervised the business of the corporation. 1928

Q. In a general way, what did this work of supervision entail? A. Well, it entailed completing productions, I might say. Shall I explain that?

Q. Yes. A. The productions as they are delivered to us from our studios are in a form that have to be altered somewhat to meet conditions abroad. In some cases we have to put them into foreign languages, that is, make English pictures talk French or other language. In other countries we have to edit them with superimposed titles so that they will be understood in those non-English speaking countries. After that, of course, we have to maintain our offices abroad and supervise the distribution and the sales of the pictures. 1929

Q. You were doing business in about how many countries abroad in 1932-1933? A. About 46.

Q. Can you tell us what traveling, if any, you person-

1930 ally did in the year 1932-1933? A. I made a list of the countries I visited.

Mr. Pollak: I think the witness may refresh his recollection from the list.

A. (continued; after examining list) I visited Mexico, Guatemala, Panama, Peru, Chile, Argentine, Brazil, Trinidad, Porto Rico, France, England, Italy, Belgium, Holland, Switzerland. I made two visits to California. I visited Hawaii, Australia, New Zealand, Java, Straits Settlements, Indo-China, China, Japan, India, Egypt, South Africa, and France. That was in the calendar year 1932.

1931 Q. And these visits were in the course of your duty as an officer of the corporation? A. Yes.

Q. They were business visits? A. Yes, they were.

Q. I suppose when you were in these foreign countries you of course visited the local subsidiary corporations; am I right? A. That is what I went for.

Q. And also, while you were here in New York, you kept in touch with these foreign corporations? A. We are in constant touch with them.

Q. Had you in 1932-1933 subordinates of your own whose functions also involved traveling abroad? A. Yes, I had.

Q. Did their functions, or the functions of one or more

1932 of them, involve roughly the same amount and kind of travel as yours? A. Of the same kind, but probably not as much.

Q. Mr. Loew, testifying in round figures, can you give us estimates—and you may refresh your recollection of the gross business of the Culver Export Corporation in the years 1921-1922 as a fiscal year, and 1926 to 1927 and 1927 to 1928 and 1932 to 1933, and you may, in answering that question, unless there is objection, give your answers in the nearest hundred thousand, unless the figures reach a million; if they reach a million give us the million.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial. I don't think we are interested in the gross business done by Culver in the ten years prior to the distribution of this picture. We will be going back to the Cleveland administration or the Civil War. 1933

Mr. Pollak: If your Honor please, there was a specific attack by them in the testimony and in the briefs on Mr. Loew's salary and the amount thereof. There was also repeated and specific contention that the whole Culver Export Corporation was a useless expense and a contention that they performed no useful function.

The Special Master: Let him answer the question. 1934

Mr. Driscoll: Exception.

A. In the year ending August 31, 1922, which was the first year that I joined the foreign department, such as it was at that time, the gross business at that time was slightly over $600,000. In 1925 the gross business was almost three million and a half. In 1928 it was over eleven million and a half, and in 1933 it was almost fifteen million and a half.

Q. I think that is far enough. You need not carry the figures any further unless Mr. Driscoll wants them. Now, Mr. Loew, you can answer this yes or no. It is the fact, is it not, that in the fiscal year 1932-1933 your salary was somewhat increased? A. Yes. 1935

Q. Answer the next question yes or no. It is also the fact, as I understand it, that in that same fiscal year the salaries of some of the employees of Culver Export Corporation were reduced, is that right? A. That is right.

Q. Will you tell in your own way the circumstances in regard to those salary shifts including both your own increase and the reduction of the salaries of some of the other employees?

1936 Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

A. Just a few months I should say before this decrease was put through I was given quite a substantial increase in salary because of the business done by the Culver Export Corporation. Then a few months subsequently the general policy of Loew's Incorporated was to reduce salaries of employees generally by a certain percentage. At that time Mr. Schenck, the President of Loew's Incorporated, called me in and said that he would like to make a reduction

1937 worldwide, to which I objected because we had just completed our most successful year and had made our greatest profit, and I objected on my own behalf as well as my subordinates.

After a great deal of discussion, we did not reduce any salaries of employees abroad and I refused to take any reduction of my own salary and tried to persuade him not to reduce the salary of anyone connected with the Culver Export Corporation. Because of their unfortunate geographical location, being in the same building with Loew's Incorporated, he thought it would be a very bad thing for the morale of the rest of the corporations and he insisted upon reducing the salaries of the other employees of

1938 the Culver Expert Corporation.

Q. You say you objected to having your own salary reduced. What did you say in terms or substance?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Overruled.

Mr. Driscoll: Exception.

A. I told him I would not accept a salary reduction, and I told him I would sooner not work any further for the company.

Q. Mr. Loew, at that time approximately what was the total amount of your personal stockholdings in any of the Loew companies? A. I did not search the record for that, but I know it was not more than two or 300 shares. 1939

The Special Master: At the time that he told them he would not take a reduction in salary, was that to the board of directors of the Culver Export Corporation?

Mr. Cohen: No; to Mr. Schenck.

Q. Who were the board of directors of Culver Export Corporation at that time, if you know? A. I remember some of them. I don't know if I remember all of them. I was a director. 1940

The Special Master: Isn't that in evidence somewhere? I thought you were to put in evidence the members of the boards of directors of those companies.

Mr. Pollak: I might at this time put in evidence this exhibit. A copy has been given to the plaintiffs' counsel. I offer in evidence a document giving a list of the officers and directors of Loew's Incorporated, Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, and Culver Export Corporation, the defendants in this case, for 1932. 1941

(The papers just offered were received in evidence and marked respectively Defendants' Exhibits Nos. 27-A, 27-B, 27-C and 27-D, of this date.)

Q. Mr. Loew, am I right in this, that the conditions of distribution and exhibition of motion pictures vary substantially in the foreign market as compared with the American market? A. Yes, they do.

42 Q. Am I also right in this, that in addition foreign countries differ substantially one from another? A. That is right.

Q. And that applies to the whole group of causes that affect the success or failure of a picture, conditions of language and climate, I suppose, and the feeling of the people towards a particular class of exhibitions; is that correct? A. That is right.

Q. And generally speaking, any one foreign country will have problems peculiar to it; is that right? A. That is right.

Q. Is this true, Mr. Loew, that the M-G-M pictures which 43 are exhibited in foreign countries will show a different selection in different countries, generally speaking? A. What you mean to say is that there are not any two pictures exhibited in the same countries throughout the world?

Q. That is correct. A. Generally speaking.

Q. One picture will be exhibited in countries A, B, C, D, E, F and G, and another picture will be exhibited in countries A, B, C, F and Q? A. That is right.

Q. Now, Mr. Loew, from your experience in the foreign business, can you form any judgment whether in a foreign field the reputation of the great American stars contributes to the success of a production?

44 Mr. Driscoll: That is objected to as incompetent, irrelevant and immaterial, not within the issues to be tried here.

The Special Master: I know what you are leading to. I think it is terribly vague kind of testimony. I think you had better go ahead and put it in.

Mr. Driscoll: Exception.

A. Yes, I think we have definite proof there is a great difference.

Q. Will you tell us in your own way the nature of that

proof? A. The nature of the proof is in the box office receipts. We have certain stars that are "box office", as we call them, and other people who do not mean anything. We also, I might add, had definite proof at the time that talking pictures were first introduced. At that time we made several foreign language versions of the same picture, without the same cast, and in a great many cases where those languages were spoken they insisted on releasing the original English version with the original star and cast sooner than release the special foreign language version that we had made for the country. 1945

Q. That is, when you had the so-called shot foreign version you would then put in a French actress to speak the French part, is that right? A. Yes. 1946

Q. And you would have a French cast? A. That is right.

Q. That cast naturally would not have any distinguished Hollywood stars in it, I take it? A. That is right.

Q. Answer this question yes or no. Did you or did you not supersede these foreign shot productions by synchronized productions; did you so replace them? A. Yes, we did.

Q. Will you tell us the reason for that, or the reason for replacing the shot foreign version by the synchronized version? A. We replaced them because of the demand for the American star.

Q. Can you tell us, Mr. Loew, whether you would class Joan Crawford in 1932 to 1933 in the foreign field as "box office", as you put it? 1947

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues.

Q. By "box office" you mean having a large box office appeal? A. Having a large public appeal.

1948 The Special Master: Objection overruled.
Mr. Driscoll: Exception.

Q. Does your answer apply both in the foreign English-speaking countries and in foreign countries where English is not spoken? A. It applies in both. I believe that Joan Crawford was more popular in the English speaking countries, but she was very popular in both.

Q. Taking first the non-English speaking foreign countries, how high as near as you could judge would you rank her in public appeal among American actresses?

1949 Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues here. There is no contest between this picture and any other picture. It is a waste of time.
The Special Master: Overruled.
Mr. Driscoll: Exception.

A. I think she definitely would be placed among the first six.

Q. In the non-English speaking foreign countries? A. Yes.

Q. And in the English speaking foreign countries? A. She would be among the first six, but higher up.

1950 Q. Would you be familiar with the box office appeal, if any, of Mr. Robert Montgomery, in 1932-1933? A. Yes.

By Mr. Pollak:

Q. You said you are familiar with Mr. Montgomery's reputation in 1932-1933 abroad? A. Yes.

Q. Are you familiar with that reputation in the English speaking foreign countries and in the non-English speaking foreign countries? A. I am.

Q. What would you say concerning that reputation? A. Montgomery had a definite appeal abroad. He was defi-

nitely a popular star abroad. I do not think he was as popular as Crawford, but he was not very far behind her. 1951

Q. Does that apply to both English and non-English speaking foreign countries? A. It applies more to English speaking countries than to non-English speaking countries.

Q. Did the reputation of Mr. Clarence Brown extend to foreign countries in 1932-1933? A. Mr. Brown was definitely known as a good director.

Q. Abroad? A. Abroad.

Mr. Driscoll: Did he say by whom he was known as a good director?

The Witness: He was known by the public because he was connected, as I remember it, with several important Greta Garbo pictures which were very popular abroad and very well directed pictures. The press abroad knew him very well and the public became aware of Mr. Brown through the press. 1952

Q. Did the popularity of M-G-M, the producing company, if you know, extend to foreign countries in 1932-1933? A. Definitely.

Q. What was that reputation?

Mr. Driscoll: I can't see how this man can qualify as an expert to testify to the reputation of either Clarence Brown or anybody else or the M-G-M abroad. Reputation is a thing that is gauged by local people, people who live in the community, able to size up the individual or thing. Here is a man sitting in the Loew State Theatre Building in New York City, and Mr. Pollak would have him testify as to the reputation of M-G-M in China. I say he is not qualified to do it. It is a waste of time. 1953

The Special Master: I think it is very weak testimony. I do not see how this witness can tell

1954 how the public in Czechoslovakia or some place like that think of Clarence Brown. I think I might almost take judicial notice of the fact that they do not know he exists.

Mr. Pollak: The witness has testified that he directed pictures of Greta Garbo.

By Mr. Pollak:

Q. What was the reputation of Greta Garbo abroad in 1932?

Mr. Driscoll: Objected to as immaterial.

1955 The Special Master: Sustained.

Q. Mr. Loew, in the testimony you have given concerning the reputation of Miss Crawford and Mr. Montgomery and the M-G-M organization, what sources did you base your opinion upon? A. Well, I base my opinion upon personal contacts. It is true that I have an office at 1540 Broadway, but when I travel throughout the world I have to leave that office, unfortunately, and I have direct contact with other offices abroad and they have direct contact with their public, and I also have some contact with the public myself.

1956 Q. When you say you have direct contact with your offices abroad, do you mean you receive reports from them? A. I mean I am actually there, besides receiving reports.

Q. In the course of a year approximately how many foreign countries would you and your immediate subordinates have visited, Mr. Loew, in 1932-1933? A. I think either I or my immediate subordinates would have visited practically every country in the world.

Q. Your subordinates would report to you? A. Yes.

Mr. Pollak: You may cross-examine.

Mr. Driscoll: I do not want to cross-examine. No cross-examination.

Q. Mr. Loew, are you familiar with the normal rates paid for the distribution of pictures abroad, yes or no? A. Generally, yes. 1957

Q. In cases where distribution is not effected through subsidiaries, what would you say is a reasonable compensation for the home office for foreign distribution?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; not within the issues.

The Special Master: Irrespective of whether or not it is within the issues, I think you should be more specific. I think you had better limit it to what countries "Letty Lynton" was distributed in, not through a wholly-owned subsidiary. 1958

Mr. Pollak: It was distributed always through subsidiaries. What the testimony is designed to show, your Honor, is this: that the distribution charge made by the home office was reasonable, judged by business standards. I will take them country by country if you wish.

The Special Master: You have a full accounting of what Culver Export Corporation did do, and I do not think testimony of what you have paid to the non-wholly owned distributors is of any particular value to us under those circumstances. You have shown what you claim is your cost of distribution. What difference does it make if you made a deal with some wholly-owned subsidiary to pay them 20 per cent or 30 per cent or 40 per cent? How many other considerations come into it? 1959

Mr. Pollak: I think this should be made clear. I think your Honor's analysis of essential legal principles is correct, namely, it is throughout a question of how the business was done by the defendants, and not how it might have been done. Indeed, the cases hold that, even if the defendants were wasteful.

1960 What I want to make clear to you is this: For their attack on Culver Export Corporation as a whole they say it was a useless thing; they deny the reasonableness of our charges, of our right to make charges. I want to say that but for Culver Export Corporation the cost of distribution would have been higher.

The Special Master: I do not think that testimony would be very helpful. I think where you have a full accounting, it has to stand on its own; there are so many other considerations that are involved if you distributed it through a non-wholly owned subsidiary that it would only mix us up.

1961 Mr. Pollak: Your Honor will give me an exception.

The Special Master: Yes.

Mr. Pollak: Mr. Loew has a further thought that he wants to bring out concerning the first part of his testimony concerning his salary.

By Mr. Pollak:

Q. Would you state in your own way the condition of the foreign field when you took hold of it in 1921 and 1922? A. Yes. The foreign department, the so-called foreign department at that time consisted of one man who was in charge of sales, and a stenographer, and no offices abroad. In 1932 to 1933 we had 117 offices abroad and some 5,000 employees throughout the world.

1962

Mr. Pollak: I think that is all, Mr. Loew.

(Witness excused.)

DAVID BLUM, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows: 1963

Direct examination by Mr. Pollak:

Q. What is your residence? A. Naughright, New Jersey.

Q. And your occupation? A. Secretary of the foreign department of Loew's Incorporated.

Q. Are you connected with Culver Export Corporation? A. I am.

Q. Are you secretary of that Corporation? A. Yes.

Q. You are a member of the Bar, Mr. Blum? A. I am.

Q. Mr. Blum, there is now no Culver Export Corporation, is that right? A. That is correct.

Q. In 1932-1933 you were secretary of Culver Export 1964
Corporation? A. That is right.

Q. And held no position with Loew's, is that right? A. That is right.

Q. But your present post is with Loew's? A. That is right.

Q. Mr. Blum, had you personally anything to do, yes or no, with the organization of the various corporations that are subsidiaries of Culver Export Corporation? A. Yes, with the legal end of it.

Q. Have you a list of those corporations? A. I believe Mr. Cohen has that.

The Special Master: When you say there is no 1965
Culver Export Corporation now, what do you mean?

Mr. Pollak: It is liquidated.

The Special Master: And all these foreign interests are held by Loew's direct?

The Witness: That is right.

Q. As of the present date? A. Yes.

Q. When was Culver Export Corporation liquidated? A. I think it was September 30, 1936.

Q. Will you state in general terms the purpose of the liquidation of Culver Export Corporation?

1966 Mr. Driscoll: Objected to. The fact is what we want, and not the purpose. This was 1936. I do not see any reason for going into the underlying purpose.

The Special Master: I don't suppose it has anything to do with this case.

Mr. Pollak: The liquidation was not directly related to this case.

Mr. Driscoll: That is a statement of a conclusion.

Q. Mr. Blum, I show you a list of the corporations formerly subsidiaries of Culver, now subsidiaries since the latter part of 1936 of Loew's, and I ask you if this list
1967 was prepared under your supervision (handing papers to the witness)? A. Yes.

Mr. Pollak: I offer this document in evidence, if your Honor please.

(The papers just offered were received in evidence and marked respectively Defendants' Exhibits No. 28-A, 28-B, 28-C, 28-D, and 28-E, of this date.)

Q. In some instances the corporations listed on Defendants' Exhibits 28-A to 28-E are incorporated in New Jersey? A. Some New Jersey, some Delaware, some native
1968 corporations abroad.

Q. By "native abroad" you mean incorporated in the foreign countries? A. Yes.

Q. Of the corporations incorporated in one or the other of the foreign states, what is the status of those corporations where they are located? A. It is domestic in the foreign country just the same as a New Jersey corporation is domestic in New Jersey.

Q. The corporations listed on Exhibit 28 are either domestic corporations of the countries in which they

operated, or are domesticated in those countries? A. That is correct. 1969

Q. And that was true in 1932? A. That is right.

Q. Will you explain, Mr. Blum, the reasons for the organization of the corporations, either domestic to the countries of operation or domesticated in those countries?

Mr. Driscoll: Objected to as immaterial and irrelevant.

The Special Master: I do not know what he is driving at, but go ahead.

Mr. Pollak: To answer these attacks on the whole set-up of Culver Export Corporation.

Mr. Driscoll: The reason for it wouldn't explain it. 1970

Mr. Pollak: If your Honor please, on no theory is there liability for distribution abroad by corporations of this character which are not parties to this law suit.

The Special Master: That is a question of law, and it is admitted that all of these corporations are wholly owned by the parent.

Mr. Pollak: The question in that situation, as I read the decisions, especially the decisions we mention in our brief, is the question whether these corporations are created separately for bona fide reasons. 1971

The Special Master: I don't think there is any question about that, that they incorporated these corporations because it was the best way they could do business.

Mr. Driscoll: I do not think there is any question about that,—these incorporated in 1927-1928, long before this play was written.

Mr. Pollak: I think, in view of Mr. Driscoll's concession, we will not press that.

1972 By Mr. Pollak:

Q. Do you know whether these corporations have separate minute books? A. Yes, that is right.

Q. And bank accounts? A. Certainly.

Q. Each has its own managing agent, is that right? A. Yes.

Q. Who is a resident of the country in which the company operates? A. Yes.

Q. Who is paid by that corporation? A. That is right.

Q. Is the activity of each company geographically limited in accordance with the fourth column of that exhibit? A. The fifth column. Yes, each company is limited to the
1973 country shown in the fourth column.

Q. In no instance do two companies operate in the same territory, is that correct? A. That is correct.

Mr. Pollak: We have some specimen minute books here, but I don't think there is any need to offer them.

Cross examination by Mr. Driscoll:

Q. Prior to the 30th of September, 1936, these corporations came directly under the Culver Export Corporation?
1974 A. By that you mean the stock ownership?

Q. What was the situation? A. Either legally or equitably owned.

Q. What was the stock ownership prior to September 30, 1936? A. That is what I meant to answer. The stock was either legally or equitably owned by Culver Export Corporation.

Q. In 1936 you dissolved the Culver Export Corporation, and they were taken over direct by Loew's Incorporated? A. That is right.

Q. As a matter of fact they dissolved a great many

other subsidiaries of Loew's Incorporated? A. Not abroad, and that is the only thing I am familiar with. 1975

Q. You are not familiar with the fact that they dissolved other subsidiaries? A. I heard something of that, but that is not within my line of duty.

Q. Do you know whether they dissolved the Distributing Company? A. I don't know.

Q. The Producing Company? A. I have no knowledge of that.

Q. Let us look at this list here, Exhibit 28, you have produced. I see the name David O. Decker as president of a number of these corporations, in fact more than anyone else. Mr. Decker, I believe, is a lawyer? A. That is right. 1976

Q. He is one of Mr. Cohen's co-workers? A. Yes.

Q. Mr. Cohen's buddy in the legal department and working under the supervision of Mr. Rubin, general counsel of Loew's Incorporated? A. That is right.

Q. And Mr. David O. Decker is president of Metro-Goldwyn-Mayer Company of Brazil operating in Brazil, and has his office in the Loew Building, up here on 47th Street and Broadway? A. 46th Street and Broadway.

Q. And Mr. Decker is the president of the Argentine Company and of the Brazil Company and of the West Indies Company and of the Chile Company and of a great many of the other companies? A. Yes. 1977

Q. Charles E. Quick, where does he make his office? A. Same place.

Q. Is he in the legal department of Loew's Incorporated also? A. No, he is not.

Q. What department is he in? A. Accounting department.

Q. He is an accountant? A. Yes.

Q. He is Vice-President of a number of these companies throughout? A. Yes.

1978 Q. Then we have Miss Len Cohen. Miss Cohen is treasurer of some of these companies? A. Yes.

Q. And she makes her office at 46th Street and Broadway in the Loew State Theatre Building? A. Yes.

Q. As treasurer of the Argentine company and as Treasurer of the West Indies company and as treasurer of the Chile company and as treasurer of the Hong Kong company she makes her office in the Loew State Theatre Building at 46th Street and Broadway? A. Yes.

Mr. Pollak: We concede that Miss Len Cohen makes her office at 46th Street and Broadway, 1540 Broadway, and that applies to each of these companies which you seem to enjoy reading off.

1979 Mr. Driscoll: Well, let us see. Miss Lillian Reiss, I suppose the concession extends to her too?

Mr. Pollak: Yes.

Q. She was assistant secretary of Culver Export Corporation, wasn't she? A. Yes.

Q. You were the secretary of the Culver Export Corporation. Are you an officer of any of these foreign corporations? A. No. You mean, was I an officer.

Q. These are still in existence, on Exhibit 28, aren't they? A. Yes.

1980 Q. Who was Mr. Davis? Is he up at Loew's Building too, M. L. Davis? A. No.

Q. He is down in South Africa? A. He is a resident in South Africa.

Q. Mr. David O. Decker and Miss Len Cohen and Mr. Charles E. Quick are the board of directors, although Mr. Davis is the local manager, acts as manager? A. Manager director.

Q. Any other ones you want to direct my attention to? Rumania? A. When we have a corporation native of that foreign country, the laws of that country would require

ns to have native directors; Roumania would be one of those corporations. 1981

Q. It would be correct to describe these as a nest of corporations having their offices in Loew's State office building? A. Yes, wherever these were corporations having offices in that building.

ROBERT L. GIFFIN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

1982

Q. What is your address? A. 152 West 42nd Street, New York City.

Q. What is your occupation, Mr. Giffen? A. Play broker, plays and literary material.

Q. That is, you dispose of literary material for clients, is that right? A. Yes, principally for pictures.

Q. By the way, you are testifying under subpoena, Mr. Giffen? A. Yes, I am.

Q. Was your occupation the same in 1931 and 1932? A. Since 1915.

Q. What is the name of the agency with which you are connected? A. It is known as Alice Kauser.

1983

Q. And you and Miss Kauser are partners? A. We are partners in a part of the business. She conducts the business of selling plays for production on the stage entirely in her own capacity.

Q. And your own function is what? A. Handling the picture rights.

Q. Handling the motion picture rights? A. And some literary rights in addition to that, and now and then disposing of a play for a client of mine if the picture department wants me to do it.

Q. In 1931-1932 you mostly handled motion picture rights yourself? A. Yes.

Q. Did you have among your clients one of the plaintiffs in this action, Mrs. Barnes? A. Yes.

Q. You did not, I suppose, personally meet Mr. Sheldon in that connection? A. No, I did not meet Mr. Sheldon in that connection.

Q. Did you have anything to do with an attempt to dispose of the motion picture rights to the play Dishonored Lady? A. Yes.

Q. Would you tell us in your own way what you did?

Mr. Driscoll: May I ask the object of this proof? It seems to me we are wasting a lot of time.

Mr. Pollak: The object of this proof is to show two things. First, that the sale price of $30,000 for the motion picture rights that Mrs. Barnes testified she hoped very much to get, was a reasonable price, was the best price that could be got, and also was a reasonable price. It bears directly on the cardinal question in the case, your Honor.

Mr. Driscoll: I do not get the object of it. Is it for the purpose of disputing $30,000 as the amount of damages, or is it for the purpose of disputing the price? It certainly has nothing to do with the profits nor the ascertaining of profits nor solving the problem referred to the Special Master. If it has to do with the damages then you are not disputing that $30,000 was the contract price?

Mr. Pollak: Certainly not. We are saying that the damages, which is one of the items that the Master on any theory must report, was $30,000. We are also saying that in this case that the damages are the proper measure of recovery, that under the discretion vested in the Master under Section 25-b, whether to award the actual profits or dam-

ages in some different amount in lieu of profits, 1987
the showing in this case is that the award should be of damages, and that also is the point of this testimony, that the measure of damages is $30,000, and that the award should be for damages and not profits. And in that connection I may mention the fact that in so far as our research has gone, and in so far as research on either side has gone, there has been no case of motion picture infringement fought through to final decree in which the award has been otherwise than as an award of damages.

The Special Master: Let us not argue all that. 1988

Mr. Driscoll: I am objecting to it. When my opponent says the Master has discretion, the order directed the Master to take testimony. It does not say there is an option. We get damages and profits; that is the decree.

The Special Master: What I say is, don't let us get into that argument now. Let us go ahead and take this testimony, on objection if you will. You are objecting to it?

Mr. Driscoll: I am objecting to it.

The Special Master: Overruled.

Mr. Driscoll: Exception.

1989

Q. (Read by the stenographer, as follows:) Would you tell us in your own way what you did? A. I don't know how extensive that would be in scope, but when the play was produced at the Empire Theatre the attention of the principal picture-producing companies was called to the play and they all asked to have someone see it, although that was not necessary because it was the practice of all of the picture companies to send a representative to attend the performance of any play that is produced on Broadway. They were always in search of Broadway material for pic-

1990 tures, and while they needed no urging to attend that performance, yet it was a practice to notify them before the opening of the play that the play would open on such date, and whoever was the agent for the play was the one who was handling the picture rights. That was done in this case. Then when the reports were in, solicitations were made from day to day; then they were provided with manuscripts, and everything was done that could be done to accelerate a sale.

The producing manager, Mr. Gilbert Miller, also interested himself in directing motion picture attention to the play and, I think, was the first one to send out a manu-
1991 script. I think he sent a manuscript to Mr. Rubin of Metro almost immediately after the production of the play. Whether he sent any to other managers or not I do not know. I presume he did. But I did not send out any manuscripts immediately, until I got some of the reactions of the principal people on its picture value. That meant a personal contact with practically all of the important members of the producing organizations which had the purchase of material in charge.

That kept on from day to day until it developed that there was a very strong opposition to the production of the play as a picture, on the part of what we call the Hays organization, the Motion Picture Producers and Distribu-
1992 tors of America. They placed what we call the ban on the play because of what they considered certain moral infractions.

Metro was very much interested in purchasing the rights, but could not do so in the face of this opposition of the Hays office. They tried to get that removed, but were not successful in doing so.

Quite some time went by. I went myself to the offices of the Hays organization and talked with Mr. Trotta. Is that his name, Arthur?

Mr. Driscoll: I don't know. 1993

Mr. Clarke: Trotta, I think.

A. (Continued.) He was in charge of that division of the censorship of the Hays office. I don't suppose I should say censorship. It was action taken by the Hays office through a consent that the motion picture companies had given to what the Hays office has prescribed as a code, a moral code. Mr. Trotta said the verdict of the organization was directly against the production of the play because of certain features of it.

Q. That is, its production as a motion picture? A. Yes. The play had then been running for some time on the stage.

At a second interview I asked Mr. Trotta to tell me the 1994
features of the play that were in question with the Hays organization so that we might have some guide in endeavoring to ameliorate the situation. There was, I understood, a practice in the Hays office that when a play was questioned, that if it could be arranged that if the objectionable feature could be removed and yet the company produced the play, it could be done with the understanding that the original title could not be used, and some other things. I said, "Several people are interested in this play; Metro wants to buy it; the author and manager want to sell it. We will see if we can't have a treatment made that will bring the play within your special requirements."

Mr. Trotta said, "We can't tell you that; we can't tell 1995
you what you have to remove and what can stay in and what must come out."

I said, "What can I do to meet your requirements if someone doesn't tell us?" He said, "The code speaks for itself. You will have to be guided by that." I said, "That leaves us still working in the dark. We are not any further along than we were in the first place." He said, "Get the best treatment you can and we will see what we can do."

That treatment was put up to the authors, Mr. Sheldon

1996 and Mrs. Barnes, through Mrs. Barnes, because Mr. Sheldon could not very well be reached because he was ill, and they then made a treatment. That treatment was submitted to the Metro, Metro having signified its intention of going through with the purchase if this treatment was satisfactory; but it was not. They had, in making the treatment, eliminated what they thought was the objectionable material, but it had very largely emasculated the dramatic value of the story and it was not satisfactory to Metro at all.

So finally, this was a year later, in the spring of 1931, contracts were finally drawn for the sale of the rights to Metro at a price of $30,000. Those contracts were drawn
1997 and they were signed by Mrs. Barnes. Am I right about this, Arthur?

Mr. Driscoll: Yes.

A. (Continued.) Mrs. Barnes, the Charles Frohman Incorporated which had an interest through Guthrie McClintic in whose name the production contract originally stood, by Guthrie McClintic, and delivered to Mr. Bickerton who was the arbiter under the basic agreement, with a letter signed by these various people—I think it was just a letter—stating that he was to deliver the contract to Metro on the payment of $30,000, that to be predicated upon the
1998 ability of Metro to secure the permission of the Hays office to make the production. They were given thirty or sixty days or some such time to do it.

Mr. Poliak: Those papers are in evidence, you will recall.

A. (Continued.) They were not able to do it, so that the trade fell through, and what was done with the contracts I don't know. I presume they still remain in the archives of the arbiter.

Q. Tell who the arbiter is. A. He was a sort of judge directly appointed by the Dramatists Guild and the Producing Managers Association. That was all of the Broadway managers. In fact, no manager could produce a play who was not a signatory of the agreement, and no author could sell one who was not a member of the Dramatists Guild. In a long and somewhat abstruse document, the arbiter was the umpire on motion picture sales. He had the final voice. It was his function to deal with the motion picture companies, with the authors and with the managers. At that time under the old basic agreement the managers and authors each owned fifty per cent interest in the motion picture rights, provided the manager had produced the play for three successive weeks in New York, then they were given 50-50 participations. 1999 2000

The basic agreement specified the manner in which motion picture sales should be made. The arbiter's function was to harmonize all differences, and final voice if that became necessary. He was kept advised of all motion picture negotiations in connection with any play that was produced. As soon as three weeks had gone by and the manager's rights were established, he had an equal voice in the decision as well as an equal share in the proceeds. Under the present agreement he does not have it. The arbiter, if there was a question as to price, if the author thought one price should be obtained and the manager was willing to accept a lower price, it was up to the arbiter to harmonize those differences, or if they could not agree to himself decide; he had the absolute power to decide. He could make a sale, if necessary, in spite of either of them. He then made all of the contracts. All contracts were submitted to him and he attended to the actual interchange of the contracts, the collection of money and the payment of money to the respective interests. He was allowed under the basic agreement a certain percentage for his services, which was deducted from the agent's commis- 2001

2002 sion and it was always set forth in the contract, but the money was handled by the arbiter, and also the contract, so that when these contracts were drawn and signed they were delivered to the arbiter, Mr. Bickerton, who is unfortunately not with us any more, and it all depended on whether Metro could secure the authorization for the purchase from the Hays office before the deal could be closed. When it was not forthcoming, it failed.

Q. Was the figure of $30,000 put up to the arbiter? A. Yes.

Q. And approved by him? A. Yes, approved by all of the parties concerned. If it had not been he would have immediately contacted them and tried for a compromise.

2003 It was only a question of going ahead and closing the trade, which for those reasons could not be done.

Q. It was satisfactory to Mrs. Barnes? A. Yes.

Q. And satisfactory to Frohman organization? A. Yes, and to Guthrie McClintic. McClintic had the original production contract. He had some kind of arrangement with Charles Frohman Inc. I don't know what it was, but anyway Charles Frohman Inc. had to be a party to the contract.

Q. Did you try to dispose of the motion picture rights to other persons than Metro? A. Yes.

Q. Do you recall what producers you tried?

2004 Mr. Driscoll: Objected to as immaterial, having nothing to do with the issues.

The Special Master: I don't think that has much to do with the issues.

Mr. Pollak: I want to show that the $30,000 price was established after full negotiations.

Q. I will put it this way. In view of the testimony that we have, was the $30,000 price the best price you received from anybody? A. It was the only actual price that we had from anybody.

Mr. Pollak: You may cross examine.

Cross examination by Mr. Driscoll: 2005

Q. Mr. Giffen, in the sale or attempted sale of motion picture rights of Dishonored Lady, there wasn't anything unusual or extraordinary about the situation, was there? A. No, only the Hays proposition; that doesn't often occur.

Q. What happened in the sale of that might happen in the sale of any other? A. Yes, with the exception of the Hays angle.

Q. And the effect of the Hays ban was to put hurdles in your way? Isn't that right? A. Yes.

Q. Also the effect was to lower the price of the motion picture rights? A. Yes.

Q. It was the Hays ban that held us up from the time of production in January 1930 to April 1931? A. That was the principal objection. 2006

Q. During all those sixteen months the matter was under consideration by Metro and negotiations were had back and forth, isn't that true? A. That is true. I wouldn't say that they were continuous; they were spasmodic.

Q. More alive at some times than at others? A. Yes.

Q. As a matter of fact, Metro procured on the initiative of Mr. Rubin a copy of this manuscript the day after the play opened in New York? A. That I don't know.

Q. You do know they did procure a manuscript? A. Yes.

Q. A day after the play opened in New York? A. I don't know when they got it. 2007

Q. And it had a New York run that lasted through the summer time? A. Yes.

Q. And then it went on the road for the rest of the year? A. Yes.

Q. It was produced in London? A. Yes, not with Miss Cornell.

Q. The play was produced in London? A. Yes.

Q. Mr. Sheldon was one of the outstanding playwrights? A. He had been more or less inactive for some time on

2008 account of his physical disabilities. Prior to that he had been the outstanding American playwright until he became physically incapacitated. After that most of his work was done through collaboration. His brain was active, and is today, but he was not able to do the writing.

Q. He was then and is now a bedridden invalid? A. Yes.

Q. His work, so far as any writing was concerned, he had to work with a collaborator? A. Yes.

Q. Mr. Sheldon's record as playwright goes back to his undergraduate days at Harvard? A. Yes. He was a member of the Baker's Dozen there, and while he was there he wrote one of the two most important plays.

2009 Q. That is "Salvation Nell"? A. Yes.

Q. That was played by Mrs. Fiske for a number of years, five or six years? A. Yes. That was a great success.

Q. And he wrote that before he graduated from college? A. Yes.

Q. He had written a number of other outstanding successes, such as Romance, a play with Doris Keene; Lulu Betts; Song of Songs. He wrote The Jest— A. He adapted it from the Italian play, and Song of Songs was adapted from Sudermann's novel.

Q. As a matter of fact he has more successful plays to his credit than any American playwright, with one or two exceptions; is that right? A. I think that can safely be

2010 said.

Mr. Driscoll: That is all.

Mr. Pollak: That is all.

SIDNEY R. FLEISCHER, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Q. Where do you reside? A. 120 Riverside Drive, New York.

Q. What is your occupation? A. Attorney at law. 2011

Q. What was your occupation in 1931 and 1932? A. An attorney.

Q. Mr. Bickerton was mentioned in the testimony. Mr. Bickerton is dead? A. Mr. Bickerton is dead. I was associated with him since 1919.

Q. In this post as arbiter? A. Mr. Bickerton held the post of arbiter.

Q. You were his legal adviser? A. I was his associate. He was also an attorney.

Q. Will you explain, if you wish to add anything to what Mr. Giffen has said, what is the status of Mr. Bickerton as arbiter, what he had to do with the fixing of motion picture rights values? 2012

Mr. Driscoll: I can't see where taking the time for this is justified.

The Special Master: I think it is pretty clear.

Q. You heard Mr. Giffen? A. Yes. It would be repetitious, with just one slight modification. The arbiter has no power to sell a picture at a price less than that fixed by both author and manager. He may sell it for less than that fixed by the author. That is the only modification I might have of Mr. Giffen's testimony.

Q. Were you familiar with the case of Dishonored Lady when it occurred? A. I was not familiar at the time. I may have since. 2013

Q. You were familiar with the play? A. Yes.

Q. You were familiar with the prices current in 1932 for motion picture rights, is that correct? A. Yes.

Q. And for a period both before and after 1932? A. Yes.

Q. Are you prepared to give your estimate of the fair value of the motion picture rights of Dishonored Lady in 1932, just yes or no? A. Yes.

Q. What would you say the fair value was?

2014 Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

The Special Master: Objection sustained. I don't think that is of any value. You have introduced evidence to show negotiations between these various parties, in which mention was made of the figure $30,000 under certain circumstances. That is the best evidence of what the parties thought at the time.

Mr. Pollak: I think it is the best evidence, but I think it is proper to show what the market value was. There is, of course, the admission by Mrs. Barnes in her testimony that she hoped very much to get that figure. But it is perfectly proper to show reasonable value.

2015 The Special Master: This evidence is what those people thought at that time.

Mr. Pollak: It is purely theoretical. I think I certainly should prove what the reasonable value of the motion picture rights was. I think it is important. We have proved it but we would like to verify it.

The Special Master: Go ahead.

Mr. Driscoll: Look at the foolishness of it. In the first place the burden of proof of damages is on us. I think the burden of proving profits is on them. We have not offered any proof as to the damages other than this figure of $30,000. They are wasting a lot of time.

2016 Mr. Pollak: We think we have a right to this proof.

The Special Master: You don't doubt that the burden of proof of the damages is on the plaintiff?

Mr. Pollak: I think that the burden of proving damages is in the plaintiff.

The Special Master: Why in the world are you

bothering with it? He has not introduced any other evidence. 2017

Mr. Pollak: What he is trying to do is to shunt off the proof of damages. He knows the damages are trifling compared with the profits.

Mr. Driscoll: I want both.

The Special Master: He wants both. Whether or not he is entitled to them is a question of law.

Mr. Pollak: As a matter of fact, you have discretion under section 25 to make an award of damages and not an award of profits.

The Special Master: Suppose I do. The only testimony and evidence before me is $30,000. 2018

Mr. Pollak: Yes; but your Honor understands that the strict legal theory is that the reasonable value of a thing is value in the market, which is not absolutely determined by the negotiations of the parties.

The Special Master: I haven't anything else before me.

Mr. Pollak: I will withdraw this question. In view of the statement of counsel, I will withdraw the question, and leave the issue as to the measure of damages where it stands. I have some other questions to ask this witness.

By Mr. Pollak: 2019

Q. Mr. Fleischer, you are testifying under subpoena? A. Yes.

Q. Have you a schedule of prices paid for motion picture rights in the year 1932? A. Yes (producing paper).

Q. That schedule which you have with you correctly sets forth the prices of motion picture rights for the year 1932? A. Motion picture sales.

Q. It also gives data concerning the length of run of plays of which the motion picture rights were sold, is that right? A. I have another schedule here, which was fur-

2020 pished to me, which was made up by Mr. Ligon Johnson in whom I have great faith and which I am willing to accept as authentic.

Mr. Pollak: Is there objection to the competency of that schedule by Mr. Johnson?

Mr. Driscoll: Yes, and to the materiality and relevancy.

Q. Stick to the schedule that you have prepared, of motion picture sales. A. Yes.

Mr. Pollak: I offer it in evidence as bearing directly on this point, first, the exercise of discretion
2021 by the Court whether to award damages or to award profits, and secondly, on the question what award would be awarded of just damages in lieu of the actual damages and actual profits.

The Special Master: I am going to accept it over the objection of Mr. Driscoll, because you seem to attach great importance to it.

Mr. Driscoll: I think I ought to take a moment to emphasize the fact in the record that this directly brings up the question whether or not the Special Master has any authority whatever to do otherwise than as directed by the decree of the Circuit Court, or of the District Court, supplementing the mandate
2022 of the Circuit Court, namely, to find out the actual damages and find out the profits. It is not offered for either one of those two purposes. He clearly states that it is offered on the theory that you have some discretion to decide whether we shall have statutory damages or for damages plus profits. And so since it is offered directly on that question, on that question solely, I want it pointed out that we object to it very strenuously, and I want my objection to appear at length on the record.

The Special Master: All right. I think we will take it anyway. Your objection is very clear, and I

think it will save time and preserve the rights of everyone if I take it under objection. 2023.

The Witness: I want to make one statement in regard to this paper. The arbiter is committed to confidence in respect to the prices at which pictures are sold, at the request of the picture companies, the producers and the authors. I am producing it now under subpoena, and I should like it understood that it be held under as great confidence as possible under the circumstances, that these prices be not revealed and no publicity be given to it, and that that be held by the Special Master for his own use, and of course within the points of possibility of the case, kept away from anyone not directly authorized. 2024

The Special Master: All I can say is that it will not be published by me.

The Witness: If they will be held where they are not available to anyone, that is all I can ask.

(The paper just offered was received in evidence and marked Defendants' Exhibits 29-A and 29-B of this date.)

Mr. Driscoll: There are no copies of that exhibit available. It will save time here if the stenographer copies it into the record.

Mr. Pollak: Then we can return the document to you. 2025

(The document just marked Defendants' Exhibits Nos. 29-A and 29-B, reads as follows:)

"1932

Date 1932	Name of Play	Sales Price
January 18th,	Society Girl	$ 22,500
" 23rd,	Dr. X	5,000
" 25th,	Congai (option)	2,500

Exhibits Read into Record.

	Date 1932	Name of Play	Sales Price	
2026	February 8th,	Precious	8,000	
	" 9th,	Reunion In Vienna	85,000	
	March 5th,	Whistling In the Dark	50,000	
	" 7th,	Blessed Event	66,000	
	" 18th,	Wild Waves	25,000	
	" 19th,	Harlem	5,500	
	" 24th,	Counsellor At Law	75,000	(plus royalty)
	April 1st,	Barretts of Wimpole Street	80,000	(plus royalty)
	" 4th,	Life Begins	6,000	
2027	" 4th,	The Inside Story	10,000	
	" 8th,	Trick For Trick	20,000	
	" 9th,	Brief Moment	10,000	(plus royalty)
	" 14th,	Riddle Me This	35,000	
	" 19th,	Animal Kingdom	50,000	
	" 25th,	Decency	500	
	" 29th,	Cross Roads	8,000	
	June 2nd,	Merry Go Round	10,000	
	" 28th,	Good Earth, The	100,000	
	August 25th,	Congai (sale)	12,500	
	October 18th,	Lilly Turner	15,000	
2028	" 22nd,	Diamond Lil	25,000	
	" 26th,	Clear All Wires	40,000	
	" 29th,	The Warriors Husband	17,500	
	November 12th,	I Loved You Wednesday	22,500	
	" 12th,	Another Language	37,500	
	" 16th,	Men Must Fight	15,000	
	December 16th,	Rendezvous	6,000	
	" 16th,	The Great Magoo	22,500	
	" 19th,	Chrysalis	30,000	
	" 21st,	Berkeley Square	30,000	

Total $947,500.00

32 Plays Sold

(1 option not asserted)"

Mr. Pollak: There is no cross examination? 2029

Mr. Driscoll: No.

Mr. Pollak: May I bring out the fact that Mr. Fleischer himself is now the arbiter. I do not think that is on the record.

(The Testimony of Thalberg was designated Reference No. 9.)

I offer in evidence, from the prior printed record the testimony of Mr. Irving Thalberg, appearing at P.P.R. pages 73 to 81, his entire testimony both direct and cross.

Mr. Driscoll: I want to object to that as immaterial and irrelevant, nothing to do with the issues. 2030

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Stromberg was designated Reference No. 10.)

Mr. Pollak: I offer in evidence the testimony of Mr. Hunt Stromberg from the prior record, both direct and cross, which appears at P.P.R. pages 81 to 114.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Meehan was designated Reference No. 11.) 2031

Mr. Pollak: I offer in evidence the testimony of Mr. John Meehan, both direct and cross, which appears at P.P.R. pages 114 to 13[illegible]

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Brown was designated Reference No. 12.)

Mr. Pollak: I offer in evidence the testimony of Mr. Clarence L. Brown, both direct and cross, which appears at P.P.R. pages 131 to 139.

2032 Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Tuchock was designated Reference No. 13.)

Mr. Pollak: I offer in evidence the testimony of Miss Wanda Tuchock, which appears at P.P.R. pages 140 to 142.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Marx was designated Reference No. 14.)

2033 Mr. Pollak: I offer in evidence the testimony of Mr. Samuel Marx, both direct and cross, which appears at P.P.R. pages 142 and 143.

Mr. Driscoll: Same objection.

The Special Master: Overruled.

Mr. Driscoll: Exception.

(The testimony of Schley was designated Reference No. 15.)

Mr. Pollak: I offer the testimony of Mrs. Edna Schley from the prior record, both direct and cross, P.P.R. pages 144-146.

Mr. Driscoll: Same objection.

2034 The Special Master: Overruled.

Mr. Driscoll: Exception.

Mr. Pollak: Mr. Master, here is an exhibit showing the officers and directors of the corporations enumerated in Defendants' Exhibit L-1, that is that long list of Loew corporations, corporations in which Loew's Incorporated has interests. I think Mr. Driscoll has a copy of it.

(The paper just produced was marked in evidence as Plaintiffs' Exhibit No. M, of this date.)

Mr. Pollak: It is stipulated that if Mr. Ligon

Johnson were called as a witness he would testify 2035
that he is an attorney at law, that he is concerned with copyright transactions in plays and was so concerned in the year 1932 and about that year; that he would testify with respect to the play "Society Girl" appearing in Defendants' Exhibit 29-A as stated in this letter from Ligon Johnson dated July 14, 1937, addressed to Mr. Samuel D. Cohen. (Letter produced.)

(Discussion off the record.)

Mr. Pollak: No objection is taken on account of the nonproduction of the witness.

Mr. Driscoll: No. I will stipulate that if he were 2036
called he would testify as set forth in the exhibit, to be marked.

Mr. Pollak: There is no objection to his competency as distinguished from the competency of the testimony?

Mr. Driscoll: As to his competency as an expert?

Mr. Pollak: Yes.

(Discussion off the record.)

Mr. Driscoll: I thought this was not to be expert testimony. This is not going in as hearsay or anything like that. He has written in this letter that such and such a play opened at such a time and ran for so many weeks. Presumably he knows what 2037
he is talking about.

(Discussion off the record.)

Mr. Cohen: This information was taken from his records.

The Special Master: Mark it for identification.

Mr. Driscoll: Mark it for identification, and I will stipulate that if he were called as a witness he would testify to the contents of that statement.

Mr. Pollak: But you object to its competency and relevancy.

2038 Mr. Driscoll: Yes.
The Special Master: Objection overruled.
Mr. Driscoll: Exception.

(The letter just referred to was marked Defendants' Exhibit No. 30 for Identification, of this date, and reads in part as follows:

[Letterhead of]
"LIGON JOHNSON
Attorney at Law
1619 Broadway
New York

2039 Ligon Johnson

John G. Tarrant

July 14, 1937

Mr. Samuel D. Cohen
Metro Goldwyn Mayer Pictures
1540 Broadway
New York, N. Y.

Dear Mr. Cohen:

In reply to yours of the 13th inst. I am listing below the opening and closing dates of plays pre-
2040 sented in New York requested by you and such data as the trade papers afford as to road showing, together with such information as is available from trade papers as to the success or failure of each from a box office standpoint:

* * *

[p. 8]

84 SOCIETY GIRL: Opened at Booth Theatre, Dec. 30, 1931, closed Jan. 16, 1932 after 22 performances.

85 DOCTOR X: Opened at Hudson Theatre, Feb. 9, 1931 and closed Apr. 18, 1931 after 80 performances. Record of single stock presentation during 1930, which might have been a tryout during the summer of 1930 at Southhampton. 2041

86 CONGAI: Opened at Sam H. Harris Theatre, Nov. 27, 1928 and going from there to the Longacre Theatre March 11, 1929 where it closed after a run of 17 weeks. Opened to very good business, later dropping to an average of $15,000 and at the time of closing was around $11,000.

87 PRECIOUS: Presented at Royale Theatre, opening Jan. 14, 1929 and closed after three weeks to poor trade at an estimated pace under $4,000. Record of two stock presentations during 1929. 2042

88 REUNION IN VIENNA: Presented at Martin Beck Theatre, opening Nov. 16, 1931; moved to Guild Theatre May 23, 1932 where it closed July 2, 1932 after a run of 280 performances. Was considered quite a success. Presented in stock during the seasons of 1932 and 1933.

89 WHISTLING IN THE DARK: Presented at Ethel Barrimore Theatre, opening Jan. 19, 1932, and closing there May 21, 1932 after a run of 144 performances. A second presentation in New York was made at the Waldorf Theatre, opening Nov. 3, 1932 and closing there February 4, 1933 (123 performances). After New York run this play was scheduled for road tour. Numerous stock presentations during 1932, 1933 and 1934; also presented during the summer of 1935 and 1937. 2043

90 BLESSED EVENT: Opened at Longacre Theatre, Feb. 12, 1932 and closed May 21, 1932 after a

2044 run of 124 performances. Had about a dozen stock presentations during season of 1932.

91 WILD WAVES: Opened at Times Square Theatre, Feb. 19, 1932, and closed March 10, 1932 after a run of 25 performances.

92 HARLEM: Opened at Apollo Theatre, Feb. 20, 1929; closed suddenly at the Times Square Theatre where the play had been transferred, in May 1929 after a 12 weeks' [p. 9] run. This play got around $11,000 first month or so and averaged $9,000 slipping to $6,000 during the last week. Reopened Oct. 21, 1929 at the Eltinge Theatre; presented in Hollywood opening
2045 Oct. 7, 1932; also at the Empire Theatre, opening Oct. 27, 1932.

93 COUNSELLOR AT LAW: Plymouth Theatre, opening Nov. 6, 1931 and closing July 16, 1932 after a run of 293 performances. Was considered quite a success. In addition to the road showing this play has had numerous stock presentation during 1933 and 1934.

94 BARRETTS OF WIMPOLE STREET: Opened at Empire Theatre, Feb. 9, 1931 and closed Feb. 13, 1932 after a run of 372 performances. Was
2046 very successful. Revival presented at the Martin Beck Theatre opening Feb. 25, 1935. Katherine Cornell toured the country and presented this play in her repertory.

95 LIFE BEGINS: Presented at Selwyn Theatre, opening, March 28, 1932; closed April 2, 1932 (8 performances).

96 INSIDE STORY: Presented at National Theatre, opening Feb. 22, 1932, and closed March 12, 1932 after a run of 24 performances.

Testimony Offered from Trial Record.

97 TRICK FOR TRICK: Opened at Sam H. Harris Theatre, Feb. 18, 1932 and transferred to the Geo. M. Cohan Theatre, March 14, 1932 at which theatre this play closed Apr. 16, 1932 after 70 performances. Single stock performance during 1932. 2047

98 BRIEF MOMENT: Presented at Belasco Theatre, Nov. 9, 1931 and closed Feb. 27, 1932 at the Cort Theatre, where it had moved Jan. 18, 1932 (128 performances). In addition to road showing, this play was presented in stock twice during 1932; once during 1933 and once during the summer of 1934. 2048

99 RIDDLE ME THIS: Presented at John Golden Theatre, opening Feb. 25, 1932 and closing May 21, 1932 after 100 performances. This play has been presented in stock during the seasons of 1932, 1933 and 1934; also during the summer of 1935 and 1936.

100 ANIMAL KINGDOM: Presented at the Broadhurst Theatre, opening Jan. 12, 1932 and closing June 18, 1932 (171 performances). This play was presented during 1932 (6 times) in stock; once during 1933 and during the summer of 1934.

101 CROSS ROADS: Morosco Theatre, opening Nov. 11, 1929 and moving to the Royale Theatre where it closed in Dec. 1929 after a three weeks' run (28 performances). Notices generally tinged praise with doubt. 2049

102 MERRY GO ROUND: Several plays have been presented in N. Y. under this title: 1; by Edgar Smith (book), music by Gus Edwards, presented at the New Circle Theatre, New York, opening Apr. 25, 1928; 2; Book and lyrics by Morrie Ryskind and Howard Dietz, music by

2050 Henry Souvaine and Jay Gorney; opening at Klaw Theatre, N. Y. C. May 31, 1927; 3; Play by Albert Maitz and Geo. Sklar, opening at Princetown Theatre, Apr. 22, and moving to Avon Theatre May 10, 1932 where it closed after 56 performances. This play had road showing. I believe you are interested in the last mentioned play.

103 GOOD EARTH: Opened at the Guild Theatre, Oct. 17, 1932 and closed Dec. 3, 1932 (56 performances). This play was not considered successful but merely ran the length of the Theatre Guild subscription season. [p. 19]

2051

104 LILLY TURNER: Presented at Morosco Theatre, opening Sept. 19, 1932, and closed Oct. 8, 1932 after a run of 24 performances. This play had a single stock presentation at Minneapolis in 1932. A presentation was offered in Cleveland under the title "Health is Wealth" in Nov. 1932.

105 CLEAR ALL WIRES: Presented at the Times Square Theatre, opening Sept. 14, 1932 and closing Dec. 3, 1932 after 91 performances.

106 DIAMOND LIL: Presented at Royale Theatre, opening Apr. 9, 1928 and closing after a 40 weeks' run. This play averaged over $15,000 weekly. Went on road tour after New York closing.

2052

107 WARRIOR'S HUSBAND: Opened at Morosco Theatre, March 11, 1932, and closed May 21, 1932 after a run of 83 performances. Single stock presentation during summer of 1937.

108 I LOVED YOU WEDNESDAY: Opening at Sam H. Harris Theatre, Oct. 11, 1932, closed Dec. 3, 1932 after a run of 63 performances. Stock presentation in Chicago in May, 1934.

109 ANOTHER LANGUAGE: Presented at Booth Theatre, opening Apr. 25, 1932 and closed Feb. 18, 1933 (348 performances). Reopened at the Waldorf Theatre May 8, 1933 and closed there July 15, 1933 after 80 performances, making a total of 428 performances. In addition to road showing, this play has had numerous stock presentations from 1932 to 1937. 2053

116 MUST MEN FIGHT: Presented at Lyceum Theatre, opening Oct. 14, 1932, and closing Nov. 12, 1932 (35 performances); few stock presentations; twice in 1932; once in 1933; once in 1934 and during the summer of 1935. 2054

111 RENDEZVOUS: Presented at Broadhurst Theatre, opening Oct. 12, 1932 and closing Oct. 29, 1932 (21 performances). Single stock presentation during 1933.

112 GREAT MAGOO: Presented at Selwyn Theatre, opening Dec. 2, 1932 and closing Dec. 10, 1932 (14 performances). Notices were not good.

113 CHRYSALIS: Presented at Martin Beck Theatre, opening Nov. 15, 1932 and closing Dec. 3, 1932 (23 performances). Single stock presentation during 1932. 2055

114 BERKELEY SQUARE: Lyceum Theatre, opening Nov. 4, 1929 and closing May, 1930 after a run of 28 weeks (227 performances). Held pace of $19,000 weekly. Heat knocked it down to $10,000. Several stock presentations during 1931, 1932, 1933; also during the summers of 1935, 1936 and 1937.

[p. 11]

Very truly yours,

[Signed] LIGON JOHNSON.")

(The testimony of Hess was designated Reference No. 16.)

Mr. Pollak: I offer in evidence from the prior record of the testimony of Mr. Gabriel L. Hess, direct and cross, appearing at P.P.R. pages 59 to 71, and in that connection I also offer in evidence from the prior record (pp. 805-813) what is there marked as Defendants' Exhibit A, being a resolution of October 31, 1930, of Motion Picture Producers and Distributors of America.

(The aforesaid resolution was designated "Reference No. 17 and was marked "Defendants' Exhibit R-7".)

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial; nothing to do with the issues.

The Special Master: Overruled.

Mr. Driscoll: Exception.

Mr. Pollak: I offer in evidence from this prior record Complainants' Exhibit 3, printed at P.P.R. pages 495 to 622 thereof. Dialogue continuity of "Letty Lynton".

(This continuity has already been designated Reference No. 6 and marked "Defendants' Exhibit R-4".)

Mr. Driscoll: We undoubtedly have that in the office. It is printed. You are offering that as an exhibit?

Mr. Pollak: Yes.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues referred to the Special Master.

The Special Master: Same ruling.

Mr. Driscoll: Exception.

Colloquy of Counsel.

Mr. Pollak: I have a statement to make, if your 2059
Honor please, about a matter affecting one exhibit, which just clarifies the record.

The Special Master: Wait a minute. Perhaps he will admit it.

Mr. Pollak: Perhaps he will. I think it should go into the record anyway.

(Discussion off the record.)

Mr. Pollak: At page 451 of the record of New York testimony I stated, as appears in the record, that Exhibit 5, which was an early accounting of Culver Export Corporation on the 1932 basis, would be "amended". The fact, however, is that Exhibit 20, 2060
a later exhibit giving a full accounting of the Culver Export Corporation, was introduced.

The item appearing in the last column of Exhibit 5 shows a series of print costs for foreign countries including Canada. Canada, while a foreign country, was, as you will recall, not a country covered by Culver Export Corporation. Excepting for the print costs for Canada, the item of print costs theretofore appearing in Exhibit 5 does appear in Exhibit 20 though not broken down by countries. For that reason and because there has been absolutely no controversy about this issue at all, it does not seem necessary to carry out the declaration that Exhibit 5 2061
would be amended.

This explanation is for the Master who in reading the record at that point would not understand what had become of that exhibit.

Let me state this, if you do not mind. It had been the intention of the defendants to introduce at the next hearing other witnesses on the point that the fair market value of the motion picture rights of Dishonored Lady was not in excess of $30,000. But in view of the statement made by plaintiffs' counsel—

2062 Mr. Driscoll: What was that statement? Let us get that on the record.

Mr. Pollak: In the objection to the testimony concerning the fair market value taken today and the disposition made following that statement by the plaintiffs' counsel, there seems no purpose in calling other witnesses on that point. They would testify substantially as Mr. Fleischer.

Mr. Driscoll: I am anxious to know what was the statement made by plaintiffs' counsel.

Mr. Pollak: As I understand it, you do not claim that your actual damages were in excess of $30,000.

2063 Mr. Driscoll: I am willing to make that statement now. I don't think I did before. The only proof that was in the record was the proposed contract between the purchaser and the author and the manager. But we are not claiming proof of actual damages in excess of $30,000; never had.

(Hearing adjourned to September 23, 1937, at 10 o'clock A. M.)

HEARING OF SEPTEMBER 23, 1937.

2064 CHARLES MOSKOWITZ, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. What is your full name, residence and occupation? A. Charles Moskowitz, 8245 Beverly Road, Kew Gardens, Long Island; occupation, in charge of the operation of circuit of theatres for Loew's Incorporated.

Q. Did you hold substantially the same post in 1932? 2065
A. Yes.

Q. Would you state in general terms your experience in the motion picture industry? A. I have been connected with the business for 24 years, all that time with the present company or its predecessor company. My general capacity for a great many years, particularly my duties for the past ten or twelve years, has been in charge of the theatres I mentioned.

Q. Among your activities and experiences, you are a trained accountant? A. Yes.

Q. And graduated as such? A. Yes.

Q. Mr. Moskowitz, would you state in your own way the general character of the services that the Marcus Loew Booking Agency performed in 1932? A. Marcus Loew Booking Agency help operate and supervise the operation of all the theatres, the so-called Loew theatres. The various departments that function in the operation of a theatre were paid for by Marcus Loew Booking Agency or Loew's Incorporated and not by the individual theatres, such departments as publicity department, sound department, projection department, ever so many that I could mention— 2066

Q. You can mention all of them. A. First, there is the accounting department, the film booking department, the film buying department, the theatre operating department, which would include supervisors and general operating heads and executive heads. I might add their construction and purchasing departments, that I think of. 2067

Q. By construction and purchasing you mean what? A. The purchasing department would buy any of the items needed by the theatre, in most cases having a big purchasing power, thereby buying cheaper than any particular theatre could buy.

Q. All of these things were true in 1932 and 1933, or true in substance? A. Yes.

Q. Mr. Moskowitz, the testimony discloses that the pic-

2068 ture "Letty Lynton" was exhibited in some one hundred, I think exactly 102, theatres, or thereabouts, connected in some way or other with the Loew chain. Your practice was to make, for services of the Booking Agency, a flat fee, was it not? Just yes or no. A. Yes.

Q. Will you state in general the considerations that determined the amount of the fee to be charged to each particular theatre?

Mr. Driscoll: Objected to. There isn't any testimony that Mr. Moskowitz is the one who determined the fee to be charged to each particular theatre.

2069

Q. Were you familiar with it?

A. Yes, thoroughly familiar.

Q. Did you participate in the determination of the general policy in fixing the fee?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

Q. Tell in your own way what you had to do with the determination of the charges. A. I had a great deal to do with determining the charges.

2070

Mr. Driscoll: Objected to as stating a conclusion.

Q. State as completely as possible what you had to do with it. A. It was easy for us to determine the cost of the home office, the district supervisor and the various charges. Those charges instead of being paid by the individual theatres were paid by this one company and charged at a proportion to each theatre by a weekly charge, such as the charge made during the engagement of "Letty Lynton". Those collections from the theatres were ap-

plied against the expenditures. 2071

Our experience over a great many years helped us to determine the name or amount or size of those charges and our expenditures would govern those charges to the theatres. How much further you want me to go into detail, I don't know.

Mr. Driscoll: I move to strike out the answer. It has nothing to do with the issues tried here. The accounts show the moneys received and the moneys disbursed, and if there is anything further it ought to be done with figures and not by a general statement in this manner.

2072

Mr. Pollak: I may say this, that may simplify Mr. Driscoll's problem and obviate Mr. Driscoll's objection. As I understand the rule of law, the fact that expenditures were made is all that is relevant. My friend wants us also to show that the expenditures, which include a charge as you may recall of Marcus Loew Booking agency, are reasonable. If Mr. Driscoll concedes the reasonableness of the charges, that is all that is necessary.

The Special Master: Which is the schedule that includes the charges that you are talking about?

Mr. Pollak: L-6.

2073

Mr. Driscoll: I endeavored to make clear, whether I made a point of it or not in this accounting here——

Mr. Pollak: Is your point a criticism of the reasonableness of these charges?

Mr. Driscoll: I don't believe you are entitled to charge them at all.

Mr Pollak: Do you claim they are unreasonable?

Mr. Driscoll: Any such charges are unreasonable, any amounts would be unreasonable.

2074 Mr. Pollak: I think, in view of what Mr. Driscoll states, that I should be permitted to go further.

The Special Master: So far as I can see, this witness is simply saying that these charges were made by the company.——

Mr. Pollak: By the Booking Agency.

The Special Master: —because in their experience over a period of years they believe them to be reasonable.

The Witness: And further, that these are not charges made at random. Individual theatres would have those expenses and probably more. By cumu-
2075 lative methods we are able to save considerably.

The Special Master: I think it should be allowed.

By Mr. Pollak:

Q. Mr. Moskowitz, are you familiar with the general rates of charges for booking services as they existed in 1932? A. Yes.

Q. Did you yourself have to do with the making of contracts with other producers for booking services? A. Yes, I did.

Q. In general terms, will you say what those other producers were? A. Practically every company, practically
2076 every film company in the business, Paramount, Warners, Fox, R-K-O, Republic.

Q. Based on your experience with and knowledge of the charges current in 1932 and 1933 for booking services will you say whether in your opinion the charges made by the Marcus Loew Booking Agency were reasonable or not?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, and I object to the form of the question.

A. They were low.

Mr. Pollak: He has testified that he was familiar with the actual contracts made by other producers, practically all of the producers, and so can testify that he made contracts with all of the producers. 2077

Q. Did you in the year 1932, yourself in behalf of your company or companies with which you were connected, make contracts with virtually all other producers?

Mr. Driscoll: What kind of contracts?

Q. For the distribution and exhibition of films? A. Yes.

Mr. Pollak: Now I ask for an answer to my question. 2078

Mr. Driscoll: You know, the ridiculous part of this is well illustrated by the charges that are made. My friend would establish a prevailing rate. You take this column; you will find charges as high as $900 and as low as $100. He would establish a prevailing rate.

Mr. Pollak: What we are bringing out here is the reasonableness of these charges—

Mr. Driscoll: By showing what somebody else charges.

Mr. Pollak: Just a minute. —which as the witness has said are based upon the particular situation of each particular theatre. 2079

The Special Master: Let him say what that basis is.

Q. Would you say a little more fully what your basis, on which you charge the particular theatre, is? A. Approximately three percent of the gross business spread over a period. May I ask a question? For example, we will take any particular theatre, take one of our neighborhood thea-

2080 tres in New York. They need publicity men, they need exploitation, they need sound experts, they need projection experts; this particular theatre could not possibly by itself hire those people and pay for them out of its own business. Therefore Marcus Loew Booking Agency hires these people and spreads them all over, so that a man instead of working for one theatre works in a district, for a section of New York, Jamaica, Long Island, Richmond Hill. This man gets quite a good salary. His salary is paid by Marcus Loew Booking Agency. It must come out of the theatre in some form. The theatre reimburses that salary by these weekly payments, which are a small percentage of gross business.

2081

By the Special Master:

Q. You have figured out that those payments have amounted to three per cent. of the gross? A. About three per cent. of the gross. I will say that the total amount received by Marcus Loew Booking Agency does not net them a profit.

Mr. Driscoll: I will object to that and ask to have it stricken out.

The Special Master: Strike it out.

2082 Mr. Pollak: The rest of it stands. I think it is a clear explanation.

By Mr. Pollak:

Q. In connection with these theatres in 1932, did you also have to do with the construction and equipment of theatres and with the purchase of theatres, if they were purchased? A. Yes.

Q. Will you tell me in general terms what you had to do with the construction and equipment of theatres in 1932 and in the years before that? A. I supervised the opera-

tion of the construction department and purchase department. 2083

Q. How long before 1932 had you done that? A. At least ten years before that.

Q. Mr. Moskowitz, will you tell us whether the general practice of your company was to build theatres or to buy them? A. To build theatres.

Q. Although you did in some instances buy them? A. Yes, in a few instances.

Q. In connection with the building of theatres, will you tell me what your practice was in regard to the control of the costs of construction—I mean always your company?

Mr. Driscoll: Is it the contention of the defendants that the defendants put up a number of theatres to show "Letty Lynton"? 2084

Mr. Pollak: It is not the contention of the defendants.

Mr. Driscoll: What is the object of this testimony?

Mr. Pollak: It is to show the reasonableness of the costs of construction and the correctness of the depreciation item on the Loew theatres.

The Special Master: Which exhibit and which column?

Mr. Driscoll: On the concession made by Mr. Pollak that no theatres were built to show "Letty Lynton", I want to offer the objection that the testimony is entirely incompetent, irrelevant and immaterial to the issues being tried here. 2085

Mr. Pollak: The point here is an issue of overhead. The exhibit is L-7, depreciation item.

The Special Master: What is the question?

(The pending question was read by the stenographer.)

2086 A. After the plans and specifications are completed, bids are received from various contractors. In addition to the bids from contractors, our own construction department engineers measure up the quantities of the different materials that would be required in the building and know the costs of labor and materials. We estimate our own costs. The lowest bidder of the contractors, after a great deal of shopping, are usually awarded the contract. The purpose naturally was to buy as cheaply as we could. Most contracts would in addition have a saving clause. The contract would be let at an upset price and if there was a saving below that, usually 75 per cent. of it went to us
2087 and 25 per cent. went to the contractor, we reserving to ourselves the privilege of subletting some of the parts included in the general contract to such contractor as we might select if we should get a cheaper bid or lower bid than the general contractor would secure for such work.

Q. Mr. Moskowitz, will you state in general terms what your practice was in regard to procuring equipment for the theatres? A. Bids are always secured for the purchase of our equipment. Quantity contracts are made where possible, such as by the purchase of electric light materials we get a discount of possibly 38 per cent. as against the average discount of ten per cent. if we bought for each particular theatre by itself; supplies for projection
2088 booth, we get the highest discounts in the business, 36 per cent., as against five or ten per cent. we could get if we were buying for any particular theatre. All of our purchases for building or equipment, no matter how small, are properly shopped and, in my opinion, are all at a very low rate.

Q. That was true in 1932 and in the preceding years? A. Yes.

Q. Mr. Moskowitz, you have said that in some instances you did buy theatres. Would you tell me in general what your practice was with respect to the fixation of the price

at which you were willing to buy theatres when you were willing to buy theatres? 2089

Mr. Driscoll: I think this is altogether too general. I think we should get down to what happened in the particular case and not give any general policy as to buying theatres.

The Special Master: Let me get this straight in my mind. All this testimony relates to L-7, is that right?

Mr. Pollak: I think so, yes—and similar groups.

The Special Master: L-7 and L-8.

Mr. Pollak: You know we have sub-classified Loew's theatres, accordingly as they were owned wholly by one of the defendants or partly owned or owned through mediation of the various companies, and accordingly as Loew's was in some instances merely operating on a servicing contract. The principle is apparent. 2090

The Special Master: What you are trying to do is to justify the accounting of Loew's Incorporated?

Mr. Pollak: Yes.

The Special Master: In other words, you are trying to justify the last column on L-8, as the profit resulting therefrom that you allocate to Letty Lynton?

Mr. Pollak: It is the ratable share of the overhead that appears on the L-6 and L-8 exhibits, that is, it is adduced from an analysis of overhead items. 2091

The Special Master: What is Mr. Driscoll's position with reference to the final figure on Defendants' Exhibit L-8? Do you say it ought to be very much increased, or do you accept it, or what?

Mr. Driscoll: We do not accept it. In the first place we say they have no right to allocate one-third of the charges to others and two-thirds to "Letty

2092 Lynton"; we say there is no authority for giving two-thirds to "Letty Lynton" and giving one-third to someone else.

The Special Master: Do you question all of the itemized expenses that they set up in L-7 and L-8?

Mr. Driscoll: I have not questioned their figures. I have not gone into any question of their figures, but I do deny their right to charge overhead to us in the operation of that theatre. I say in each theatre they have a right to charge against each week's receipts the direct charges of the operation. But when they go back to New York City and charge

2093 up part of the Loew Building against us and part of these salaries, I say they have no right to do that at all. They have the right to charge the direct cost of the operation of that theatre against that week's receipts. That is my position.

The Special Master: What does that refer to in the last analysis? I don't remember what you say in your brief about this.

Mr. Driscoll: It refers to the allocation of all these overhead charges.

The Special Master: I know about the production end of it. I mean as to the operations of these theatres.

2094 Mr. Driscoll: It applies more clearly to the operation of the theatres. That is my position. They have a theatre. They may have had a mortgage set up on that theatre or may not. It does not interest us. We were not responsible for that mortgage or anything of that sort. But they take a picture, which is held to be an infringement on our play, they take "Letty Lynton" and put it into that theatre for a week. They take in gross receipts of say $3,000 or $5,000 or $10,000 or $80,000 as in the case of the Capitol Theatre. We say they can de-

duct against that the cost of their music, the cost 2095
of other acts if they are on the bill, the cost of their manager, the cost of their ushers, and all of those direct charges against that week's business. They can deduct all of those charges.

They say, "No. You are in partnership with us. We have all of these theatres and we have lumped them all together and we have all this overhead and all this general office expense and all this, that and the other thing; we may have been losing money on a lot of pictures, but we have a right to level the whole thing out against our entire year's product." We say, "You haven't any such thing."

The Special Master: What items do you say they 2096
have a right to charge? You give the direct items of operation at the theatre, and so forth, during the week. What is your view on insurance premiums?

Mr. Driscoll: I say as to the theatres they have no right to charge those. That is my view. It is very clear in our brief. Here in Exhibit L-8, the items they are entitled to charge, the pay-roll and the trade bills, those are the items they are entitled to charge against it. Further down on the same page you have the cost of "Letty Lynton", the cost of the other attractions; they are entitled to charge those.

The Special Master: What he is saying is that 2097
he is entitled to charge the ordinary overhead charges of that theatre?

Mr. Driscoll: You mean this witness?

The Special Master: No; that is what Mr. Pollak says. You disagree with him on that. You claim all those items are improper charges?

Mr. Driscoll: That is right.

The Special Master: Then you go further and say that they did not exist anyway and that they are inaccurately stated.

2098 Mr. Driscoll: I do not say they are inaccurately stated. I have not taken that position as to any of their items.

The Special Master: Why do we go along and pursue this line?

Mr. Driscoll: I don't know. I have never taken that position.

The Special Master: He does not object to this classification of the items as a charge. Why do you have to go further into it?

Mr. Pollak: I did not know until this moment that he agreed to the reasonableness of the charges.

2099 Mr. Driscoll: He does not at this moment. Let us not have a misunderstanding about that.

The Special Master: But they do stand unaffected by any cross examination, whether he agrees to the reasonableness or not, primarily, if they are proper charges in this case. He has not impaired their validity, has he?

Mr. Pollak: I do not think so, Mr. Auchincloss. But I think the point is now covered, the proposition being reduced to an issue of law as to which we are quite confident from the authorities we have submitted.

2100 The Special Master: If he goes ahead and says that that is an improper, ridiculous and unreasonable charge, then you will have any opportunity to go further into it.

Mr. Pollak: Certain ambiguity has arisen by reason of two meanings of the word "reasonable". I understand that, apart from a general proposition of law here, Mr. Driscoll has now clearly stated that we are entitled to deduct nothing in the way of overhead. There is certainly no dispute that these expenses were incurred. He denies that they were reasonable.

The Special Master: He says they are entirely improper charges. He has not in his cross examination or brief charged that such charges were inaccurate. 2101

Mr. Pollak: No, I understand that he does not charge that they were excessive. He contends that they should not be allowed at all. I think with that explanation of the issues we can dispense with examination along this line, unless cross examination elicits something different, or direct examination——

The Special Master: We will go ahead then.

Mr. Pollak: I think I have only one more thing to ask you. I won't say this is in connection with the specific point of law.

2102

By Mr. Pollak:

Q. Mr. Moskowitz, you can answer this question just yes or no. Have you formed an opinion as to the length of time and the approximate cost that would be involved in getting an appraisal now as of 1932 of the 100 theatres in which "Letty Lynton" was shown? Just, have you formed such an opinion? A. Yes.

Q. Will you state what that opinion is?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial.

2103

Mr. Pollak: The point of it is this, Mr. Special Master. We are computing these overhead items, as you will see from the exhibits, on a basis of investment and depreciation. The decisions are that where overhead is allowed it may be computed in one of several practicable ways, depending on the exigencies of the business. There is a situation where it may be computed on an appraisal. There is a situation in which it may be computed on investment and depreciation. I wanted to bring out

2104 for the record the impracticability in this particular situation of getting an appraisal now as of 1932 for 100 scattered enterprises. I am entitled to do it in my judgment. I just want to foreclose any argument that if we are entitled to overhead it should have been computed on a somewhat different basis.

Mr. Driscoll: You mean, if it was one theatre it would be all right, but because you have to multiply it by 100 it is not?

Mr. Pollak: I think that is one of the circumstances.

The Special Master: You just suspend that question until you find out what Mr. Driscoll asks. My inclination is that unless Mr. Driscoll goes into this

2105 particular item we are just wasting time. You won't be prejudiced by it.

Mr. Pollak: I am not thinking only of you, Mr. Anchincloss. I am thinking also of some higher court. I think Mr. Driscoll ought to let us know what his objections are in this record. All I want to know from Mr. Driscoll is whether or not his objection is based upon the proposition that computation should have been predicated upon an appraisal; that is all I want to know. If he tells me that is not the nature of his objection, I don't care

2106 to have the question answered.

Mr. Driscoll: There is no statement that I am going to make other than to refer Mr. Pollak to our brief. Mr. Pollak has had the benefit of our brief for some period of time. He knows exactly what our position is and he is not going to get any statement of that sort on the record at this time. The brief is perfectly clear on the point; nobody can mistake it.

The Special Master: At what page of the brief is this particular point?

(Discussion off the record.) 2107

Mr. Pollak: Whatever his position in the brief may be, I want the record to show the fact in Court that this issue is either taken care of by evidence or waived by Mr. Driscoll.

Mr. Driscoll: Mr. Driscoll is not waiving anything.

Mr. Pollak: I certainly want the record to show this whole issue.

(Discussion off the record.)

The Special Master: He has questioned it. You can go ahead and put it in.

Mr. Pollak: Will you read the question? 2108

(The pending question was read by the stenographer.)

Mr. Driscoll: I object to that.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

A. In my opinion, to properly appraise any one of these properties would take at least sixty days. It would be necessary for the appraiser to not only measure the different component parts of the building such as bricks, cement, and so forth, establish costs, cube up various parts of the building, satisfy himself as to values as of 1932, get the physical condition as nearly as possible of 1932, allow for 2109
reasonable depreciation from then until now. Again I say it would take at least two months to arrive at a value of any of these properties. You have 102 pieces of property besides the studio. The length of time would depend on how many competent appraisers, with knowledge of theatre property, you could find. The cost would be exorbitant.

Q. Give a figure for the cost, minimum.

Mr. Driscoll: I object to that.

The Special Master: Objection overruled.

Mr. Driscoll: Exception.

2110 A. Possibly half a million dollars.

Q. Mr. Moskowitz, just one more question. You can answer yes or no. Are you familiar with the rates of depreciation on theatre equipment and on buildings used for theatre purposes? A. Yes.

Q. What would you regard as reasonable rates for those two? A. Ten per cent. on equipment; three per cent. on buildings.

Q. Were those rates customarily listed by you in 1932 and preceding years on reports to the government? A. Yes, they were.

Q. And passed by the government?

2111 Mr. Driscoll: I object to "passed by the government". It is not the best evidence and would not affect the issue here anyway.

The Special Master: It is not the best evidence, but I will take it.

Mr. Driscoll: Exception.

A. Yes.

Mr. Pollak: You may cross-examine.

Mr. Driscoll: No cross-examination.

The Special Master: Any other witnesses, Mr. Pollak?

2112 Mr. Pollak: I want to recall Mr. Mills for a few questions.

JESSE T. MILLS, recalled.

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, referring to the item of one million 359 odd thousand dollars appearing on Exhibit 18-D-5, have

you the checks for those payments? A. I have (producing checks). 2113

Mr. Pollak: Do you wish them introduced in evidence, Mr. Driscoll?

Mr. Driscoll: I have no wishes in the matter. It is entirely up to you to prove the case.

Mr. Pollak: It is a question whether the record should be cluttered with a mass of checks. Will you look at them (handing papers to Mr. Driscoll)?

Mr. Driscoll: I think the record ought to show that the defendants have produced the following checks: Check for $50,000 payable to the order of Loew's Incorporated, dated 9-30-31, with the notation "repayment of loan". 2114

Check for $59,992.42——

Mr. Pollak: They are all listed on Exhibit 10, Arthur.

Mr. Driscoll: That doesn't show the notations on the checks. I think we can shorten it up considerably in this way. You say that the list of checks did appear on Exhibit 10.

——dated 9-26-31, to the order of Loew's Incorporated. The notation is "Interest period ending 9-26-31"; $109,992.42, less payment on account $50,000". 2115

Check, $107,907.93, to the order of Loew's dated 10-24-31, and notation on the voucher is, "Interest—period ending 10-24-31".

The next is a check for $14,446.93, to the order of Loew's, dated 11-5-31; notation on the voucher, "Additional interest to 9-26-31, $21,370 Additional interest to 10-24-31, $23,076.93".

The next is check for $130,265.65, to the order of Loew's, dated 11-21-31; notation on voucher is "Interest—period ending 11-21-31".

16 The next is check for $130,497.42, to the order of Loew's Incorporated, dated 12-19-31; notation is, "Period ending 12-19-31".

The next is check for $129,809.47, to the order of Loew's Incorporated, dated 1-14-32; notation on voucher, "Interest for period ending 1-15-32".

Next is check for $126,701.52, to the order of Loew's Incorporated, dated 2-13-32; notation on voucher is, "Interest—period ending 2-13-32".

The next is check for $122,728.73, to the order of Loew's Incorporated, dated 3-14-32; notation on voucher, "Interest—period ending 3-12-32."

17 Next check, for $114,689.96, to the order of Loew's Incorporated, dated 4-7-32; notation on voucher, "Interest—period ending 4-9-32."

Next check, $110,411.13, to the order of Loew's Incorporated, dated 5-7-32; notation on voucher, "Interest—period ending 5-7-32".

Next check for $106,884.28, to the order of Loew's Incorporated, dated 6-4-32; notation on voucher, "Interest—period ending 6-4-32".

Next check in the amount of $103,832.51, to the order of Loew's Incorporated, dated 7-1-32; notation on voucher, "Interest—period ending 7-2-32".

18 Next check for $101,974.96, to the order of Loew's Incorporated, dated 7-30-32; notation on voucher, "Interest—period ending 7-30-32".

Next and last check for $119,344.88, to the order of Loew's Incorporated, dated 9-1-32; notation on voucher, "Interest for period ending 9-1-32".

By Mr. Pollak:

Q. Mr. Mills, in connection with distribution in foreign countries, the various corporations controlled by Culver made distribution in the foreign lands, the testimony has

shown, of "Letty Lynton" and of many other pictures. 2119
Some of those pictures were unprofitable. Is it a fact, based on your experience as an accountant and your acquaintance with this and other industries, that the costs of distribution per unit distributed are affected by the number that are distributed? Just, are they affected? A. They are.

Q. Which way; increased or diminished? A. Naturally the larger the number of units distributed, the lesser the cost per unit distributed.

Q. Also based on your experience with the motion picture industry, is there, if you know—just, yes or no—a requirement by certain foreign countries that there must be distributed a certain proportion of pictures produced in those countries? 2120

Mr. Driscoll: That is too general. Let us find out what the situation was in 1932 and the foreign countries in which that condition existed.

Mr. Pollak: I withdraw that question.

Q. By the way, the answer you have given applies to the year 1932? A. Always.

Q. Mr. Mills, in 1932 and 1933, if you know, did any foreign countries require the distribution of a certain quota of pictures produced in those countries, along with American films? A. They did. 2121

Q. Can you name any such countries? A. Notably England, Germany, France and, I think, Italy.

Q. Mr. Mills, also based on your knowledge, were those foreign produced films generally successful or not?

Mr. Driscoll: I object to that as too general; calling for a conclusion.

Q. Speaking comparatively, were they more or less successful than American pictures?

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2122 Mr. Driscoll: Objected to as galling for a conclusion.

The Special Master: Objection sustained.

Q. Do you know whether some of them had a loss? A. They did.

Q. Do you know whether more of them had losses than the American pictures?

Mr. Driscoll: Objected to. It is an attempt to do indirectly what the Special Master has ruled he may not do directly.

2123 The Special Master: I think Mr. Driscoll is right. If you want to go into it you will have to do into it in more detail.

Mr. Pollak: It is based on a question put by Mr. Driscoll.

Mr. Driscoll: Will you kindly point out the question, Mr. Pollak?

(Discussion off the record.)

Mr. Pollak: I beg pardon; it was a statement by Mr. Raftery (indicating page of record).

Q. Have you figures that would show the losses of the foreign companies subsidiary to Culver upon foreign produced films?

2124

Mr. Driscoll: I object to the form of that question.

Mr. Pollak: I am not even sure that they have the figures.

(Discussion off the record.)

Q. Referring, Mr. Mills, to Exhibit 21 B-1, 2 and 3, have you an explanation to make concerning the item, profit on outside producers' pictures? A. Yes; that in these schedules

in general you will notice that where the figures are the contra to the description in the description column, it is shown in red. On the originals of those sheets that item is red, indicating that there was a loss in England under that caption as against a profit which would have been indicated if there had been black ink. That description, "on outside producers' pictures", should perhaps be elaborated on to further describe them as foreign pictures, English pictures. 2125

By the Special Master:

Q. Is it your contention that that $27,000 is the result of pictures that you had to produce? A. That we had to release in order to release the American pictures. We had to release a number of English pictures in order to release American pictures. 2126

By Mr. Pollak:

Q. Does the same apply under the same caption to other countries? A. It does.

Q. In instances where there were losses? A. Yes, and in instances where there were profits they were shown.

Q. And the phrase "outside producers" does not mean rival American producers? A. It does not limit it to that.

Q. Did these subsidiary companies of Culver ever distribute pictures of other American producers? A. In only a very few instances a year, and my recollection tells me that there were none in Europe; principally in South Africa or Australia where any distribution did occur. 2127

Q. In European countries this item refers to a profit or loss upon quota pictures, is that right? A. Yes.

Mr. Driscoll: Why not let the witness's testimony stand as he gave it. I don't think it is fair to sum-

2128 narize it that way when it is not in accordance with the testimony.

Q. Did these subsidiaries of Culver distribute any American pictures other than those as to which there were certain special arrangements—than the Cosmopolitan pictures? A. They did.

Q. In what country? A. I don't know the exact countries; there were a few such.

Q. That was in 1933? A. It was.

Mr. Pollak: Do you want those instances?

2129 Mr. Driscoll: Do I?

Mr. Pollak: Yes.

Mr. Driscoll: It seems to me that you have gotten into a mess and will have to revamp this entire record.

(Discussion off the record.)

Mr. Pollak: If you think that you want these rare instances checked up, we will check them up.

Q. Can you find out, in 1933 what pictures not of M-G-M progeny were produced in foreign lands? A. Distributed?

Q. Distributed. A. I can find that out.

Q. And the amounts? A. Yes.

2130 Q. Can you do that by Tuesday? A. Yes.

Q. As far as you know, were there any instances in which there were losses on any pictures, other than your own pictures, in 1933? A. I will have to answer that on Tuesday.

Q. Mr. Mills, have you with you a group of checks aggregating some $922,000? A. I have. (Checks produced by the witness.)

The Special Master: What exhibit is that?

Mr. Cohen: JS-D-5.

Mr. Driscoll: $922,141.09. 2131

Mr. Pollak: Mr. Rubin will testify concerning the item. I think it will save time to have Mr. Mills testify to these checks.

The Special Master: Are they listed anywhere?

Mr. Pollak: It is aggregated on Exhibit 18-D-5.

Q. Suppose you read the items off to us? A. This is a list of checks aggregating $1,034,416.80, which, less an adjustment of $112,275.71 made in January 1933, brings the net amount down to $922,141.09, the amount accruing to Louis B. Mayer Pictures as percentage compensation for the year ending August 31, 1932. These checks are all checks of Metro-Goldwyn Pictures Corporation and payable to the order of Louis B. Mayer Pictures (reading): 2132

Check No.	Date	Amount
1884	9-26-1931	$ 38,461.54
2773	10-24-1931	38,461.54
3702	11-21-1931	38,461.54
3607	11-20-1931	5,570.63
4306	12-11-1931	2,000.00
4094	12- 4-1931	13,043.79
4330	12-15-1931	38,320.59
4523	12-19-1931	38,461.54
4872	12-30-1931	50,000.00
4989	12-30-1931	89,000.00
5364	1-15-1932	38,461.54
5874	2- 4-1932	6,416.24
6167	2-11-1932	38,461.54
6928	3-10-1932	38,461.54
7566	4- 7-1932	38,461.54
7991	4-20-1932	216,000.08
7565	4- 7-1932	12,000.00
9922	6-17-1932	69,084.90

2133

2134

Check No.	Date	Amount
10040	6-21-1932	67,147.52
10574	7- 1-1932	38,461.54
11538	7-29-1932	38,461.54
11251	7-22-1932	34,916.95
12226	8-22-1932	7,839.26

Blank number—this is the number where they pulled the check a year later—blank number and blank date, $38,461.54. Those add up now to the amount of $1,034,416.80, that is, a total amount of more than $922,000. There was an overpayment, which was adjusted in the January payment, and we finally arrive at the audited figures for the year.

2135

Mr. Driscoll: I would like to have the record show that the check of September 26, 1931, bears the notation on the voucher, "Guaranty".

Check of October 24, 1931, "Guaranty for period ending 10-24-31."

Check of November 21, 1931, "Guaranty for period ending 11-21-31."

Check of November 20, 1931, "Additional compensation, period ending 9-25-31."

2136

Check of December 4, 1931, "On account."

Check of December 15, 1931, "Additional compensation to 11-20-31."

Check of December 19, 1931, "Guaranty for period ending 12-19-31."

Check of December 30, 1931, "Advance re additional compensation."

Check of December 30, 1931, "advance re additional compensation."

Check of January 15, 1932, "Guaranty for period ending 1-16-32."

Check of February 4, 1932, "Additional compensation." 2137

Check of February 11, 1932, "Guaranty, period ending 2-13-32."

Check of March 10, 1932, "Guaranty".

Check of April 7, 1932, "Guaranty".

Another check of April 7, 1932, "On account of additional compensation to 3-12-32."

Check of April 20, 1932, "On account of percentage retained, to 3-11-32."

Check of June 17, 1932, "As per agreement."

Check of June 21, 1932, "As per agreement."

Check of July 1, 1932, "Guaranty." 2138

Check of July 29, 1932, "Guaranty."

Check of July 22, 1932, "Additional compensation."

Check of August 22, 1932, "Additional for period ending 7-29-32."

By Mr. Driscoll:

Q. This one was the next year's? A. Yes, that was the one where they pulled the wrong check.

By Mr. Pollak:

2139

Q. The checks, if you know, were all paid pursuant to an agreement then in effect with Louis B. Mayer Pictures which has not yet been produced in evidence? A. That is true.

Mr. Pollak: Have you any cross examination of Mr. Mills?

Mr. Driscoll: No.

The Special Master: Have you anything more today?

2140 Mr. Pollak: I think that is all. There are these matters of Mr. Craig.

Mr. Driscoll: As to foreign versions.

Mr. Pollak: Under date of September 10, 1937, Mr. Craig writes to Mr. Cohen at 1540 Broadway, as follows: "On pages 238 and 240 of my testimony I testified that on the shot foreign versions there was an overhead charge of $1,200 per version and on synchronized versions $500 per version. Actually the studio method in 1932 was to charge $1,500 overhead on Synchronized versions and $500 on superimposed versions.

2141 "All of the 'Letty Lynton' versions were synchronized, on which $1,500 per version was properly charged. The German version, French version and Italian version, each synchronized and $1,500 was charged for each version. There was no superimposed version of 'Letty Lynton'. There were no shot versions in the fiscal year of 1932." Signed by Mr. Craig.

Now, Mr. Driscoll has stipulated that Mr. Craig, if called, would testify as shown in a series of sheets, which I think we should have copied and given to Mr. Driscoll, but mark them as exhibits. He has already seen them. You can mark the original as one exhibit.

2142 The Special Master: That is all Craig?

Mr. Pollak: Yes.

The Special Master: Put it in as part of the Culver City testimony; put it in as the next exhibit in the "C" series. It refers to his previous testimony. What does it do? Correct other things?

Mr. Pollak: It meets their contention concerning the apportionment of overhead on a ratio of .018. It only became germane lately, after their brief was in.

The Special Master: All right; put it in.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. C-30, of this date.) 2143

Mr. Pollak: I think it will help you with this exhibit, which is not important, if I read, with Mr. Driscoll's consent, the following summarization of it, contained in a letter which has been shown to Mr. Driscoll, also from Mr. Craig to Mr. Cohen.

Mr. Driscoll: Let me see it before you read it. (Paper handed to Mr. Driscoll.)

Mr. Pollak: Have you any objection to putting the whole letter in?

Mr. Driscoll: No; go ahead and put it in. 2144

Mr. Pollak: I will offer it as the next Culver exhibit.

(The paper just offered was received in evidence and marked Defendants' Exhibit No. C-31, of this date.)

Mr. Cohen: May I withdraw the exhibits long enough to make copies of them, and I will furnish a copy to Mr. Driscoll?

The Special Master: Yes.

Mr. Pollak: I offer in evidence the certificate of incorporation and by-laws of Motion Picture Producers and Distributors of America, Incorporated. 2145

(The papers just offered were received in evidence and marked Defendants' Exhibit No. 31, of this date.)

Mr. Pollak: I offer in evidence the form of Motion Picture Distributors application for Class A membership, including resolution with reference

to fees and dues adopted by the incorporators of the association.

(The papers just offered were received in evidence and marked Defendants' Exhibit No. 32, of this date.)

Mr. Driscoll: Of course, if a member should by mistake wrongly compute their gross for a year I don't suppose that even Walter Pollak would contend that they could not correct that and get back that overpayment. This is the interesting part of that exhibit and all that need to have gone into the record. I will dictate it into the record. I don't suppose you will furnish me with a copy of it.

Mr. Pollak: Yes, we will.

Mr. Driscoll (reading): Until the amount of such gross revenue shall finally be determined by agreement between the member and the Association * * * the amount of the gross revenue fixed tentatively by the Board shall be used as the basis for computing the amount of the membership fee and or dues of the member, and the member shall make payments to the Association on that basis. If the amount of such gross revenue shall finally be determined by such agreement * * * the Association and the member shall make such adjustment as may be necessary with respect to payments previously made."

Mr. Pollak: I have one more document, which was compiled by Mr. Craig. It is a schedule showing the charge of unassigned time as to stars for all feature pictures containing stars during the production year of 1932. It is to show that the amount of unassigned time in the case of this picture and these stars was actually considerably less than

the average, as I understand the schedule. I think 2149
this should be a Culver City item.

Mr. Driscoll: I object to that as incompetent, irrelevant and immaterial.

The Special Master: It is a question of law. Objection overruled.

Mr. Driscoll: Exception.

(The paper just offered was received in evidence and marked Defendants' Exhibit C-32, of this date.)

(Hearing adjourned to October 5, 1937, at two o'clock P. M.)

2150

HEARING OF OCTOBER 5, 1937

J. ROBERT RUBIN, called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Will you give your name and residence? A. J. Robert Rubin, 993 Fifth Avenue, New York City.

Q. What is your occupation? A. Lawyer; vice-president and general counsel for Metro-Goldwyn-Mayer Corporation 2151
and vice-president of Loew's Incorporated.

Q. Mr. Rubin, would you tell in general, terms your experience in connection with the motion picture industry? A. In general terms, I have been connected with the motion picture industry since 1915. In 1915 I caused to be organized the Metro Pictures Corporation, as a lawyer. I did some work for it after that and I think I was assistant secretary.

I worked with the Metro Pictures Corporation and I was assistant secretary until 1920, when the control, or

2152 rather all the capital stock, of Metro Pictures Corporation was sold to Loew's Incorporated.

Thereafter I continued with Loew's Incorporated in control of the Metro Pictures Corporation.

In 1924 there was a merger between the Metro Pictures Corporation and the Goldwyn Pictures Corporation under the title of Metro-Goldwyn Pictures Corporation. At the same time the Metro Pictures Corporation purchased all of the assets of Louis B. Mayer Pictures which had been assigned by the Louis B. Mayer Productions.

I continued to remain with the Metro-Goldwyn Pictures Corporation, being vice-president, and continued as secretary and became a director of Loew's. I have been occupy-
2153 ing the position of vice-president and general counsel of Metro-Goldwyn Pictures Corporation practically since the Metro organization. At the early stages we did not call my title general counsel, but that is what it developed into and what I did.

In 1917 I was with Mr. Mayer. He and I organized the Anita Stewart Pictures. We engaged Miss Stewart as our full star in that company. Mr. Driscoll's office was representing Miss Stewart at that time. Mr. Mayer and I were the majority control of the Anite Stewart company. He was majority; I had a minority interest, and there were others interested in it. We manufactured Anita Stewart pictures
2154 and released them through the First National Pictures Corporation.

Then we organized the Chaplin Mayer Corporation which manufactured pictures with Mildred Harris Chaplin as the star.

Then we organized the Louis B. Mayer Productions and we produced pictures with John Stahl as director, Fred Niblo as director, Reginald Barker as director.

We released the Stahl pictures through the First National Pictures Corporation and released the Reginald Barker and Fred Niblo pictures through Metro Pictures Corporation.

Along about 1924, when the Metro was starting to take 2155
over the Goldwyn Pictures Corporation, I talked with Mr. Schenck, discussing the production management of the Metro Pictures Corporation and particularly if Metro would take over the Goldwyn Pictures Corporation and how production activities were to be managed. He wanted to know whether the Mayer group would come and take over the production management.

I talked to Mr. Mayer and then we arranged between Mr. Mayer, Mr. Thalberg—I should say Mr. Thalberg in 1923 joined Mr. Mayer and myself in the Louis B. Mayer Productions. In 1924 Mr. Mayer, Mr. Thalberg and myself had a meeting with Mr. Loew and Mr. Schenck and 2156
Mr. Bernstein and Mr. Lee Friedman who represented the Loew group and the Metro Pictures Corporation, and we arranged the contract of April 7, 1924, when Mr. Mayer, Mr. Thalberg and I under the name of Louis B. Mayer Pictures took over the production management of all the Metro-Goldwyn Pictures. That contract I think was for three years with an option for three more.

Q. I think the most convenient way, Mr. Rubin,—if I may interrupt—and which will be a help to your Honor, showing the whole contractual relation up to the end of the fiscal year of 1932, at one time—they happen to be printed. There is also printed with them a document, December 15, 1932, which has no relevancy to this case, being 2157
after the conclusion of that fiscal year, but I offer the whole of this group of documents marked "Metro Pictures Corporation and Louis B. Mayer Pictures Incorporated, agreement dated April 7, 1924, together with modifications," through and including page 51. This seems to bear some exhibit number of a printed character which has no particular significance.

(The document just offered was received in evidence and marked Defendants' Exhibit 33 of this date.)

2158 The Special Master: Is this a contract in support of the item of $922,000?

Mr. Pollak: Yes. You will recall that the fact of those payments was shown at the last hearing.

Mr. Driscoll: In order not to hold up this hearing, I would like to reserve my right to object to it after I have had an opportunity to examine it. I can't examine 52 printed pages in time to put an objection on the record that will meet the situation.

Mr. Pollak: That is agreeable to me.

A. The first contract was entered into between us; that
2159 was for three years and I think there was an option for three years more. That option was exercised and the contract was, I think, during those six years modified in some degree.

In 1927 a new contract was entered into, or rather, a continuation of the old contract was entered into, in which Loew's was added as a party and they agreed to take over and assume the obligations of Metro Pictures Corporation until 1932. The contract by its terms extends the original contract to 1932.

At the end of 1932, or April 7, 1932, the contract would revert back to Metro Pictures Corporation as the sole party obligated under the agreement.

2160

By Mr. Driscoll:

Q. Is that contract of 1927 with Loew's Incorporated in this binder? A. Yes. As a matter of fact, all the contracts between Loew's and Metro-Goldwyn and the group consisting of Mayer, Thalberg and myself, are in that folder.

Q. Go ahead, Mr. Rubin. A. I think it was in November, 1927, that the contract between Metro, Loew's, Louis B. Mayer Pictures, was transferred to Louis B. Mayer Pictures, a copartnership of Mayer, Thalberg and myself. We con-

tinued as a copartnership rather than a corporation from November on until Thalberg's death, and Mayer and I are still continuing under that contract, which expires December 31, 1938. 2161

Q. As it now stands? A. Yes.

Q. Reverting to the conditions as they were in 1932, the contract was then to run to what period? A. In 1932 it was to run to April 7, 1937.

Q. A five-year extension had been arranged? A. A five year extension had been arranged in May, 1930.

Q. Go ahead, Mr. Rubin, and tell the story in your own way. A. We all had different duties. Mr. Mayer was vice-president in charge of production; Mr. Thalberg had general supervision of all production, and I had general charge of all production activities east of the Rockies. That would include everything that happened in the City of New York, everything that happened throughout Europe. 2162

I had under myself a department which read and advised as to outstanding plays. I had a department under myself which read and synopsized magazines, books, stories of all kinds, and scenarios. We had a talent department which investigated the talent throughout the Western Hemisphere and throughout Europe.

Q. By "talent", what do you mean? A. I mean director, actor, writer. Every director, actor and writer who entered into a contract with the studio away from the studio entered into his contract with me. If it was in Europe, then the contract would come to me; if it was in New York or Chicago or any place in this section of the country I would do the negotiating. 2163

Q. And if the contract were entered into on the Coast it would be entered into by them? A. Every actor, director or other person who contracted west of the Rockies contracted through the Coast, but in the East I assumed that responsibility for the Coast.

We had, during those years, in addition to that, the

2164 public relations department. The public relations department was a department that contacted all city, state and Federal authorities in the East. If we were making a picture in New York or any place in the East, our production department here would contact with the city authorities or state authorities or federal authorities. If we might need to make arrangements to take any picture on Federal grounds, that was part of our obligation. Any arrangement with the United States Government for the use of the parks, or in connection with the Navy or Army, that was part of our obligations. We did all that contacting.

2165 (At this point Mr. Pollak withdrew from the room, with permission of the Special Master.)

A. (Continued.) We had charge also of censorship problems in the East. Our story department read and synopsized and sent recommendations during the year 1932 of approximately 5,000 stories and plays. We saw probably 20,000 people who asked for interviews. We had 4,000 auditions and we made tests of 300 people. That was an eastern studio production problem. And we have continued. That was begun in 1924 and that has continued until now.

In addition to that we had contact with all of the branch
2166 offices throughout the United States who sent us recommendations in regard to talent. When a man in any one of the big cities where we had an office saw an act which he thought was of interest, the information was conveyed to my office. That was investigated. We had a number of talent scouts who worked under me who went and investigated that talent suggestion. If it was worthy we called them in, had auditions and possibly a test.

I don't know whether you are familiar enough with the test? If you are I won't have to describe it.

The Special Master: I am.

Mr. Driscoll: He had a thorough course at the Coast. 2167

By Mr. Cohen:

Q. I think, for the purposes of the record, you should describe what a test is. A. A test is a photographic and sound record of some literary material that an actor portrays. We want to know what kind of an actor he is, so we give him the lines to learn and then we take a photograph of him and a sound recording, a photograph of his actions and a sound recording of his voice. We can then tell how he will appear in a play, in a picture. Nobody—I don't know of any single exception—is engaged without a test or without previous motion picture experience. It is a curious thing. It is almost impossible to tell—I withdraw that; it is very difficult to tell how a person will photograph until you get him in front of a camera. You know certain features will photograph better than others. So you pick out certain persons, those you know will photograph well. It is a fact that out of 20,000 people that we see, 4,000 auditions are given and we make tests of 300 in a year. 2168

I don't know of anything else I can tell you.

Q. After these tests were made in New York were they sent to the West Coast? A. Yes, all tests were sent to the West Coast and viewed by the studio and there the decision is made as to whether they should engage them. 2169

I should add that when the tests are made these people are under option to us. We make a proposed contract, which is determined by the Coast's assent or dissent. If they accept them then the contract goes into force; if they don't, the contract falls. It is an option for a limited period, the period being practically limited to the time it takes to make the test, send it to California and have it reviewed. Then a report would come back to me from the studio as to whether or not they want those particular people.

2170 I may say that in 1925 25 people were engaged from the 300 that were tested.

Q. Under your charge is there also a scenario department in the East? A. When you say scenario department, I say reading department, a play, book and magazine reading department. I think I stated before, Mr. Cohen, that these two reading departments reviewed, synopsized and made recommendations covering five thousand plays, books and magazine stories. I may say also that I personally went to every play that was produced, and I have been doing that since 1924. I make a report the day after I see a play. I go almost invariably to the opening, and if I am very much

2171 interested in the play I go twice or three times. But I go to all of them, and have been doing that since 1924.

We also have as one of the functions of our talent department the reviews of all night clubs, all entertainments of any kind. We cover colleges where they give plays, all dramatic schools, all little theatres, all summer stock companies, and all broadcasting stations. We have somebody who reviews each one of those broadcasting acts. A report is made to me and then compiled and then sent to the Coast.

Every form of amusement is covered by us throughout the world. We have scouts, a talent scout in London; we have a reading department in London. We have a talent department in Paris and a reading department in

2172 Paris. We have a talent department in Budapesth and a reading department in Budapesth. We have one in Vienna, and we get advices from our offices in Rome, Poland and Scandanavia.

All these reports are collated in my office and then sent on to California with recommendations.

Q. Can you state, Mr. Rubin, whether you are in contact with the West Coast on these production matters, and if so how often you are in contact with them? A. I have been in contact with them every day and in many days more than once, since 1924. At the time Mr. Thalberg was

actively in charge of production I would be on the tele- 2173
phone with him as much as four or five times a day, beginning in the afternoon and ending around one-thirty in the morning. He was always wanting to know what was happening, the prevailing stories, books and plays, and we would have discussions about them. Likewise as to talent. We still do. I go there twice a year.

In the spring we have meetings in regard to our program for the coming year, our program starting in, our selling season starting in the last of May, first of June, so we get up our program the first of April. That is not so important any more, for the last two years; that was so in 1932. Then we sold by star series; now we sell 2174
so many pictures. We did not sell that way then.

Q. Other than the change in sales policy, would you say that the conditions that you have just described were in existence in 1932? A. Yes, with the exception of the method of selling they were exactly the same.

I might add this, that we spend here in the purchase of plays and books approximately a million dollars a year. We purchase literary material here of approximately one million dollars a year, and have been doing it since 1926. Most literary material is purchased here because it involves not only the purchase of literary material sold here in New York but it involves literary material sold throughout Europe which is purchased through me. 2175

I may say also that while engaged in these production activities I remain as general counsel in supervision of the affairs of the company.

If we want money for the purchase of a play or for the hiring of talent, we put in a voucher and receive a check from the accounting department.

(Mr. Pollak returned to the hearing room.)

2176 By Mr. Pollak:

Q. And all the testimony you have given relates in essentials to conditions as they existed in 1932? A. Yes.

Q. I want to ask you one or two other questions. Your association with both Mr. Mayer and Mr. Thalberg antedated 1924? A. Oh, yes.

Q. And with Mr. Mayer long before that? A. Mr. Mayer I knew in 1914, we having become partners in 1917; Mr. Thalberg becoming a partner in 1923.

Q. Mr. Rubin, have you described the legal department? A. No.

2177 Q. Will you describe that in general terms as it was in 1932? A. We had in charge of the legal department myself as general counsel. I had four assistants, and we took care of all the legal problems of production east of the Rockies. Loeb, Walker & Loeb represented us in California. We had a Mr. Sidney Wright representing us in London, and we had a Monta—still have both of these gentlemen—representing us in Paris. We have consulting counsel in Vienna. These gentlemen are under retainer to us.

We had at the time all of the problems of distribution throughout the world; all litigation involving production and distribution came to our legal department here. We conducted a general law office covering every phase of company activity along those lines.

2178 We did not touch Loew's Incorporated because they had a legal department of their own. Mr. Friedman headed the legal department of Loew's Incorporated. All the problems affecting Loew's Incorporated were handled by his office.

Q. Mr. Rubin, did the legal department have anything to do with either the picture Letty Lynton or the play Dishonored Lady, excepting the preparation of the conditional contract for the purchase of the motion picture rights of Dishonored Lady and the preparation and supervision of a contract for the purchase of the motion picture rights of

Letty Lynton? A. No; but I may add, Mr. Pollak, that the contract for the purchase of the motion picture rights of Letty Lynton was done in London by our London correspondents. 2179

Q. That appears from an exhibit in evidence? A. Mr. Wright represented us in that. My office here represented the company in the preparation of the conditional contract for the purchase of Dishonored Lady.

Q. The organization which you have described as existing in 1932, was that built up essentially between the dates 1924 and 1932? A. It was. It began building immediately after the merger of Metro and Goldwyn, and continued.

Q. Mr. Rubin, you have said something about public relations. Would you care to expand and explain the nature of the public relations, at least in general terms? A. I think I did, Mr. Pollak. 2180

Q. Have you discussed censorship? A. I think I said that one of the functions of our department was to meet censorship objections; in case a picture was objected to by the censors we would have to go and see if we couldn't get them to withdraw or to explain to them what was meant, or change the title. In the old silent days it was just a question of change of title or of cutting it. That was part of the work of our department.

Q. You have testified that in those public relations you dealt with public authorities. Have you explained that it involved the negotiations as to the use of public places and public buildings? A. I think I did that. 2181

Q. Did you have anything to do, in 1932, with the preparation of the production schedule of M-G-M? A. Yes, Mr. Mayer and Mr. Thalberg and I each spring at that time would meet in California and discuss and arrange our production schedule for the year. I would go out with the stories that we fellows in our eastern office would recommend, and between the three of us we would work out a schedule.

2182 Q. The decision as to what was to be produced was a decision reached by the three of you? A. That is right.

Q. Your visits to the Coast were roughly how often? A. Twice a year, spring and fall.

Q. The series of documents in evidence as Exhibit 33, put in by me this afternoon, make reference to a minimum guaranty. I will ask you to tell us, in general terms, whether M-G Pictures Corporation or Loew's lost any money by reason of that guaranty?

Mr. Driscoll: I object to that.

2183 A. No, they did not.

Q. I will rephrase it. Did in any case your share of the profits fall short of the guaranteed minimum? A. No, it did not. They did in one year, but it was made up in the next year. The guaranty was over a two-year period. Never did they fail to recoup their advances to us.

Q. Mr. Rubin, would you tell us in general terms, and stating a maximum, what the total of the stock interest in Loew's held by you and Mr. Mayer and Mr. Thalberg at any time between 1927 and 1932 was, in percentage? A. Not to exceed one per cent.

Q. And as to M-G-M, what if any was your holding? A. We didn't have very much. Metro-Goldwyn Pictures had a
2184 preferred stock in which I had a few shares. Its common stock was all owned by Loew's Incorporated, every share.

Q. That has been testified to. Let me ask you this. Did you or any one of you three or all three together have a controlling interest in any corporation that is here a defendant, or any subsidiary or affiliate of any defendant? A. No, we did not.

Q. Would you care to state who the largest stockholders in, say, 1932 and 1933, in Loew's were? A. The largest stockholders in 1932 were the Film Securities Corporation which is the corporation which was organized at the re-

quest of the Government pursuant to a consent decree 2185
which was entered into between Fox and the Government, by the terms of which all of that stock the Fox Film Corporation owned in Loew's, 660,000 shares, were transferred to the Fox trustees. Those trustees were Thomas Perkins of Boston, Thomas G. Gregory, former Attorney General of the United States, from Texas, and Judge Hazel, John R. Hazel. They were the trustees who voted those shares. That 660,000 shares was approximately 43 per cent of all the stock of Loew's.

I might say that that group was dominated by Chase National Bank and by Winthrop Aldrich personally; they were the dominating interest in the control of that stock. 2186

Q. Does this memorandum refresh your recollection as to the persons for whom this stock was held towards the end of the year 1932 (handing paper to the witness)? A. Yes.

Q. Will you state who they were? A. Weco Corporation, which is the Western Electric Corporation; Graybar Electric Corporation, which is also Western Electric; the Chase National Bank; Bancamerica Blair Corporation; Interstate Equities Corporation; Haystone Securities Corporation; the First of Boston Corporation; Securities Allied Corporation; Dillon, Read & Co.; Commercial Investment Trust Incorporated; United States and Foreign Securities Corporation; United States and International Securities 2187
Corporation; Chemical Bank and Trust Company; Manufacturers and Traders Trust Company; Manufacturers Trust Company; New York Trust Company, and The Philadelphia National Bank. These people had control of this stock because they were the owners of $20,000,000 of notes to which this stock was collateral and when the notes failed to be paid they took over the stock.

Q. By this stock you mean the 660,000 shares? A. 660,000 shares of Loew's Incorporated stock.

Mr. Pollak: If your Honor please, I have here a copy of the directors' resolution relating to the contract that was in effect in the year 1930.

Q. You have testified that was the extension voted in the year 1930? A. The extension was voted on in May, 1930, and that extended it from 1932 to 1937, April 7th.

Mr. Driscoll: I just don't know what it all means until I have an opportunity to examine the contract. I reserve any objection to it at this time, the same as in the case of the contract.

Mr. Pollak: That is agreeable. I take it that there is no objection on the ground that it is only a copy and not attested?

Mr. Driscoll: No.

(The paper just offered was received in evidence and marked Defendants' Exhibit 34, of this date.)

Q. Mr. Rubin, testimony has been received in this case to the effect that in the year 1932 the sum of $85,000 was paid for the motion picture rights to Reunion in Vienna. Did you have anything to do with that? A. I purchased it.

Q. And that is the correct figure? A. That is correct.

Q. Will you state in general terms, Mr. Rubin, what the character of the play, Reunion in Vienna, was?

Mr. Driscoll: I can't see that we are trying that question.

The Special Master: What has that to do with it?

Mr. Pollak: A point has been made by Mr. Driscoll that large sums were paid for particular plays, for the motion picture rights in them, and one of them is this play, Reunion in Vienna. That has so far been the subject of testimony. In connec-

tion with our contention that the figure of $30,000, 2191
which is the figure that Mrs. Barnes testified she was anxious to get, is a reasonable figure for motion picture rights in "Letty Lynton" and is the measure of plaintiffs' recovery; I want to show and want to explain the circumstances obtaining on the higher prices of certain other motion picture rights in 1932, and the ones that I am mentioning, by the way, are among the very highest payments made in 1932.

Mr. Driscoll: Your Honor will recall that a schedule of such payments was received in evidence. It seems to me that Mr. Pollak's statement is a fair exposition as to why that is absolutely beside the 2192
point and why it should not be gone into. We are not trying Reunion in Vienna. On cross examination of some witnesses that he produced we asked in regard to some plays that were purchased at high prices. If he is going into each play, we are going to be some time.

The Special Master: I think we have had enough on those subjects. I remember Mr. Driscoll's mentioning a number of plays that had been purchased at large prices. I don't think that the evidence is very material one way or the other myself.

Mr. Pollak: May I shorten it and preserve our rights, if your Honor please, by just making an 2193
offer of proof that this witness would testify as to the $85,000 payment for Reunion in Vienna in 1932 and as to the $100,000 payment for Good Earth in 1932; as to the $80,000 payment plus a royalty for Barretts of Wimpole Street in 1932; that he negotiated these transactions, and that all of these purchases were of the motion picture rights of plays that had been outstanding Broadway successes, shortly theretofore and purchases that carried the right to use the name of these successes?

The Witness: There is only one correction; that Good Earth had not been a Broadway production. I purchased it on the strength of its tremendous success as a book.

Mr. Pollak: Would there by any objection to having that in the record, subject to any objection?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues being tried here. We are here on an accounting proceeding as to the profits made on "Letty Lynton", not on the profits made on Good Earth or anything else.

The Special Master: I think you have got plenty of testimony in support of your theory with reference to this $30,000, including Mrs. Barnes. I don't see why it makes any difference if you paid $100,000 for one play and $200,000 for another play.

Mr. Driscoll: I object to it.

Mr. Pollak: I am satisfied. I would like to explain a point of fact. The evidence has disclosed that in addition to the $80,000 paid outright for the Barretts of Wimpole Street there was a royalty promised. I don't think the evidence has so far shown what that royalty amounted to or what it came to. That is somewhat different, if your Honor please; that is supplementing the showing of fact.

The Special Master: I don't think that any of that has anything to do with this case. I promise you I don't. I think you have got the testimony in reference to these negotiations; whether it is material or controlling or not remains to be seen, but I think you have this testimony with reference to this $30,000, and that is the main point you want to make. I don't see what difference it makes whether you paid $80,000 for Barretts of Wimpole Street or not.

Mr. Pollak: I withdraw that. I do not take an objection.

Mr. Driscoll: You mean you do not take an exception. 2197

By Mr. Pollak:

Q. Mr. Rubin, what, if anything, did you have to do in 1932 with shorts? A. Nothing.

Q. Or with foreign versions? A. 1932; nothing.

Q. How as to the other two principal executives? A. Nothing.

Mr. Pollak: That is all. Mr. Driscoll, you may cross examine. 2198

Cross examination by Mr. Driscoll:

Q. Now, to get this corporate set-up, Mr. Rubin, in 1932 Loew's Incorporated owned 100 per cent. of the stock of M-G-M Incorporated? A. That is right.

Q. Now, Loew's Incorporated is still in existence and functioning?

Mr. Pollak: The common stock.

A. He is talking about M-G-M Incorporated, that was an intermediate corporation.

Q. Is M-G-M Incorporated in existence now? A. No. 2199

Q. When was that dissolved? A. In this last year.

Q. M-G-M Incorporated in turn owned— A. All of the common capital stock of Metro-Goldwyn Pictures Corporation.

Q. Now, Metro-Goldwyn Pictures Corporation, is that in existence now? A. No, that has been merged.

Q. When was that merged? A. This last year.

Q. Into what was it merged? A. Into Loew's. I can say to you the plan was to merge all of the subsidiaries we could into Loew's.

2200 Q. And Metro-Goldwyn Pictures Corporation in turn owned the stock of Metro-Goldwyn-Mayer Distributing Corporation? A. I think they did; I am not sure about that, Mr. Driscoll.

Q. Is Metro-Goldwyn-Mayer Distributing Corporation in existence now? A. No, that is out of existence.

Q. That has ~~been merged~~ into Loew's? A. Yes.

Q. And Metro-Goldwyn Pictures Corporation also owned Metro-Goldwyn-Mayer Corporation, the producer? A. Yes, that was a producing subsidiary, and still is in existence.

Q. Culver Export was also owned by Metro-Goldwyn Pictures Corporation? A. I think so; I won't swear to it.

2201 Q. Is Culver Export Corporation still in existence? A. No; that was merged into Loew's.

Q. At the same time as the others? A. Yes.

Q. Culver Export Corporation in turn owned 100 per cent. of a number of subsidiaries used in foreign distribution? A. It owned 100 per cent. of some and owned less than 100 per cent. of others. I am not sure that Culver owned all of the stock of those local distributors.

By Mr. Pollak:

Q. That has been testified to; as to Sweden it did not; that has all been put in a schedule. A. I am not sure.

2202

By Mr. Driscoll:

Q. You say Culver has been merged into Loew's? A. Yes.

Q. Have these foreign subsidiaries, owned 100 per cent., merged into Loew's? A. None of the foreign subsidiaries.

Q. They are owned in the same relationship by Loew's as they were by Culver? A. I am not able to testify as to that.

Q. So that all these main corporations—when I say main

corporations I mean Loew's Incorporated, M-G-M Incorporated, Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Metro-Goldwyn-Mayer Corporation, Culver Export Corporation—they are all merged into Loew's, with the exception of Metro-Goldwyn-Mayer Corporation, the producer, is that correct? A. Yes. 2203

Q. Now, then, as to the subsidiaries that operate the various theatres theretofore— A. They are still in existence.

Q. —they have not been merged into Loew's? A. No, neither the theatre subsidiaries nor the distributors throughout the rest of the world have been merged. They are still in existence. 2204

Mr. Driscoll: That is all.

Mr. Pollak: That is all, Mr. Rubin. I have nothing more.

The Special Master: Are you finished for today?

Mr. Pollak: I think Mr. Mills has one schedule. There is one more matter Mr. Cohen has reminded me of.

Re-direct examination by Mr. Pollak:

Q. Mr. Rubin, the evidence has disclosed that the production cost was distributed 25 per cent. to Culver and 75 per cent to Metro-Goldwyn Pictures. Who set that percentage arrangement? A. I think I did. 2205

Q. Was that division made in your best judgment? A. I thought that was what we should charge at that time.

Q. The decision was made on or before 1932? A. I won't say I did it alone, but it was done by those of us in charge. We determined that would be an appropriate percentage.

Q. In 1932 or theretofore? A. It was before that. I might say we have changed it since.

2206 Q. The evidence has disclosed that income was divided 80 per cent. to the Pictures Corporation and 20 per cent. to the Distributing Corporation. How was that division made? A. Probably Mr. Mills and I worked that out, on the theory that that was what it cost for distribution; we allowed the distributing company 20 per cent.

Q. That was your best judgment? A. That is right; that is what we thought was equitable and fair.

Q. That was long before 1932? A. That was long before 1932.

Q. The evidence also disclosed that the home office expenses were divided exactly or roughly 30 per cent. to the
2207 Pictures Corporation and 70 per cent. to the Distributing Corporation; who made that division? A. I don't recall whether I did that or not.

Q. Were you familiar with it? A. Yes, I was familiar with it; it was done long before 1932.

Q. Was that division made, if you know, in the best judgment of the executives? A. I know I approved of it.

Q. It was in existence in 1932? A. Yes.

Q. And theretofore? A. Yes.

Mr. Pollak: I think that is all. I want Mr. Mills for a moment.

2208 Re-cross examination by Mr. Driscoll:

Q. You said that the division between foreign and domestic companies has been changed? A. Yes, this week.

Q. What is the change? A. 70 per cent. and 30 per cent.; the foreign business has improved considerably.

JESSE T. MILLS, recalled.

2209

Direct examination by Mr. Pollak (continued):

Q. Mr. Mills, you remember at the last hearing you were asked to find out whether there were any losses on American pictures distributed abroad in the season of 1933 by any of the Culver subsidiaries? Do you remember that; yes or no? A. Distributed abroad?

Q. Distributed abroad, yes. I am referring to American pictures other than your own, of course. You remember you were asked to look that up? A. Yes.

Q. Have you found any such loss? A. Only one.

Q. What was that? A. $2,269.

2210

Q. In what country? A. South Africa.

Q. You have already testified that there were other losses occasioned by the enforced distribution of non-American pictures in certain foreign countries? A. Yes.

Q. Mr. Mills, am I right in this, that the only loss on any American picture, other than one of your own productions, distributed in the year 1933, was a loss of less than $3,000 in South Africa? A. That is right.

Q. Mr. Mills, have you prepared a schedule showing the relative success or non-success of pictures released in the year 1932, having in the one hand stars and in the other hand not having stars; yes or no; have you such a schedule? A. Yes.

2211

Q. Was that schedule correctly prepared? A. Yes.

Q. Under your supervision? A. Right.

Q. Have you a copy of it for Mr. Driscoll? A. I have not with me, no. There is only one copy. (Pencil schedule produced.)

Mr. Pollak: I will offer this.

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial, not within the issues we are trying here before the Special Master.

2212 Mr. Pollak: I ask to have it marked for identification.

(The paper just offered was marked Defendants Exhibit 35 for Identification, of this date.)

Q. Referring to Defendants' Exhibit 35 for Identification, that classifies the pictures released in 1933 in three groups, does it not (handing paper to the witness)? A. I will have to refresh my recollection on it. We have summarized this in two groups.

Q. Which are the two groups? A. For the fiscal year 1932, the two groups consist of 28 pictures in which there 2213 were stars and 13 pictures in which there were no outstanding stars.

Q. What were the average profits on the feature pictures containing stars?

Mr. Driscoll: Objected to as incompetent, irrelevant and immaterial and not within the issues being tried in this accounting proceeding.

The Special Master: Put it in for the purpose of identification, and an exception to you in refusing to take any further evidence.

Mr. Pollak: That is all. I want an exception noted. I now offer it in evidence. 2214

The Special Master: It is excluded, with an exception to you.

Mr. Pollak: In Exhibit 18-E-1, the item "New York Expense in Connection with Production" which appears as $149,520.31, should be $151,125.59 as detailed on Defendants' Exhibit 11.

This closes the defendants' evidence, if your Honor please. As we made clear to your Honor at the time of the submission of briefs, we might have, of course, further findings to submit to your Honor.

and we may have and probably shall have memo- 2215
randa on points of fact or law to submit to your Honor. One memorandum that I have in mind and that is substantially complete now, is a memorandum listing the points in the picture that demonstrably were not taken from the play and also listing the points in the play that demonstrably were based on matters in the public domain. These analyses are based, as your Honor will recall, upon the statements of Judge Hand in his opinion that much of the picture owes nothing to the play, and again, that a considerable part of the play—I think are Judge Hand's words in the record—was based upon in- 2216
cidents in the public domain. I will have that document certainly by next week and I will send a copy of it to Mr. Driscoll at the Coast and one to Mr. Clarke here because they might reply to it.

The Special Master: This is the end of the testimony?

Mr. Pollak: This is the end of the testimony.

Mr. Driscoll: I want to offer in evidence the following from Mr. Rubin's testimony in the trial before Judge Woolsey (P.P.R. at fol. 66):

(The testimony of Rubin was designated Reference No. 18.) 2217

The Special Master: Are you going to read it?

Mr. Driscoll: Yes. "I was acting as counsel for Metro during 1930 and 1931. When I say 'Metro' I mean the general Metro interests. I was during that period of time an officer of those corporations with authority to act for those corporations."

I am reading from folio 67: "There was a manuscript of the play submitted about that time to me on behalf of the defendant Metro-Goldwyn-Mayer

2218 Corporation; that is the producing corporation, and any manuscript that is given is for the purpose of providing information for that corporation, and at the same time it was for the purpose of producing a picture that might be distributed by Metro-Goldwyn-Mayer Distributing Corporation or shown in the Loew theatres, and might also be exported by the Culver Export Company. Really what I do when I am looking over manuscripts is looking after the interests of all the defendant corporations."

I want to read from folio 85: "All these corporations are working together as one. They work together in harmony and work together on the promotion and production and distribution of a picture like 'Letty Lynton,' very likely."

2219 Then I want to call Mr. Prager to explain or analyze these four schedules put in last week, prepared by Mr. Craig.

The Special Master: That is, referring to Exhibit C-30.

MAX PRAGER, called as a witness on behalf of the plaintiffs, having been first duly sworn, testified as follows:

2220 Direct examination by Mr. Driscoll:

Q. You have given your name, Mr. Prager? A. Yes.

Q. And your residence? A. 924 East 10th Street, Brooklyn.

Q. What is your business, Mr. Prager? A. Practicing certified public accountant.

Q. You have been associated with the attorneys for the complainants in this matter? A. Yes.

Q. Have you at my request looked over the papers that

have been offered in evidence marked Defendants' Exhibit C-30? A. Yes, sir. 2221

Q. I think the four of them are marked under the one mark, Defendants' Exhibit C-30. I show you schedule No. 1 of Exhibit C-30, and ask you if you have examined that schedule (handing paper to the witness)? A. I have.

Q. That schedule purports to cover the days and hours consumed, under five different headings, does it not? A. Yes.

Q. That is, days and hours chargeable to the various headings? A. Yes.

Q. Those are feature pictures, 1327 days; feature Cosmopolitan, 33 days; feature retakes Cosmopolitan, 25½ hours; feature retakes Cosmopolitan, 24½ hours; and 5, two shorts, estimated at two days each, four days? A. Yes. 2222

Q. Now, Mrs. Prager, that then starts with the number of days, 1,364, and attempts then, does it not, to reduce the 299½ hours to days at the rate of eight hours a day? A. Yes.

Q. Adding 37 days to the 1,364 days in the first column? A. That is right.

Q. Making a total of 1,401 days? A. Yes.

Q. On one of the schedules submitted in evidence at the Coast "Letty Lynton" was listed as 33 shooting days? A. Yes.

Q. This schedule then compares the 33 shooting days to the 1,401 days which presumably is the number of shooting days for all of the business at the studio within the fiscal year, is that correct? A. That is right. 2223

Q. And finds a percentage of .0235? A. That is right.

Q. Which presumably is supposed to represent the proportion of total shooting days in the studio taken up by "Letty Lynton"? A. That is right.

Q. On that schedule, Mr. Prager, they have rates and amounts footing up to $2,153,868. Those figures have nothing whatever to do in arriving at this .0235, have they?

2224 Mr. Pollak: I don't think Mr. Prager can testify to that. I object to his testifying. The document is an exhibit prepared by Mr. Craig and received in evidence. If it does not seem to be the fact, if the mathematics of that exhibit are unconvincing or it is logical, that is a matter of internal evidence from the document itself. Mr. Prager has had nothing to do with its preparation.

Mr. Driscoll: It is quite evident that Mr. Pollak does not understand the exhibit at all. If he had given any study to the exhibit it would become clear to him that the $2,153,000 and the items going to make that up have nothing whatever to do with his
2225 arriving at the .0235. .0235 is simply arrived at by taking the total shooting days of 1,401 and comparing 33 days to 1,401.

Mr. Pollak: As a matter of fact, that is true enough.

Mr. Driscoll: That is the point I want on the record. Even Mr. Pollak sees that now. The $2,153,000 have nothing whatever to do with arriving at the .0235.

Mr. Pollak: It is perfectly obvious that .0235 represents the ratio of 33 to 1,401; that is obvious from the exhibit. It is not a matter to be testified
2226 to by Mr. Prager.

Mr. Driscoll: Very well.

Q. Mr. Prager, as an accountant would you say that the $2,135,868 has anything to do with arriving at .0235? A. The financial figures have absolutely nothing to do with the derivation of this ratio of .1235.

Mr. Driscoll: That is what I wanted to know.

Mr. Pollak: That is conceded, that that represents the ratio between those figures.

Mr. Driscoll: Let us have it on the record that 2227
Mr. Pollak conceded this.

Mr. Pollak: That is just what I did concede—the ratio between 33 and 1,404.

Q. Mr. Prager, item No. 1 on this exhibit, feature pictures, has a rate of $1,559 per day? A. That is right.

Q. Item 2 has a rate of $1,250 per day? A. That is right.

Q. Item No. 3 has a rate of $125 per hour? Is that true? A. That is right.

Q. Or $1,000 a day of eight hours? A. Yes; eight hours.

Q. Item 4 has a rate of $100 per hour? A. Yes.

Q. And the two shorts have a rate of $1,750 a day for 2228
each short? A. Yes.

Q. I presume from this statement that $1,559 is the cost per day estimated by the studio? A. Yes.

Q. If that is so, then items 2, 3 and 4 and 5 are all in below cost on that statement? A. Yes.

Q. All of them? A. They are in below cost if we take item No. 1 as the basis of cost.

Q. If you take— A. As the true basis of cost for a camera shooting day.

Q. So far as these computations are made, "Letty Lynton" is on the basis of $1,559 per day? A. That is right.

Q. And all of these others are below that? A. Yes, that 2229
is right.

Q. Will you turn to Schedule No. 2 of that same exhibit? Is it not true as a matter of accountancy or mathematics or whatever Mr. Pollak would have us call it that the rates there set forth and the amount of money charged against each picture likewise have nothing whatever to do with the percentage of .0239 arrived at as the ratio between 33 and 1,381? A. Well, this schedule, the second schedule is on a somewhat different basis from the first.

Q. What is the difference between the first and second

2230 schedules, Mr. Prager? A. In the first schedule items 2 to 5 inclusive have, I presume, the precise time it took to produce each of these products.

Q. That is the shooting time that was charged against each one of those items— A. —is a definite amount, ascertained. The same items on the second schedule, 2 to 5 inclusive, while in the upper part of the schedule the precise amount of time consumed by each is stated, yet in the lower part of the schedule instead of showing the precise amount of time it is derived by finding the amount of overhead charged to 2 and 5 inclusive and dividing it by a theoretical rate of $1,559 per camera shooting day, thereby deriving a smaller number of days and hours
2231 than would otherwise seem to be the case.

Q. In other words, Schedule 1 presumes to set forth the exact shooting time charged against items 2 to 5? A. Yes, sir.

Q. Schedule 2 endeavors to change that shooting time to a theoretical smaller figure? A. That is right.

Q. Would you say that theoretical smaller figure goes to ascertain the ratio of .0239? A. That is right.

Mr. Pollak: Your Honor, of course, understands that the point of these schedules was to give every possible basis of computation of overhead. The
2232 difference between Schedules 1 and 2 is, as I read them, .0004; isn't that right?

The Witness: The difference is the difference between .0235 and .0239.

Mr. Pollak: Am I right in saying that the difference is .0004?

The Witness: Yes.

Mr. Pollak: May I interrupt your question by one question on cross-examination? I ask if the difference between the two is 4-10,000ths, yes or no?

The Witness: Yes.

Q. Now, in Schedule No. 1 of this Exhibit C-30, Mr. Prager, they take a base on a total shooting day production for the entire studio, 1,401 days? A. That is right. 2233

Q. In Schedule 2 of this fictitious computation they succeed in reducing that to 1,381 days, is that correct? A. Yes.

Mr. Pollak: I take it that if I fail to object to such characterizations as "fictitious" your Honor will not regard me as conceding to any such designation.

The Special Master: Certainly.

Q. The fewer the days the higher the rate, isn't that true? A. That is true, the other figures remaining the same. 2234

Q. In other words, if "Letty Lynton" is charged with 33 shooting days and that remains in each computation, then the smaller the days the higher the rate? A. That is right.

Q. On this exhibit schedule 2, again as in the case of schedule No. 1, the rate set forth and the amount set forth have nothing whatever to do in arriving at the percentage of .0239? A. In this Schedule No. 2, Mr. Driscoll, it is to the extent of fixing the 1,381 days.

Q. Will you explain to what extent it is? 2235

The Special Master: He has already explained that.

Q. Mr. Prager, I will ask you to look at Exhibit C-23. What is that schedule, so that the Master may know (handing paper to the witness)? A. It is headed, "Statement showing production costs accrued on features during fiscal year 1932 and percentage of completed costs and shooting time."

36 Q. On that schedule the defendants purport to give, do they not, the amount of money for labor and material spent on that picture during the fiscal year in question? A. It includes labor and material, departmental overhead and general overhead.

Mr. Pollak: Pardon me; on that exhibit I don't find general studio overhead included there, Mr. Prager.

Mr. Driscoll: I think that was testified to by Mr. Craig out on the Coast.

Mr. Pollak: That that exhibit included general studio overhead?

37 Mr. Driscoll: Let us read Mr. Craig's testimony, page 550 (reading):

"Question. You have on your schedule C-25 a total production cost for the fiscal year of 1932 of $16,204,197.54. In that you have charges for overhead, studio overhead against each picture on the basis of camera shooting days?

"Answer. That is correct.

"Question. Now, turning to the amended accounting, Mr. Craig, you have this overhead item of $2,246,793.28. How much of that $2,246,793.28 is in this $16,204,197.54?

38 "Answer. There was absorbed in the—let's see now—perhaps you had better read the question so that I will be sure.

"(The question was read by the reporter.)

"Answer. $2,153,868."

The Special Master: The studio overhead is not in this thing. This is $14,991,354.56.

Mr. Driscoll: That $14,000,000 is part of the $16,000,000; that is the $14,000,000 plus the $2,000,000.

The Special Master: You are not referring to this exhibit now?

Mr. Driscoll: No, I am reading from Craig's testi- 2239
mony.

Mr. Pollak: He is referring to this exhibit.

The Special Master: You are not referring to page 3 of Exhibit C-30?

Mr. Driscoll: No, the question refers to Exhibit C-25.

The Special Master: I thought you were referring to the third page of Exhibit C-30.

Mr. Driscoll: No; I am referring to Craig's testimony in regard to C-25; I read from pages 550 to 551.

The Special Master: On page 3 of this Exhibit 2240
C-30 it says, "Total cost of feature pictures during fiscal year 1932, per Exhibit C-25 in studio hearing, $14,991,315.56."

Mr. Driscoll: Yes, that is the exhibit; I have not come to that yet. Before I come to that I want to point out this:

Q. In C-25, where they take their footings, whether you regard it as $14,991,000 or $16,204,000, seven different productions have substantial charges against them but have no shooting days whatever against them (handing paper to the witness)? A. That is correct.

Q. If those seven different productions had camera days 2241
assigned to them that would decrease the ratio charged to Letty Lynton? A. That is right.

Q. Those seven different productions have a total charge of a million dollars? A. That is right, approximately so.

Q. Now, will you kindly turn to schedule 3 of Exhibit C-30 (handing paper to the witness)? Mr. Prager, will you in your own words kindly explain that exhibit to us? A. This schedule No. 3 is headed, "Percentage of overhead chargeable to Letty Lynton on basis of direct production costs of feature pictures." It starts out with a figure of

2242 $14,991,315.56, which is what you would call a subtotal of Exhibit C-25.

Q. That is the same figure that appears on the second page of Exhibit C-25, entitled, "Total features in process during year"; is that right? A. That is right.

Q. Go ahead. A. To which are added certain credits or red ink figures appearing on Exhibit C-25, together with a small adjustment of $52.75, making a total adjusted figure of $15,038,614.09, from which is deducted $3,678,758.93, purporting to represent the studio overhead deducted on the same basis as set forth in complainant's memorandum, pages 7 to 11 inclusive, except total elimination of pub-
2243 licity charges explained below, giving a net figure of $11,359,855.16, which presumably represents nothing more than labor and materials with all overhead excluded.

There is contrasted with that total the labor and material costs of Letty Lynton as set forth in complainants' memorandum on page 11 of $238,649.30, from which is deducted $3,179.64, an elimination of publicity charges included in the previous figure.

This, according to Schedule No. 3, brings the labor and material cost of Letty Lynton down to $235,469.66.

Now, the ratio of labor and material costs of Letty Lynton to the total for the fiscal year 1932 of $11,359,855.16, is .02073.

2244 Q. Now, Mr. Prager, that Exhibit purports to question our computation made on page 12 of our memorandum? A. That is right.

Q. In our computation we took a labor and material figure for Letty Lynton of $262,000 plus? A. That is right.

Q. This exhibit takes a labor and material figure of $235,000 plus? A. That is right.

Q. Can you tell us where the difference lies? A. In our computation we used the defendants' figure of labor and material and departmental overhead as set forth in their Exhibit 18-D-5 of $262,682.69.

Q. That is the figure given in their Exhibit 18-D-5? A. That is correct. 2245

Q. How did they reduce that down, if you know, to $235,000 plus? A. They start with our figure of $238,649.30, as set forth in complainants' memorandum, page 11, from which they take a deduction of $3,179.64, which, according to the footnote on this schedule is as follows:

"Complainant's Memorandum objects to Publicity Charges, but leaves in picture Letty Lynton a charge based on .018% of total Publicity Charges for year. We claim basis of .018% is incorrect and to arrive at proper basis eliminate all Publicity Charges to arrive at percentage of overhead per complainant's own basis."

Q. So that they reduce our figure of $262,000 taken from their exhibit 18-D-5, to $235,000, by purporting to eliminate the publicity charges? A. That is right. 2246

Q. In arriving at their percentage here have they included in their figures the various expenditures appearing in Exhibit C-25, second page, of cost of suspense productions, $308,000 plus, cost of pictures completed in prior years, $59,000 plus? A. No, they have not.

Q. Cost of shorts, $110,000 plus? A. No.

Q. They did include two items of shorts of $7,000 each, didn't they? A. That is $7,000 overhead included in the cost of shorts.

Q. So that it would make a difference of half a million dollars in their basis figures if they included those expenditures? A. That is correct. 2247

Q. And those are not included? A. That is right.

Q. Will you look at Defendants' Exhibit 30, page 4 (handing paper to the witness)? How does that differ in its method of bringing out the correct ratio, as they call it, .0213, from Schedule No. 3? A. Schedule No. 4 starts——

The Special Master: Isn't it self-explanatory?

Mr. Driscoll: Maybe it is.

2248 The Special Master: It seems so to me.

Mr. Driscoll: If the Master understands it, the rest of us can pass it. All right, you may examine Mr. Prager.

Mr. Pollak: I don't think I want to examine Mr. Prager. I will say this, that he——:

The Special Master: On or off the record?

Mr. Pollak: On the record. These documents having been compiled by Mr. Craig——

Mr. Pollak: Yes, I don't think I want to examine Mr. Prager.

Mr. Driscoll: We rest. It is understood that is all the testimony.

2249 Mr. Pollak: I told you that I have not absolutely foregone the opportunity to call Mr. Craig. I don't think I can renounce it for him, or forego it.

The Special Master: I don't think Mr. Prager's testimony has led us into anything new in this case.

The Special Master: Have you any other testimony?

Mr. Pollak: Other than possible rebuttal.

HEARING OF MARCH 16, 1938.

2250 JOSEPH R. VOGEL, of 381 Park Avenue, New York, N. Y., called as a witness on behalf of the defendants, having been first duly sworn, testified as follows:

Direct examination by Mr. Pollak:

Q. Mr. Vogel, would you state in your own way what your functions are in connection with the Loew theatres? A. I am the operator of all Loew theatres outside of New York City and in New York City at the Capitol, the Astor, the Paradise and the Valencia theatres.

Q. By the way, how long have you been with Loew's theatres? A. Twenty-nine years. 2251

Q. Is this a fair general statement, that in conjunction with Mr. Moskowitz you are in general charge of the construction and operation of the theatres? A. Yes, sir.

Q. Of the Loew's circuit. Now, Mr. Vogel, are you also familiar with the costs of construction, in a general way? A. Yes, sir.

Q. And of operation? A. Yes.

Q. And of the methods of computing overhead in connection with the theatres? A. Yes, sir.

Q. Am I right in this, that in the acquisition of land for a theatre it is frequently as a practical matter impossible to use every inch of space simply for a theatre? A. You are right. 2252

Q. Would you explain to the Master, if necessary drawing little diagrams, why that is so, Mr. Vogel? A. After deciding to build a theatre in any particular zone, the first thing done is to try to find the proper location. By the proper location I mean the location where a great majority of the people in the town pass some time during the day. Also, in a town where parking conditions are very bad, we have to figure on the possibilities of rear parking.

When we finally decide on a location, we then try to assemble the piece of property large enough to build a theatre which we think is the proper size theatre. An entrance to a theatre is somewhere between twenty and thirty feet. The entrance is called a lobby. It is practically impossible to buy twenty or thirty feet of frontage and then buy sufficient ground in the rear to build a theatre. 2253

Q. What is that? A. In many instances more than one owner has the piece of property adjoining the theatre. You have to make a deal with three or four owners of various pieces of property. The property itself in the rear is large enough for the theatre, and the front is too large for a lobby.

2254 Q. By twenty or thirty feet did you mean width or depth? A. Width.

Q. Am I right in this, that when you buy a plot the seller in many instances insists on selling the whole plot? A. Very definitely; he won't sell a piece of it because he can't improve it at a later date.

Q. In other words, if you look for the plot that you exactly need for the theatre, you just couldn't get the plot? A. Almost impossible.

Q. So that when you build on such property there is actually some excess property? A. Most always. That is easily understood. The lobby is at the end of the theatre; 2255 the theatre is generally back. You must have an entrance to the theatre and you must have some property left over almost always.

Q. In other words, the area necessarily used in the back is larger than the area used in the front? A. Right.

Q. The acquisition of just the area necessary to use front and back would leave a front area high and dry? A. Unless we stupidly build the theatre back to the sidewalk and use the frontage purely for the theatre, instead of using the rear ground. In most instances you can just buy a piece of property just large enough to build a two thousand or three thousand seat theatre. The property is usually a little larger. You could build the theatre up to the front 2256 but we would just be wasting that frontage and getting no revenue for it at all.

Q. As a practical matter that is never done? A. Practically never.

Q. Am I right in this, Mr. Vogel, that the Loew theatres are not in the real estate business as such? A. Definitely no.

Q. The real estate activities they have are incidental to this use of the excess space? A. Yes.

Q. And solely so? A. Yes, sir.

Q. In the cases where you don't build a theatre, the

amount of excess space is necessarily determined by what you take over, that is correct, isn't it? A. Correct. 2257

Q. There is on your part no option in those cases? A. No option.

Q. I want to ask you to turn to an entirely different subject. You are familiar, are you not, Mr. Vogel, with the exhibition of films in the theatres? A. Yes.

Q. It is a fact, is it not, that in all exhibitions news reels or shorts or both of them are given along with the feature? A. Yes.

Q. That was a fact in 1932? A. Yes, sir.

Q. Universal, so far as you know, throughout the exhibition world, in the United States, anyway? A. Yes. 2258

Q. Is it your opinion as a person familiar with exhibition that the news reels and shorts aided in the attractiveness of theatrical productions?

Mr. Driscoll: That is objected to as incompetent, irrelevant and immaterial; no basis laid.

The Special Master: There isn't much basis for it, I think.

Mr. Pollak: He has testified that he has had thirty years' experience.

Q. Do you constantly make contracts for the exhibition of films? A. Yes. 2259

Q. You deal with the managers of the individual theatres that take particular films for exhibition? A. I purchase the pictures for them.

Q. Do you receive representations as to the success or failure of different films in different theatres? A. From every theatre every week.

Q. And for how long roughly have you had this type of activity? A. Sixteen years.

Q. I now repeat the question.

2260 Mr. Driscoll: Same objection.

The Special Master: You are practically asking the witness, looking at an exhibit like Plaintiffs' Exhibit No. B, showing the weekly report of Loew's Astoria during the period during which "Letty Lynton" was exhibited there, whether in his opinion the shorts or extra "Down Memory Lane," News No. 44, was an added attraction to the theatre or not.

Mr. Pollak: It is almost self-evident that it was, but I think it is desirable to have it in the record that it was. I think it is desirable to have the testi-
2261 mony of a witness who is familiar with it. I think it is desirable to have a record in a case of this importance.

The Special Master: Of course, as applied to any particular case he can't tell of his own knowledge that during that week the fact that they had those shorts there made any mathematical difference in the receipts of the theatre at the time that "Letty Lynton" was being played.

Mr. Pollak: It is because he can't testify to a particular instance and because no human being can after a lapse of six years, that I am having him testify to the general fact. Also as to the case in
2262 each theatre. He has already testified that the practice was universal. I should like to supplement that by what is almost self-evident, that the universal practice had a foundation in practical business conditions.

The Special Master: You have got the testimony in that very time in those "B" exhibits, that there were shorts that ran along, or sometimes vaudeville——

Mr. Pollak: I will get to vaudéville in a moment.

The Special Master: ——at the same time that

"Letty Lynton" was given, so you don't need any 2263
further testimony on that.

Mr. Pollak: I think I would like to have his expert judgment on it.

The Special Master: Well, go ahead. Exception.

Q. (The pending question was read by the stenographer, as follows: "Is it your opinion as a person familiar with exhibition that the news reels and shorts aided in the attractiveness of theatrical productions?") A. Yes, sir.

Q. How with respect to vaudeville, Mr. Vogel; would your answer be the same? A. Yes, sir.

Q. Mr. Vogel, have you in your possession certain data 2264
bearing on the attractiveness of vaudeville as reflected in the motion picture business? Do you know of any facts bearing on it, just yes or no? I will reframe the question. As to vaudeville, Mr. Vogel, can you give specific illustrations of your conclusion that vaudeville added to the attractiveness of a motion picture production?

The Special Master: Confine yourself to the theatres involved in this case and the evidence that is in already.

Mr. Pollak: Speaking of the Loew chain of theatres or a theatre.

The Special Master: With reference to the par- 2265
ticular weeks that are in evidence, the testimony of which is in evidence.

Q. Can you give an illustration as far back as 1932 of your particular chain?

The Special Master: We have in evidence full schedules of what happened while "Letty Lynton" was being exhibited, so the witness should confine himself to a designation of those exhibits, it seems to me, not just general testimony to the effect that

2266 vaudeville is a great thing and helps the receipts of the pictures. He should confine himself to these. They are all there if he wants to look at them.

Mr. Pollak: Yes, refresh your recollection. (Exhibits handed to the witness.)

The Special Master: What theatre do you want?

The Witness: Century Theatre, Baltimore; (examining exhibits) it didn't play the Century; it played the Stanley.

The Special Master: There is a memorandum of Mr. Driscoll's which purports to go into this subject.

Mr. Driscoll: Do you want a list of the vaudeville theatres?

2267 The Witness: I have one here, Penn Theatre, Pittsburgh (referring to Plaintiffs' Exhibit D-20).

Q. Taking the Penn Theatre, Pittsburgh, Mr. Vogel, you wanted to give an illustration drawn from that; will you give it? A. The stage show here and the picture together resulted in a gross of $16,00[illegible]. This was as poor a year as we have had in show business. Pictures of the type of "Letty Lynton," in my judgment, would not have done $10,000 without a stage show at that time. The vaudeville show made our theatre more popular. We gave at our theatre a vaudeville show when the other theatres throughout the city at that time ran straight picture show, so that 2268 the patrons of our theatre in addition to seeing "Letty Lynton" saw a vaudeville stage show, which they could not do at any other theatre in the town.

Q. And substantially that would be true in other theatres in which you showed vaudeville? A. Yes, sir.

Q. Have you anything to add to this matter of vaudeville, Mr. Vogel, in your own way? A. To this particular week?

Q. Preferably that week. A. It is very hard for me.

Q. Is it your opinion, throughout the whole chain the receipts were increased by the fact that vaudeville was shown with the film? A. Definitely.

Cross examination by Mr. Driscoll: 2269

Q. At this particular time how many vaudeville theatres did you have out of the 101 Loew theatres? A. I don't remember.

Q. Was it 50 or 75 or 100, or was it 18? A. Closer to eighteen.

Q. Haven't you taken the trouble to see whether or not we were accurate in our statement to this Court that you were operating only eighteen vaudeville theatres at this time? A. I did not.

Q. Didn't Mr. Pollak ask you to check the assertion that you were operating only eighteen vaudeville theatres? A. 2270
He didn't mention the number of theatres.

Q. Now, Mr. Vogel, aren't these the only theatres that were vaudeville theatres at that time: the Boulevard, the Pitkin, the Newark, the Metropolitan, the State, the Triborough, the Valencia, the Orpheum, the Rochester, the Gates, the Yonkers, the Boston, the Bay Ridge, the Jersey City, the Syracuse, the Paradise, the Penn Pittsburgh and the Fox Atlanta; aren't those the only theatres that were showing vaudeville at that time?

Mr. Pollak: The witness may refresh his recollection. He wouldn't know off hand.

2271

A. I think so; I am not positive.

Q. Do you know of any others? A. No. The Century, Baltimore, didn't show "Letty Lynton."

Q. I am taking into consideration only the 101 theatres that played "Letty Lynton."

The Special Master: And they played vaudeville at the time they played "Letty Lynton."

Mr. Driscoll: I wanted to know how many of the 101 played vaudeville; only eighteen played vaude-

272 ville; I didn't happen to include the theatre he mentioned.

Q. You spoke about vaudeville contributing to the attractiveness of the show; I think Walter put it to you and you said yes. How many vaudeville theatres does Loew run now? A. Three.

Q. It runs three now? A. Yes.

Q. It ran eighteen in 1932; five years prior to that it ran perhaps a hundred? A. Yes.

Q. So that vaudeville at this time was on its way out, in 1932? A. You couldn't get the attractions.

273 Q. Vaudeville was on its way out at this time, Mr. Vogel; that was my question. A. Yes.

Q. Let us take the Penn of Pittsburgh, that you spoke about on your direct examination. Have you the box office statement of that there before you?

The Special Master: D-20.

A. (Producing paper.) Yes, sir.

Q. You pointed out that the receipts there that week were $16,000, did you not? A. Yes, sir.

Q. In that particular instance we have certain expenses that are definitely vaudeville expenses, haven't we? A. Yes.

274 Q. The first part of that would be an item of salaries for vaudeville, and in that particular case it was $3,768; is that correct? A. No; less cost of the shorts, $3,600.

Q. Then you had to have an orchestra when you had vaudeville, didn't you? A. Yes.

Q. In that particular case it was $1,055? A. Yes.

Q. And you also had to have certain extra help when you had vaudeville? A. Yes.

Q. In this particular case you had a maintenance man; you didn't have him ordinarily, did you? A. Yes.

Q. Stage manager; you didn't have him when you didn't have vaudeville? A. Yes. 2275

Q. Property man, $74.75? A. Yes.

Q. And carpenter? A. Yes, we have him.

Q. So that we have stage manager salary, we have property man salary, we have orchestra disbursement and we have vaudeville act salaries and so forth, and they all come to—how much would you say that was? A. The whole thing would be $5,600.

Q. And your statement on direct examination was that the picture without vaudeville would not have drawn in more than $10,000 instead of $16,000? A. Yes.

Q. And your direct expense for vaudeville alone which you identify now is $5,600? A. Yes. 2276

Q. So that there wasn't any profit whatever in the vaudeville? A. Very little.

Q. And that is true throughout the entire circuit of 18 theatres; there was practically no profit to vaudeville? A. No; in this particular instance that particular show had no drawing card so we didn't make any money.

Q. In other words, the extra expense you were put to by reason of your stage show ate up whatever additional money came into your theatre by reason of the vaudeville? A. Not all of it.

Q. It ate up one-third of the box office receipts for the direct expenses of the vaudeville? A. Yes. 2277

By Mr. Pollak:

Q. There were two or three matters mentioned by Mr. Driscoll. As to the fact that there are fewer vaudeville shows now; have you anything to say as to that? A. The radio and motion pictures have corralled all the attractions that formerly played at theatres, and those that we can get ask for so much money that it is impossible to make any money with it, so that at most of the theatres we have decided to eliminate vaudeville.

Letter, Dated April 11, 1938, Made Part of Record.

2278 By Mr. Driscoll:

Q. In other words, vaudeville doesn't pay? A. In a few spots, like the State Theatre.

Mr. Pollak: That is all.

Mr. Driscoll: The defendants rest again?

Mr. Pollak: We rest.

The Special Master: The record is permanently closed.

Subsequent to this hearing and on or about April 11, 1938 Special Master Auchincloss received the following
2279 letter dated April 11, 1938 from Walter H. Pollock, Esq., Counsel for the defendants and in pursuance of the request contained in said letter directed the official stenographer to add this letter to the minutes:

COPY

COHEN, COLE, WEISS & WHARTON
61 Broadway
New York

11 April 1938

2280 Gordon Auchincloss, Esq.
50 Broadway
New York, N. Y.

Re Sheldon and Barnes v. Metro-Goldwyn Pictures, et al.

Dear Mr. Auchincloss:

Following up Mr. Cohen's conversation with you of last Friday, I wish, on behalf of the defendant Loew's Incorporated and its subsidiaries, to call your attention to the

fact that on Exhibits L-6, L-8, L-9, L-10 and L-12 we have 2281
shown in the next to the last column on such Exhibits the entire amount of the profit attributable to Loew's Incorporated for the period during which "Letty Lynton" with other attractions was exhibited; and in the last column on such Exhibits we have shown the ⅔rds share of such profit which according to our contention should be allocated to "Letty Lynton."

Owing to the uncertainty as to the basis on which profits would be allowed in the case of theatres, we omitted to compute the amount of the federal income taxes which we claim should be allowed based upon the amount ultimately found to be due to the plaintiffs in the action.

The federal corporation income tax payable in respect 2282
to the year 1932 was 13¾% and this percentage of the final figures is the amount which we claim should be allowed the defendant Loew's Incorporated in respect of this claim.

I respectfully suggest that for the completion of the record the stenographer be requested to add this letter to the record.

I am sending a copy of this letter to Mr. Driscoll.

Sincerely yours,

(Sgd.) WALTER H. POLLAK

WHP/G

2283

Vol. II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 482

EDWARD SHELDON AND MARGARET AYER BARNES, PETITIONERS,

vs.

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 25, 1939.

CERTIORARI GRANTED DECEMBER 4, 1939.

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Direct	529
Alexander Lichtman:	
Direct	540
Cross	548
Re-direct	558
Daniel Jaycocks:	
Direct	562
Cross	569
Re-direct	572
George P. Skouras:	
Direct	573
Cross	578
Re-direct	586

Defendants' Witnesses (continued).

	PAGE
John M. Benas:	
Direct	588
Samuel Rinzler:	
Direct	596
Cross	599
Nathan J. Blumberg:	
Direct	600
Cross	604
Re-direct	606
Louis Notarius:	
Direct	608
Cross	612
Re-direct	613
Re-cross	614
Re-re-direct	614
William Yoost:	
Direct	616
Cross	620
Arthur M. Loew:	
Direct	642
David Blum:	
Direct	655
Cross	658
Robert La Giffin:	
Direct	661
Cross	669
Sidney R. Fleischer:	
Direct	670
Charles Moskowitz:	
Direct	688

Defendants' Witnesses (continued).

PAGE

J. Robert Rubin:
Direct 717
Cross 733
Re-direct 735
Re-cross 736

Joseph R. Vogel:
Direct 750
Cross 757
Re-direct 759

COMPLAINANTS' WITNESS:

Marx Prager:
Direct 740

DEFENDANTS' (NEW YORK) EXHIBITS:

6—Statements as to "Percentage retained by Foreign Distributors" of "Letty Lynton", marked in evidence at folio 51 764

9—Statement entitled "Depreciation—Los Angeles Studio", marked in evidence at folio 891 765

10—Statement as to "interest paid" to Loew's Incorporated. Total $1,559,559.70, marked in evidence at folio 899 765

15—Schedule showing, by numbers and dates, receipt of Exhibitors' contracts, covering "Joan Crawford No. 2 Production 208" ("Letty Lynton"), marked in evidence at folio 971 766

16—Form of contract as entered into with Exhibitors (1932) covering production (as above entitled), marked in evidence at folio 971 767

Defendants' (New York) Exhibits (continued).

	Page
17—"Corporation Organization Chart—August 31, 1932" with annexed sheet "Subsidiaries of Culver Export Corporation distributing in Foreign Countries, August 31, 1932", marked in evidence at folio 979	770
18*—Net income from "Letty Lynton", marked in evidence at folio 983	773
18-A—Total distributing expense ratio to film rental income, year ended August 31, 1932, marked in evidence at folio 983	774
18-B—Home office expenses of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation year ended August 31, 1932, marked in evidence at folio 983	775
18-C1 to C3—Salaries year ended August 31, 1932, marked in evidence at folio 984	776 to 779
18-D1 to D5—Completed negative cost "Letty Lynton", marked in evidence at folio 984	780 to 788
18-E1 and E2—Schedule A "Studio Overhead", marked in evidence at folio 984	789 to 791
18-F—Interest on investment in Studio plant and equipment, year ended August 31, 1932, marked in evidence at folio 984	792
19*—Net income from "Letty Lynton", marked in evidence at folio 1099	793
19-A—Total distributing expense ratio to film rental income year ended August 31, 1932, marked in evidence at folio 1099	794

*Exhibits 18 to 18-F constitute the amended account of Metro-Goldwyn Pictures Corporation.

*Exhibits 19 to 19-E constitute the amended account of Metro-Goldwyn-Mayer Distributing Corporation.

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Defendants' (New York) Exhibits (continued).

PAGE

19-B—Home Office Expenses of Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, year ended August 31, 1932, marked in evidence at folio 1099..... 795

19-C—Branch Office Expenses—year ended August 31, 1932, marked in evidence at folio 1099..... 796

19-D—Depreciation—Branch Equipment—year ended August 31, 1932, marked in evidence at folio 1099 797

19-E—Interest on Investment in Branch Office Equipment—year ended August 31, 1932, marked in evidence at folio 1099..... 798

20*—Culver Export Corporation Net Income from "Letty Lynton", marked in evidence at folio 1156 799

20-A—Total Distributing Expense Ratio to film rental income, year ended August 31, 1933, marked in evidence at folio 1156..... 799

20-B—Sundry Schedules, year ended August 31, 1933, marked in evidence at folio 1156..... 800

20-C—Salaries, year ended August 31, 1933, marked in evidence at folio 1156..... 801

20-D—Cost of production, "Letty Lynton", marked in evidence at folio 1156..... 802

21**—Foreign Subsidiaries, Net Income from "Letty Lynton", marked in evidence at folio 1160..... 803

* Exhibits 20 to 20-D constitute the amended account of Culver Export Corporation (exclusive of Foreign Subsidiaries).

** Exhibits 21 to 21-B3 constitute the amended account of the foreign subsidiaries of Culver Export Corporation.

Defendants' (New York) Exhibits (continued).

	PAGE
21-A1—Net income attributed to "Letty Lynton" (Foreign Versions) showing Distribution of Profit of Foreign Subsidiaries by countries, marked in evidence at folio 1160	804
21-A2—Net Income attributed to "Letty Lynton" (English Versions) showing Distribution of Foreign Subsidiaries by countries, marked in evidence at folio 1160	805
21-B1 to B3—Total Distributing Expense Ratio to Film Rental Income, year ended August 31, 1933, marked in evidence at folio 1160	807 to 809
22—Metro-Goldwyn-Mayer Culver City Analyses of Changes in Continuity and Production Balances, marked in evidence at folio 1274	810
23—M-G-M Studio. Continuities used and rejected 1930-1936 inclusive, marked in evidence at folio 1281	811
24—Metro-Goldwyn-Mayer Corporation—Comparative Statement of Direct Production for the Fiscal Years ended 1930 to 1936 inclusive, marked in evidence at folio 1283	812
25—Apportionment of Studio overhead on basis of Gross Receipts of Pictures Produced at Studio, marked in evidence at folio 1323	813
26—Short Review of "Letty Lynton" prepared by witness Louis Notarius for Paramount Theatres, marked in evidence at folio 1847	814
27-A—List of Officers and Directors of Defendant, Loew's Incorporated, marked in evidence at folio 1941	815
27-B—List of Officers and Directors of Defendant, Metro-Goldwyn Pictures Corporation, marked in evidence at folio 1941	816

Defendants' (New York) Exhibits (continued).

PAGE

27-C—List of Officers and Directors of Defendant, Metro-Goldwyn-Mayer Distributing Corporation, marked in evidence at folio 1941 817

27-D—List of Officers and Directors of Defendant, Culver Export Corporation, marked in evidence at folio 1941 818

28-A to 28-E—Corporations formerly subsidiary to Culver Export Corporation (now subsidiary to Loew's Incorporated), marked in evidence at folio 1967 ..... 819 to 823

29-A and 29-B—Sales of motion picture rights in plays (1932) made up by witness Sidney R. Fleischer (printed herein at pages 675 to 676), marked in evidence at folio 2024.

30 for Identification—Portions of letter of July 14, 1937, from Ligon Johnson, Esq. to Samuel D. Cohen, containing statement as to runs of plays embraced in Exhibit 29-A to 29-B (printed herein at pages 680 to 685), marked in evidence at folio 2038.

31—Extracts from Certificate of Incorporation and By-Laws of Motion Picture Producers and Distributors of America, marked in evidence at folio 2145 825

32—Resolution of Motion Picture Producers and Distributors of America re dues of members, with application for Class A membership, marked in evidence at folio 2146 828

33—Pages 1 to 51 of Printed Papers embodied contract between Louis B. Mayer Pictures (copartnership) and Metro-Goldwyn Pictures Corporation, Loew's Incorporated, etc., marked in evidence at folio 2157 832

Defendants' (New York) Exhibits (continued).

PAGE

34—Copy of Resolution of Board of Directors of May 8, 1930, approving contract, marked in evidence at folio 2189..... 883

DEFENDANTS' (CULVER CITY) EXHIBITS:

C-24—Schedule as to Shorts for fiscal year 1931-32, marked in evidence at folio 670..... 885

C-25—Statement entitled "Statement showing Production costs accrued on Features during Fiscal year 1932 and Percentage of Completed Costs and Shooting Time", marked in evidence at folio 671 886

C-27—List of Pictures released during the fiscal year 1932 regardless of when they were produced, marked in evidence at folio 789..... 888

C-29—Exhibit headed "Schedule A-1 Studio Overhead", marked in evidence at folio 863..... 889

C-30—Four sheets containing Craig's computations of overhead ratios on cost and material basis, marked in evidence at folio 2143..... 893

C-31—Letter, Craig to S. D. Cohen of Sept. 10, 1937, re four sheets above, marked in evidence at folio 2144..... 897

C-32—Schedule of charges of stars' unassigned time, marked in evidence at folio 2149..... 899

DEFENDANT, LOEW'S INCORPORATED, EXHIBITS:

L-1—Exhibit tendered as complete accounting by Loew's Incorporated, showing only stock ownership in theatre companies which exhibited "Letty Lynton", marked in evidence at folio 1370..... 900

Defendant, Loew's Incorporated, Exhibits (continued).

	PAGE
L-2—Weekly statement Metropolitan Theatre, Brooklyn (week ending May 20, 1932), marked in evidence at folio 1401	904
L-3—Computation of overhead as to Metropolitan Theatre, Brooklyn, marked in evidence at folio 1403	905
L-4—Weekly Statement Lexington Theatre (N. Y.) week ending May 20, 1932, marked in evidence at folio 1433	906
L-5—Computation of overhead as to Lexington Theatre (N. Y.), marked in evidence at folio 1435	907
L-6*—Schedule showing Profit or Loss of Theatres operated by corporations wholly owned by Loew's Incorporated, marked in evidence at folio 1484	908
L-7—Overhead expenses of theatres listed in Exhibit L-6, marked in evidence at folio 1487	909
L-8—Schedule showing Profit or Loss of theatres operated by Corporations partly owned by Loew's Incorporated, marked in evidence at folio 1513	910
L-8-A—Schedule showing profit as to two additional theatres (omitted from Exhibit L-8), marked in evidence at folio 1594	911
L-9—Overhead expenses of theatres listed in Exhibit L-8, marked in evidence at folio 1514	912
L-10—Schedule showing Profit or Loss of theatres operated by corporations in which Loew's Incorporated have indirect stock ownership, marked in evidence at folio 1587	913
L-11—Overhead Expenses of Theatres listed in Exhibit L-10, marked in evidence at folio 1589	914

* Exhibits L-6 to L-13, inclusive, constitute the account of 100 odd theatres in which Loew's Incorporated had stock interest or otherwise which exhibited the motion picture "Letty Lynton".

Defendant, Loew's Incorporated, Exhibits (continued).

PAGE

L-12—Schedule showing Profit or Loss of Theatres Managed by Marcus Loew Booking Agency, marked in evidence at folio 1590 915

L-13—Overhead expense of Theatres listed in Defendants' Exhibit L-12, marked in evidence at folio 1591 916

Defendants' exhibit offered before the Special Master from the Proceedings Before Accounting (Prior Printed Record) and marked herein Defendants' Exhibits R-1, R-2, etc., as well as testimony offered before the Special Master from such prior proceedings, are listed separately immediately following the index to Complainants' exhibits.

COMPLAINANTS' EXHIBITS:

B-4, B-11, B-13, B-27, B-29, B-37, B-39 and B-43—Manager's reports as to certain theatres listed on Defendants' Exhibit L-6, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1527....917 to 924

C-3, C-12 and C-13—Manager's reports as to certain theatres listed on Defendants' Exhibit L-8, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1597 .....925 to 927

D, D-4, D-8, D-10 and D-20—Manager's reports as to certain theatres listed on Defendants' Exhibit L-10, covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1598.....928 to 932

Complainants' Exhibits (continued).

PAGE

L-7—Manager's report of Fox Theatre, Atlanta, Ga., one of the theatres listed on Exhibit L-12 covering weekly operation during period when "Letty Lynton" was exhibited, marked in evidence at folio 1599 933

M—Officers and Directors of Theatre Companies, marked in evidence at folio 2034 934

Statement as to Testimony and Exhibits printed in the Proceedings before Accounting (hereinafter for brevity referred to as P. P. R.) and reoffered in evidence in the Accounting Proceedings before the Special Master.

(Each reference to the prior printed record whether to testimony or exhibits has been given, at the request of the Special Master, a separate reference number, and in the case of exhibits from the prior printed record, separate exhibit numbers, R-1, R-2, etc., have been superadded.)

Reference No. 1—Testimony of Margaret Ayer Barnes (actually incorporated in this record) 631

Reference No. 2—Letter of April 15, 1931 and agreement of April 17, 1931 in relation to purchase of motion picture rights of play "Dishonored Lady" (P. P. R. "Complainants' Exhibit S", pp. 788-893; marked herein Defendants' Exhibit R-1) ... 635

Reference No. 3—Testimony of Jesse L. Lasky (actually incorporated in this record) 637

Reference No. 4—"Trial of Madeleine Smith" (Book) (Defendants' Exhibit E of original record, marked herein Defendants' Exhibit R-2; not printed as part of either record, but will be handed up on the argument) 639

References to Record of Proceedings before Accounting (continued).

PAGE

Reference No. 5—Manuscript of Complainants' play, "Dishonored Lady" (Complainants' Exhibit I, of original record, P. P. R., pp. 237-494; marked herein as Defendants' Exhibit R-3) 640

Reference No. 6—Continuity of motion picture "Letty Lynton" (Complainants' Exhibit 3 of original record, P. P. R., pp. 495-622; marked herein as Defendants' Exhibit R-4) 640

Reference No. 7—Novel "Letty Lynton" by Mrs. Belloc Lowndes (Defendants' Exhibit C of original record, marked herein as Defendants' Exhibit R-5, not printed as part of either record, but will be handed up on the argument) 641

Reference No. 8—Assignment of motion picture rights to the novel "Letty Lynton" (Defendants' Exhibit D of original record, P. P. R., pages 826-828, marked herein as Defendants' Exhibit R-6) 641

Reference No. 9—Testimony of Irving Thalberg (P. P. R., pages 73-81) 677

Reference No. 10—Testimony of Hunt Stromberg (P. P. R., pages 81-114) 677

Reference No. 11—Testimony of John Meehan (P. P. R., pages 114-130) 677

Reference No. 12—Testimony of Clarence L. Brown (P. P. R., pages 131-139) 677

Reference No. 13—Testimony of Wanda Tuchok (P. P. R., pages 140-142) 678

References to Record of Proceedings before Accounting (continued).

	PAGE
Reference No. 14—Testimony of Samuel Marx (P. P. R., pages 142-143)	678
Reference No. 15—Testimony of Edna Schley (P. P. R., pages 144-146)	678
Reference No. 16—Testimony of Gabriel L. Hess (P. P. R., pages 59-71)	686
Reference No. 17—Resolution of Motion Picture Producers and Distributors of America (Defendants' Exhibit A of original record, P. P. R., pages 805-813; marked herein as Defendants' Exhibit R-7)	686
Reference No. 18—Testimony of J. Robert Rubin (actually incorporated in this record)	739

Statement as to Exhibits.

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For the convenience of the Court we herewith set forth an excerpt from the preliminary portion of the Special Master's report which explains the designations given to the exhibits.

> "It may be noted here that Complainants' Exhibits are in one series, with alphabetical designations A to M, both inclusive, with addition of arabic numerals where exhibits consist of more than one sheet, and that the Defendants' Exhibits are in four series; first, those introduced in New York in connection with general accounting marked simply with arabic numerals 1 to 34, with addition of letters and numbers where exhibits consist of more than one sheet; second, those introduced in Culver City, California, in connection with general accounting marked with arabic numerals prefaced by letter "C", C-1 to C-34; third, those introduced in connection with the accounting on behalf of the defendant Loew's Incorporated, marked L-1 to L-15, inclusive, and fourth, there were references to testimony and to exhibits which either appear in the printed record of the case in the United States Circuit Court of Appeals, or were submitted (unprinted) to that Court as a part of that record. All such references either to testimony or to exhibits are numbered consecutively References 1-18, inclusive, and in the case of exhibits introduced from such printed record, there were superadded exhibit numbers R-1 to R-7, inclusive."

2288

2289

Only such exhibits as are deemed by the parties necessary to a decision of the questions arising on the appeal have been printed as a part of this record.

Defendants' Exhibit 6.

"LETTY LYNTON"

Percentage Retained By Foreign Distributors

		1932-1933		1933-1934		1934-1935		1935-1936	
2290	Country	Foreign Version	Regular	Foreign Version	Regular	Foreign Version	Regular	Foreign Version	Re
	Argentina	25	25*	30	30*	30	30*	30	30
	Australia		40*		40*		40*		40
	Austria	35	35	40*	40	40*	40	40*	40
	Belgium	15*	25	15*	25	25*	25	25*	25
	British West Indies		25		25*		45*		40
	Brazil	15	30*	15	30*	15	30*	15	30
	Bulgaria	30	40	35	35	40	40	40	40
	Chile	30	30*	30	30*	30	30*	30	30
	China		30*		30*		30*		30
	Colombia	35	35*	35	35*	35	35*	45	45
	Cuba	35	35*	35	35*	40	40*	40	40
	Czecho-Slovakia	35	35	35	35	35	35	60	60
	Denmark	35	35*	35	35*	35	35	35	35
	Dutch East Indies		35*		35*		45*		45
2291	Egypt	15	40	25*	25*	25*	25*	25	25
	Esthonia					40	40	40	40
	Finland	35*	35*	40*	40*	40	40*	40	40
	France	35*	35	40*	40	60*	60	60*	60
	Germany	40*	40	50*	50	50*	50	50	50
	Great Britain		35*		35*		35*		35
	Greece	40	40	35*	35*	30*	30*	30*	30
	Guatemala	35	35*	35*	35*	35*	35*	40	40
	Holland	15*	35*	30*	30	30*	30	35	35
	Hungary	35*	35*	35*	35*	35	35*	35	35
	India		30*		30*		30*		30
	Italy	15*	38*	35*	35	36½*	36½	35*	35
	Japan		35*		35*		35*		35
	Jugo Slavia	45	45	45*	45	45*	45	55*	55
	Latvia	40*	40	40*	40	60*	60	60	60
2292	Lithuania					50	50	50	50
	Mexico	35	35*	40	40*	40	40*	50	50
	Norway	40	40*	40	40*	40	40*	35	35
	Panama	15	40*	15	40*	15*	40	15	40
	Peru	30	30*	30	30*	30	30*	30	30
	Philippines	30	30*	30	30*	30	30*	30	30
	Poland	35	35*	35	35*	37½	37½*	42½	42
	Portugal	35	35	35*	35*	35*	35*	35*	35
	Puerto Rico	40	40*	40	40*	40	40*	40	40
	Roumania	40	40	40	40	40	40	50	50
	South Africa		25		25*		25*		25
	Spain	35	35	35*	35*	50*	50*	50*	50
	Straits Settl'ts	25	25*	25	25*	25	25*	25	25

Defendants' Exhibit 9.

2293

Depreciation—Los Angeles Studio

	At Aug. 31/31	100% Depreciated	Balance	Rate	Depreciation
CULVER CITY					
Studio					
Equipment	2,440,567.82	921,078.02	1,519,489.80	15%	227,923.31
CULVER CITY					
Studio Sound					
Equipment	784,291.95		784,291.95	15%	117,665.87
CULVER CITY					
Studio Bldg.	2,971,870.05		2,971,870.05	5%	148,593.50
HOLLYWOOD					
Studio Bldg.	528,970.53		528,970.53	5%	26,448.53
					$520,631.21

2294

Rental of Studio & Facilities	340,927.05
Unabsorbed Studio Depreciation	179,704.16
	$520,631.21

Defendants' Exhibit 10.

Interest Paid

Date	Amount	Check #
Sept. 30/31	$50,000.	1934
" 26/31	59,992.42	1942
" 24/31	107,979.93	2794
Nov. 5/31	44,446.93	3040
" 21/31	130,265.65	3752
Dec. 19/31	130,497.42	4700
Jan. 14/32	129,809.47	5253
Feb. 13/32	126,701.52	6308
Mar. 12/32	122,728.73	7071
Apr. 7/32	114,689.96	7567
May 7/32	110,411.13	8512
June 4/32	106,884.28	9616
July 1/32	103,832.51	10581
" 30/32	101,974.90	11701
Sept. 1/32	119,344.88	12963
	$1,559,559.79	

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	Argentina	25	25*	30	30*	30	30*	30	30*
	Australia		40*		40*		40*		40*
	Austria	35	35	40*	40	40*	40	40*	40
	Belgium	15*	25	15*	25	25*	25	25*	25*
	British West Indies		25		25*		45*		40*
	Brazil	15	30*	15	30*	15	30*	15	30*
	Bulgaria	30	40	35	35	40	40	40	40
	Chile	30	30*	30	30*	30	30*	30	30*
	China		30*		30*		30*		30
	Colombia	35	35*	35	35*	35	35*	45	45
	Cuba	35	35*	35	35*	40	40*	40	40*
	Czecho-Slovakia	35	35	35	35	35	35	60	60
	Denmark	35	35*	35	35*	35	35	35	35
	Dutch East Indies		35*		35*		45*		45*
2291	Egypt	15	40	25*	25*	25*	25*	25	25*
	Esthonia					40	40	40	40
	Finland	35*	35*	40*	40*	40	40*	40	40*
	France	35*	35	40*	40	60*	60	60*	60
	Germany	40*	40	50*	50	50*	50	50	50
	Great Britain		35*		35*		35*		35*
	Greece	40	40	35*	35*	30*	30*	30*	30*
	Guatemala	35	35*	35*	35*	35*	35*	40	40
	Holland	15*	35*	30*	30	30*	30	35	35
	Hungary	35*	35*	35*	35*	35	35*	35	35*
	India		30*		30*		30*		30*
	Italy	15*	38*	35*	35	36½*	36½	35*	35
	Japan		35*		35*		35*		35*
	Jugo Slavia	45	45	45*	45	45*	45	55*	55
	Latvia	40*	40	40*	40	60*	60	60	60
2292	Lithuania					50	50	50	50
	Mexico	35	35*	40	40*	40	40*	50	50*
	Norway	40	40*	40	40*	40	40*	35	35*
	Panama	15	40*	15	40*	15*	40	15	40
	Peru	30	30*	30	30*	30	30*	30	30*
	Philippines	30	30*	30	30*	30	30*	30	30
	Poland	35	35*	35	35*	37½	37½*	42½	42½
	Portugal	35	35	35*	35*	35*	35*	35*	35*
	Puerto Rico	40	40*	40	40*	40	40*	40	40*
	Roumania	40	40	40	40	40	40	50	50
	South Africa		25		25*		25*		25*
	Spain	35	35	35*	35*	50*	50*	50*	50*
	Straits S'tlm'ts	35	35*	35	35*	35	35*	35	35
	Sweden	35	35*	35	35*	35	35*	35	35
	Switzerland	20	35	25*	25	25*	25*	25*	25
	Turkey	40	40	30*	30				
	Uruguay			40	40	47	47	83	83
	Venezuela	35	35*	35*	35*	40*	40*	50*	50*

Asterisk (*) after percentage figure denotes rate applicable to distribution of LETTY LYNTON in the particular country opposite which the figure appears, as well as (by reference to column heading) the version distributed therein for fiscal year shown, i.e. whether regular English version or one of the foreign versions (French, German, Italian or Spanish). Figures not so marked were not applicable to distribution of such motion picture.

Defendants' Exhibit 15.

2296

Contracts received 1931-32 Season

Week-ending	No.	To date	Week-ending	No.	To date
5/30 1931	7		1/30	151	6447
6/6	53	60	2/6	99	6546
6/13	74	134	2/13	126	6672
6/20	147	281	2/20	130	6802
6/27	150	431	2/27	131	6933
7/3	109	540	3/5	71	7004
7/11	154	694	3/12	84	7088
7/18	91	785	3/19	90	7178
7/25	166	951	3/26	60	7238
8/1	108	1059	4/2	50	7288
2297 8/8	148	1207	4/9	52	7340
8/15	258	1465	4/16	48	7388
8/22	249	1714	4/23	(red) 108	7280
8/29	116	1830	4/30	35	7315
9/4	208	2038	5/7	35	7350
9/12	218	2256	5/14	16	7366
9/19	244	2500	5/21	50	7416
9/26	160	2660	5/28	20	7436
10/3	228	2888	6/4	12	7448
10/10	246	3134	6/11	27	7475
10/17	207	3341	6/18	31	7506
10/24	250	3591	6/25	25	7531
10/31	238	3829	7/2	14	7545
11/7	230	4059	7/9	12	7557
11/14	224	4283	7/16	23	7580
2298 11/21	253	4536	7/23	11	7591
11/28	256	4792	7/30	10	7601
12/5	252	5044	8/6	6	7607
12/12	262	5306	8/13	12	7619
12/19	238	5544	8/20	10	7629
12/26	170	5714	8/27	10	7639
1/2 1932	102	5816	9/3	3	7642
1/9	157	5973	9/10	12	7654
1/16	162	6135	9/17	2	7656
1/23	161	6296	9/24	10	7666

Defendants' Exhibit 16

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Extract from printed form of contract under which motion picture tty Lynton was licensed by the defendant Metro-Goldwyn-Mayer istributing Corporation to exhibitors covering the 1931-32 release ason, the motion picture Letty Lynton being designated in said hedule as "Production #208 Joan Crawford #2".

SCHEDULE

Number	Designation of Photoplay	Consecutive days run	License Fee or Minimum Guarantee Against Percentage of Receipts License Fee or Guarantee	% of all Gross receipts	Gross Receipts In Excess of which Distributor shares	Distributor's Percentage of Excess	Score Charge License Fee
01	WALLACE BEERY No. 1						
02	WALLACE BEERY No. 2						
03	COSMOPOLITAN No. 1						
04	COSMOPOLITAN No. 2						
05	COSMOPOLITAN No. 3						
06	COSMOPOLITAN No. 4						
07	JOAN CRAWFORD No. 1						
08	JOAN CRAWFORD No. 2						
09	MARION DAVIES No. 1						
10	MARION DAVIES No. 2						
11	GRETA GARBO No. 1						
12	GRETA GARBO No. 2						
13	JOHN GILBERT No. 1						
14	JOHN GILBERT No. 2						
15	JOHN GILBERT No. 3						
16	WILLIAM HAINES No. 1						
17	WILLIAM HAINES No. 2						
18	WILLIAM HAINES No. 3						
19	BUSTER KEATON No. 1						
20	BUSTER KEATON No. 2						
21	LAUREL & HARDY No. 1						
22	LUNT & FONTANNE No. 1						
23	ROBERT MONTGOMERY No. 1						
24	ROBERT MONTGOMERY No. 2						
25	ROBERT MONTGOMERY No. 3						
26	RAMON NOVARRO No. 1						
27	RAMON NOVARRO No. 2						

2300

2301

Defendants' Exhibit 16.

2302.

Production Number	Designation of Photoplay	Consecutive days run	License Fee or Minimum Guarantee Against Percentage of Receipts License Fee or Guarantee	% of all Gross receipts	Gross Receipts In Excess of Which Distributor shares	Distributor's Percentage of Excess	Score Charge License Fee
228	NORMA SHEARER No. 1						
229	NORMA SHEARER No. 2						
230	LAWRENCE TIBBETT No. 1						
231	AFTER ALL. (Based upon the play by John Van Druten)						
232	ARSENE LUPIN. (Based upon the famous play "Arsene Lupin" by M. LeBlanc and F. de Crosset)						
2303							
233	THE AWAKENING. (An original story by John Van Druten)						
234	BOARDING SCHOOL (An original story by Helen Meinardi)						
235	BRIDGE VS. BRIDGE. (Based upon the story by Ed. L. McKenna)						
236	FLYING HIGH. (Based upon George White's famous Broadway success, by J. McGowan, DeSylva, Brown and Henderson)						
2304							
237	WIFE TO HUGO (Based upon the novel by Job Baines)						
238	GUILTY HANDS. (An original story by Bayard Veiller)						
239	HONOLULU. (An original story by Mildred Cram)						
240	NIGHT COURT. (An original play by Charles Beahan and Mark Hellinger)						

Defendants' Exhibit 16.

2305

Production Number	Designation of Photoplay.	Consecutive days run	License Fee or Minimum Guarantee Against Percentage of Receipts: License Fee or Guarantee	% of all Gross receipts	Gross Receipts In Excess of which Distributor shares	Distributor's Percentage of Excess	Score Charge License Fee
241	RED HEADED WOMAN. (Based upon the story by Katherine Brush)						
242	THE SQUAW MAN. (Based upon the play by E. M. Royle)						
243	THREE WISE FOOLS. (Based upon the play by Austin Strong)						
244	THE MARQUEE FIVE, No. 1						
245	THE MARQUEE FIVE, No. 2						
246	THE MARQUEE FIVE, No. 3						
247	THE MARQUEE FIVE, No. 4						
248	THE MARQUEE FIVE, No. 5						
251	EMMA (Starring Marie Dressler)						
252	PROSPERITY (Starring Marie Dressler)						

2306

It is understood and agreed that where a photoplay is designated in this schedule only by the name of a single star, or only by the name of a single director, this shall not refer to and there shall not be included herein because of such designation any picture in which the said star shall appear with any other star or stars, whether designated in the Schedule or not, nor any picture which may be directed by the said director and in which there shall appear any star or stars.

2307

IT IS FURTHER UNDERSTOOD AND AGREED THAT DISTRIBUTOR MAY RELEASE AT ANY TIME, AND INDEPENDENTLY OF THIS AGREEMENT, AN ADDITIONAL PHOTOPLAY OF ANY STAR LISTED IN THE SCHEDULE (BUT NOT MORE THAN THREE (3) SUCH ADDITIONAL PHOTOPLAYS ALTOGETHER DURING THE TERM OF THIS AGREEMENT); THAT NOTHING IN THIS AGREEMENT CONTAINED GIVES EXHIBITOR ANY RIGHT TO ANY OF SUCH ADDITIONAL PHOTOPLAYS, AND, THAT ANY THEREOF, WHENEVER RELEASED, MAY BE EXHIBITED AND/OR LICENSED FOR EXHIBITION BY DISTRIBUTOR FREE OF ANY CLAIM THERETO BY EXHIBITOR HEREUNDER, AND WITHOUT AFFECTING IN ANY MANNER DISTRIBUTOR'S OBLIGATION TO FURNISH AND EXHIBITOR'S OBLIGATION TO PLAY AND/OR PAY FOR ANY AND ALL THE PHOTOPLAYS CONTRACTED FOR HEREUNDER.

Defendants' Exhibit 17.

CORPORATE ORGANIZATION CHART

AUGUST 31, 1932.

Loew's Incorporated

Owns 100% of stock of M-G-M Company, Inc.

Owns 18,901-21/48 Shares of Metro-Goldwyn Pictures Corporation 7% Cumulative Preferred Stock

M-G-M Company Inc.
Owns 100% of Common Stock of

Metro-Goldwyn Pictures Corporation
Capitalization:

157,913⅜ Shares 7% Cumulative Preferred stock at $27.00 Par	$4,263,661.13
620,000 Shares Common Stock at $5.00 Par	3,100,000.00

Owns 100% of Stock of

Metro-Goldwyn-Mayer Distributing Corporation
Domestic Distributor

Metro-Goldwyn-Mayer Corporation
Producer

Culver Export Corporation
Owns 100% or less of

Various Subsidiaries Distributing in Foreign Countries per list attached

(NOTES:) The Corporate Chart at August 31, 1933 was the same as shown above except that the total shares of Metro-Goldwyn Pictures 7% Cumulative Preferred Stock owned by Loew's Incorporated was 18,601-41/48 Shares, and the total outstanding 7% Cumulative Preferred Stock of Metro-Goldwyn Pictures Corporation was 154,173⅜ Shares—$4,162,681.13.

The Cumulative Preferred Stock of Metro-Goldwyn Pictures Corporation was listed on the New York Stock Exchange and except as above stated was held by outside stockholders.

Defendants' Exhibit 17:

SUBSIDIARIES OF CULVER EXPORT CORPORATION DISTRIBUTING IN FOREIGN COUNTRIES

2311

AUGUST 31, 1932.

Operates in	Name of Company
gentine	M-G-M de la Argentina
stralia	M-G-M Ltd.
w Zealand	M-G-M-N.Z.Ltd.
stria	M-G-M-Films G.m.b.H.
lgium	M-G-M S.A.Belge
azil	M-G-M do Brazil
igaria	M-G-M-Film Vertriebs A.G.
ile	M-G-M de Chile
ina	M-G-M of China
lumbia	M-G-M de Colombia
ba	M-G-M de Cuba S.A.
echo-Slovakia	M-G-M A.G.
nmark	M-G-M A.S.
tch East Indies (Java) and Straits Settlements (Singapore)	M-G-M Oriental Inc.
ypt	M-G-M of Egypt
nland	O.Y.M-G-M-Films O.B.
ance and Turkey	M-G-M S.A.F.
rmany	M-G-M-Films A.G.
eat Britain	M-G-M Pictures Ltd.
eece	M-G-M Films (Hellas) Ltd.
lland	N/V M-G-M Films Company
ngary	M-G-M Distributing Corporation
dia	M-G-M India Ltd.
aly	S.A.I.M-G-M Films
pan	M-G-M Company Ltd.
go-Slavia	M-G-J.D.Z.F.F.
tvia	Filmindustrie A.G. M-G-M
xico	M-G-M de Mexico
rway	M-G-M A.S.
nama	M-G-M de Panama
ru	M-G-M del Peru
land	T/F^e M-G-M
rto Rico	M-G-M de Puerto Rico
rtugal	M-G-M Films Ltda.
mania	M-G-Films, S.A.R.

2312

2313

Defendants' Exhibit 17.

2314

Operates in	Name of Company
South Africa	M-G-M Films S.A. Proprietary Ltd.
Spain	M-G-M Iberica S.A.
Switzerland	M-G-M S.A. Geneva
Venezuela	M-G-M de Venezuela
British West Indies	M-G-M of West Indies
Philippines	M-G-M Manila Inc.
Sweden	Filmaktiebolaget Le Mat-M-G

NOTE:—#1

All of above corporations were wholly owned by Culver Export Corporation except Filmaktiebolaget Le Mat—Metro-Goldwyn (Sweden) of which Culver Export Corporation owned 115/215 of the capital stock.

2315

NOTE:—#2

Philippine subsidiary become wholly owned during year ended August 31st, 1933; 50 2/3% owned at August 31, 1932.

NOTE:—#3

Distribution in Guatemala during the year ended August 31, 1933 was carried on thru a branch office of Culver Export Corporation located in that country.

NOTE:—#4

With the exceptions noted in Notes 1, 2 and 3, the status of subsidiaries was the same in 1933 as in 1932.

2316

Defendants' Exhibit 18.

METRO-GOLDWYN PICTURES CORP.

NET INCOME FROM "LETTY LYNTON"

Film Rental Income (excluding Canada)		$727,053.84	
Less: Retained by M.G.M. Dist. Corp. (20%)		145,410.77	
Net Film Rental Income		$581,643.07	
Distributing Expense—2.15% of Same		12,505.33	
		$569,137.74	
Production Cost		391,542.24	
Net Income (excluding Canada)			$177,595.50
Canadian Film Rental Income		$27,369.72	
Less: Retained by Regal Films Ltd.		11,432.29	
Net Film Rental Income		$15,937.43	
Less:			
Cost of Prints	$2,479.40		
E R P I Royalty	600.00		
M P P D A Dues	79.69	3,159.09	
Net Income from Canada			12,778.34
Net Income from "Letty Lynton"			$190,373.84
Less Federal Income Taxes 14½%			29,604.21
			$160,769.63

Defendants' Exhibit 18-A.

320

METRO-GOLDWYN PICTURES CORPORATION

TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME

YEAR ENDED AUGUST 31, 1932

Film Rental Income (excluding Canada)	$30,020,526.08	
Less: Retained by M-G-M Dist. Corp. (20%)	6,004,105.22	
Net Film Rental Income		$24,016,420.86
DISTRIBUTING EXPENSE		
Home Office Expense—Per Schedule (18-B)	$567,617.36	
Depreciation of Equipment—Home Office	14,927.54	
	$582,544.90	
LESS		
Trailer Income	$50,000.08	
Miscellaneous Income	16,513.19	
	66,513.27	
Total Distributing Expense (—2.15% of Net Film Rental Income)		$516,031.63

321

322

Defendants' Exhibit 18-B.

METRO-GOLDWYN PICTURES CORPORATION

HOME OFFICE EXPENSES OF METRO-GOLDWYN PICTURES CORP. & METRO-GOLDWYN-MAYER DIST. CORP.

Year Ended August 31, 1932

Salaries—General (Per Schedules 18-C1, 18-C2, 18-C3)	$1,077,254.55
Rent and Light	108,921.58
Advertising	94,844.29
General Expense	76,550.31
Telephone & Telegraph	64,075.25
Traveling	59,979.93
Stationary and Printing	46,084.00
Legal	56,552.02
Film Repairs and Maintenance	33,450.70
Office Supplies and Expense	27,560.63
Postage	25,560.00
Scenario	20,626.79
"The Distributor" (Magazine)	20,586.72
Branch Office Supplies & Expenses	19,051.45
Taxes	17,855.43
Branch Shipping Supplies and Expense	16,772.05
Sound Instruction	15,305.96
Exchange	15,143.35
Insurance	13,501.69
Accounting	13,016.50
Branch Stationary and Printing Expense	11,742.34
"Leo" (The Lion Tour)	9,248.52
Trackless Train	8,822.50
Shipping Supplies and Expense	8,904.27
Freight and Express	4,484.24
Sales Promotion	3,818.86
Branch Postage	2,479.71
Managers Convention	2,408.10
	$1,872,601.74
Reimbursed by Metro-Goldwyn-Mayer Dist. Corp.	1,304,984.38
	$ 567,617.36

Defendants' Exhibit 18-C1.

2326

METRO-GOLDWYN PICTURES CORPORATION

SALARIES

Year Ended August 31, 1932

Felix F. Feist	$ 76,875.00
David Bernstein	60,660.00
N. M. Schenck	50,550.00
J. Robert Rubin	50,550.00
Wm. F. Rodgers	38,437.50
Howard Dietz	37,812.50
T. J. Connors	25,625.00
E. M. Saunders	25,625.00
Fred C. Quimby	25,625.00
2327 E. J. Bowes	25,033.56
Silas F. Seadler	17,937.50
Bertram Bloch	16,636.25
Chas. K. Stern	15,375.00
D. O. Decker	12,900.00
Jay A. Gove	11,610.00
Alan F. Cummings	11,610.00
Chas. J. Sonin	10,320.00
Wm. R. Ferguson	9,288.00
H. L. Burrows	9,030.00
S. S. Braunberg	9,030.00
Wm. D. Kelly	9,030.00
J. S. Mac Leod	9,030.00
Nina Lewton	7,740.00
Chas. E. Quick	7,740.00
2328 Wm. G. Crawford	7,380.00
Thos. Gerety	6,450.00
E. W. Aaron	6,450.00
A. M. Holah	5,195.00
Jas. Englander	5,195.00
Wm. O'Brien	5,195.00
E. H. Brauer	5,195.00
F. E. Mc Roy	5,195.00
Geo. E. Berry	5,195.00
Jos. Flynn	4,935.25
T. Halsey Raines	4,896.67
Wm. Marsh	4,675.50

Defendants' Exhibit 18-C2.

Wm. L. Engelhardt	4,675.50	2329
Pat E. Reis	4,415.75	
Clias F. Deesen	4,415.75	
Wm. B. Jones	4,415.75	
Albert Druaux	4,284.00	
Jas. Pagliaro	4,284.00	
Morris Alin	4,415.75	
J. H. Zimmerman	3,661.00	
J. M. Cummings	3,661.00	
J. R. Connacher	3,661.00	
Wm. F. Reilly	3,661.00	
Ross P. Mac Leod	3,661.00	
Ernest Morrell	3,922.50	
Parke D. Agnew	3,661.00	
Arthur Lacks	3,922.50	
Wm. T. Wilson	3,922.50	2330
Milton Beecher	3,622.50	
Louis Field	3,399.50	
Nathan Rapport	3,399.50	
Rose Klein	3,242.60	
Joel Bezahler	3,399.50	
Gladys Arkenburgh	3,138.00	
Beatrice Rumashevsky	3,138.00	

Defendants' Exhibit 18-C2.

Metro-Goldwyn Pictures Corp.—Salaries yr ended 8/31/32—

Contd.—Sheet #2

A. C. Gonzalez	3,000.00	
Hal Roach	2,920.00	2331
Arthur Sterling	2,876.50	
Marie Ritter	2,876.50	
Rose Lesher	2,876.50	
Joe Zelenko	2,876.50	
Janet Markowitz	2,876.50	
John Donohue	2,632.50	
Thos. F. Grady	2,632.50	
Val Lewton	2,632.50	
Julie A. Herne	2,632.50	
Hassell Brooks	2,632.50	
Bertha Fried	2,632.50	
Pauline Weinberg	2,632.50	
Hilda Lesser	2,632.50	
Ida Wolpin	2,474.50	

Defendants' Exhibit 18-C2.

2332

Anna Mae Bradford	2369.25
Claire Mannheimer	2,369.25
John J. Ash	2.369.25
Hattie Hecht	2,436.00
M. Leezer	2,421.90
Sally Simon	2,369.25
Otto Goldburg	2,211.30
Rose Morgan	2,263.95
Ruth Lewis	2,263.95
Melvin Hermann	2,106.00
Harry Krebs	2,106.00
Alice Goodman	2,106.00
Eve Zucker	2,106.00
Mina Sidel	2,106.00
Augusta Zpritzer	2,106.00

2333

Morris Krumpel	2,106.00
O. K. Swann	2,106.00
Ruth Glass	2,106.00
Edward F. Nevers	2,106.00
Lydia Bauer	2,000.70
M. Eisenstadt	2,000.70
Alfred De Oro Jr.	2,000.70
Joe L. Seeley	2,259.25
Robert Long	1,842.75
Belle Landau	1,842.75
Rose M. Gaines	1,842.75
Clare Peeler	1,947.75
Helen Boyis	1,842.75
Rudolpho Tovany	1,842.75
Ira S. Martin	1,842.75

2334

H. D. Hagan	1,842.75
Matilda Green	1,842.75
Harold Postman	1,842.75
John E. Daly	1,842.75
Pearl Fox	1,842.75
Mae O'Donnell	1,842.75
W. H. Hulings	1,842.75
Mildred Lewis	1,737.45
Josephine Markus	1,737.45
Alice Fleming	1,737.45
Dorothy Aron	1,790.10
Ira Singer	1,737.45
N. Ventura	1,737.45
Mildren Gordon	1,737.45
Florence Ehrlich	1,737.45
Mary Daly	1,737.45

Defendants' Exhibit 18-C3.

Metro-Goldwyn Pictures Corp.—Salaries yr ended 8/31/32— 2335
Contd.—Sheet #3

Elizabeth Callahan	1,632.15
Mae Mc Farlane	1,632.15
Dorothy Moskowitz	1,684.80
Rita Mc Carthy	1,632.15
Dorothy Prendergast	1,624.00
A. M. Ash	1,676.50
Jeanne Neuwirth	1,711.09
Marigold Ball	1,579.50
Frieda Feinstein	1,579.50
Reginna Cohen	1,579.50
Frances Wittlin	1,579.50
I. L. Hirsch	1,579.50 2336
Marion Bokser	1,579.50
Abe Kupchik	1,579.50
Eugene Adler	1,579.50
Ida Fariel	1,526.85
Lillian Cook	1,526.85
Sidney B. Garvey	1,579.50
Carolyn Hohfeler	1,579.50
Mildred Walcoff	1,466.85
Frances K[illegible]p	859.50
Samuel Cohen	891.00
Nettie Rothschild	798.00
S. D. Morway	225.00
Benn Jacobson	897.75
Thomas E. Bailey	630.00
Joseph Maguire	270.00 2337
Various (110 Employees)	176,921.93
	1,077,254.55

Defendants' Exhibit 18-D1.

2338

METRO-GOLDWYN PICTURES CORPORATION

COMPLETED NEGATIVE COST

"LETTY LYNTON"

Classification		Amount
DIRECTION		
Compensation paid to Clarence Brown	$75,000.00	
Compensation paid to James Basevi, director of miniature department	575.42	$75,575.42
PRODUCTION MANAGER AND ASSISTANTS		
2339 Preparing	$ 49.20	
Photographing	533.32	582.52
ASST. DIRECTOR AND CLERKS		
Preparing	$ 99.15	
Photographing	1,944.76	2,043.91
COMPENSATION PAID TO CAMERMEN AND ASSTS.		
Max Fabian	$ 219.35	
Harold Lipstein	241.05	
Oliver Marsh	2,933.32	
Harold Rosson	12.97	
Walter Bader	37.86	
2340 Edward Fitzgerald	69.91	
Harold Marzorati	43.36	
Robert Palmer	7.08	
Richard Wade	6.25	
Harold Wenstrom	16.66	
Tony Gaudio	25.00	
Harold Baldwin	4.95	
Wilbur Bradley	20.66	
Samuel Cohen	8.25	
Dale Deverman	1.77	
Thos. Dowling	18.79	

Defendants' Exhibit 18-D1.

Classification		Amount	2347
Wm. Foxall	9.45		
J. B. Harper	56.40		
Robert Hoag	3.12		
Kenneth Meade	80.90		
Kyme Meade	290.44		
Thos. Tutwiler	62.71		
Mathew Kluznick	5.48		
Harry Marble	9.90		
	$ 4,185.63		
Camera Dept. O.H.	1,045.17	5,230.80	
EDITORS AND CUTTERS			2348
Working	$ 2,747.61		
Previews and Expenses	39.50		
Proportion Dept. Overhead	221.57		
Supplies	2.38	3,011.06	
COMPENSATION PAID TO STOCK TALENT			
Joan Crawford	$18,916.68		
Robert Montgomery	10,000.02		
Nils Asther	2,400.00		
Helen Robinson	17.51		
Lewis Stone	1,125.00		
Karen Morley	41.66		
			2349

Defendants' Exhibit 18-D2.

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Page 2.

"LETTY LYNTON"—Cont.

Classification		Amount
COMPENSATION PAID TO STOCK TALENT (Cont.)		
Belle Donovan	$ 20.00	
Ruth Holly	25.01	
Nika Justin	15.00	
Walda Mansfield	33.32	
Gladys Mason	11.66	
Betty Sanford	20.00	
Ruth Renick	8.33	
2345	$32,634.19	
Stock Talent O.H.	896.05	$33,530.24
COMPENSATION PAID TO PICTURE TALENT		
May Robson	$ 2,833.32	
Louise C. Hale	3,000.00	
	$ 5,833.32	
Commission	30.17	5,863.49
EXTRA TALENT		
Salaries	$10,766.85	
Fees Central Casting	385.90	11,152.75
2346		
COMPENSATION PAID FOR STORY		
Wanda Tuchok	$ 2,333.33	
John Meehan	23,333.34	
D. Taylor	1,866.66	
Mitzi Cummings	52.50	
	$27,585.83	
Book Cost	3,850.00	
Miscellaneous Expense	5.64	
Scenario Dept. O.H.	3,310.30	
Script Expense	554.67	35,306.44

Defendants' Exhibit 18-D2.

Classification		Amount	
WARDROBE—WOMEN'S			2347
Purchased	$ 186.95		
Studio Construction	4,618.34		
Outside Rentals	200.00		
Studio—Altering, Fitting, etc.	1,094.01		
Damage and Loss	.50		
Proportion Departmental Overhead	2,500.00		
Transportation	68.19		
Laundry and Cleaning	90.42		
Repairs by Prop Shop	3.85		
Make-Up	251.61	9,013.87	
WARDROBE—MEN'S			2348
Purchased	$ 150.00		
Outside Rentals	181.63		
Studio—Altering, Fitting, etc.	530.12		
Laundry and Cleaning	70.58		
Transportation	18.11		
Make-Up	282.44	1,232.88	
LIGHTING			
Dining Sets, Salary	$ 887.5[illegible]		
Operation Sets, Salary	2,017.16		
Striking Sets, Salary	268.18		
Supplies and Expense	47.14		
Rent Outside Electric Equipment	206.47		
Operation of Power Plants	21.00		2349
Proportion of Dept. Overhead	275.71	3,723.18	

Defendants' Exhibit 18-D3.

2350

"LETTY LYNTON"—Cont.

Classification		Amount
AUTOMOBILE AND TRUCK HIRE		
Company Equipment	$ 372.49	
Outside Rentals	264.93	$ 637.42
MEALS AND LODGING		19.85
MEALS—COMPANY RESTAURANT		182.35
LOCATION EXPENSE		
Salary and Location Man		20.79

2351

NEGATIVE RAW STOCK		
126,980 ft. @ .04	$ 5,079.20	
2,120 ft. @ .03	63.60	5,142.80
NEGATIVE PROCESSING		
115,165 ft. @ .015	$ 1,727.49	
12 fades @ 1.00	12.00	1,739.49
POSITIVE RAW STOCK		
367,291 ft. @ .01	$ 3,672.91	
400 ft. @ .01¼	5.00	3,677.91

2352

POSITIVE PROCESSING		
138,305 ft. @ .0315	$ 4,356.31	
80,890 ft. @ .0225	1,820.03	
124,635 ft. @ .015	1,869.21	
32 fades @ .50	16.00	8,061.55

Defendants' Exhibit 18-D3.

Classification		Amount	
TITLES			2353
Temp Title Stock & Lab. Expense	$ 40.89		
Final Title First Cost	46.60	87.49	
PUBLICITY SALARIES		4,206.10	
STILLS			
Salary Still Man	$ 444.31		
Number of Stills	709.62	1,153.93	
WORKMEN'S COMPENSATION INSURANCE		803.49	
SPECIAL SHOTS			
Newcomb Shots	$ 1,092.80		2354
Reis Shots	195.75	1,288.55	
MISC. UNCLASSIFIED EXPENSE		1,722.07	
RECORDING CHARGES		6,558.00	
RE-RECORDING CHARGE			
Preliminary Film	$ 27.20		
Final Film	249.60		
Final Disc.	663.98	940.78	
MUSIC			
Songs, Copyrights, Purchases	$ 5.00		
Arranging	235.64		
Scoring	200.00		2355
Miscellaneous	495.78	936.42	

Defendants' Exhibit 18-D4.

2356

"LETTY LYNTON"—Cont.

Classification		Amount
MUSICIANS		
Rehearsing	$ 144.71	
Recording	1,030.00	
Side Line	134.37	
Victrola Operators	125.00	
Overhead	910.76	$ 2,344.84

COST OF SETS

2357

Set No.	Name of Set	Labor	Material	Total Cost
1100	Test Sets	$ 44.87	$ 26.35	$ 71.22
1101	Int. Letty's Cabin & Corridor	1,516.01	575.14	2,091.15
1102	Int. Letty's Hotel Room	1,724.78	756.94	2,481.72
1103	Int. Tango Barn	1,065.94	364.34	1,430.28
1104	Int. Lynton Home—Lower Floor	1,604.58	645.67	2,250.25
1105	Int. Lynton Home—Upper Floor	1,573.14	505.39	2,078.53
1106	Int. Hotel Lobby	1,227.18	710.69	1,937.87
1107	Int. Renaul's Hotel Suite	2,065.07	784.39	2,849.46
2358 1108	Int. Custom's Dock	1,066.84	556.20	1,623.04
1109	Int. Lynton Home—Dining Room	362.13	141.14	503.27
1110	Int. Roof Cafe Aboard Boat	1,693.65	927.02	2,620.67
1111	Int. Dining Room Aboard Boat	496.70	300.78	797.48
1112	Int. Darrow Home	746.88	377.32	1,124.20
1113	Ext. Street and Tango Barn	433.55	453.72	887.27
1114	Int. District Attorney's Office	624.96	179.84	804.80
1115	Int. Pit in Customs Dock	248.19	80.66	328.85

Defendants' Exhibit 18-DJ.

	Classification				Amount	2359
116	Ext. Country Home and Road	1.04	30.83	31.87		
117	Ext. Boat (Fox Studio Location)	510.54	2,344.06	2,854.60		
118	Int. Subway Car	327.65	62.51	390.16		
119	Ext. Subway Entrance	276.08	160.16	436.24		
120	Ext. Darrow Home	136.69	141.88	278.57		
121	Ext. Courthouse	13.01	.88	13.89		
122	Int. Hale's New York Apt.	88.47	9.19	97.66		
123	Ext. New York Street	165.85	34.18	200.03		
124	Int. New Bedroom and Bath	325.54	152.56	478.10		
125	Ext. Lynton Home	328.48	193.27	521.75		2360
175	Process—Victoria (S. A. Town)	76.49	68.20	144.69		
176	Minature Airplane Backgrounds	338.32	103.12	441.44		
177	Process—Deck of Liner	271.40	118.81	390.21		
178	Process—Sleigh	98.20	65.60	163.80		
179	Process—Ext. Stern of Ship	170.84	656.05	826.89		
180	Process—Ext. Deck of Tender	285.58	95.05	389.63		
181	Process—Ext. Deck of Steamer approaching New York	18.84	.10	18.94		2361
190	Inserts and Sound Effects	7.07	4.23	11.30		
194	Synchronizing	7.25		7.25		
196	Construction Supervision		3,704.65	3,704.65		
197	Preliminary Work	122.92	50.06	172.98		
198	Build Equipment and Props	100.02	103.82	203.84		
199	Striking Sets		1,200.00	1,200.00		
	Total	$20,164.75	$16,684.80	$36,849.55	36,849.55	
	ADDED YEAR ENDED AUGUST 30, 1933				52.75	

Defendants' Exhibit 18-D5.

2362 "LETTY LYNTON"—Cont.

Forward from page 4			$262,682.69
GENERAL STUDIO OVERHEAD—ARRIVED AT AS FOLLOWS			
Studio Overhead—Detail on Schedule A Annexed Hereto		$2,246,793.28	
Addition to Reserve for Continuities		500,000.00	
Income from Royalties from Music Publishers on Songs Used In Productions		*11,520.35*	
Salaries Paid by New York			
Thalberg	$151,650.00		
Other Production Executives (per exh. 13)	26,000.00	177,650.00	
2363 Compensation Paid to Louis B. Mayer Pictures		922,141.09	
Depreciation—Los Angeles Studio (per exh. 9)	520,631.21		
Less: Rental of Studio & Facilities	334,464.61		
Unabsorbed Studio Depreciation		186,166.60	
Interest Paid (per exh. 10)		1,559,559.79	
Interest on Investment in Studio Plant & Equipment (per Defts'. Ex. 18E)		310,584.16	
		$5,891,374.57	
1/36 of Above Allocated to Letty Lynton on Basis of 36 Pictures Produced During Year			163,649.29
2364 Total Negative Cost			$426,331.98
25% Charged to Culver Export Corp.			106,582.99
Negative Cost to Metro Goldwyn Pictures Corp.			$319,748.99
POSITIVE & OTHER DIRECT COSTS			
234 Prints		$35,736.33	
Advertising—Direct (per exhibit 12)		24,293.05	
Censorship		1,684.35	
E R P I Royalty—U. S.		4,000.00	
Music Royalty		1,465.02	
Records		984.38	
M P P D A Dues—U. S.		3,630.42	71,793.25
Total Production Cost—Metro Goldwyn Pictures Corp. (excluding Canada)			$391,542.24

(Figures in italics were red in original.)

Defendants' Exhibit 18-E1.

2365

Schedule A

Studio Overhead

Classification	Dr.	Cr.
laries—Executive Department	$1,047,599.43	
penses—Executive Department	16,482.79	
laries—Accounting Department	100,421.33	
penses—Accounting Department	21,309.88	
laries——Production Department	72,346.20	
penses—Production Office	2,368.15	
laries—Casting Office	41,600.32	
penses—Casting Office	35,210.19	
laries—Projection Department	2,225.51	
penses—Projection Department	31.42	2366
laries and Expenses—Business Office	48,847.61	
ayage and Auto Hire	1,748.47	
ant Engineering and Planning	50,660.93	
pense of Personnel Department	220.63	
laries, Maintenance	123,602.31	
aintenance—Repair of Buildings	32,553.44	
pair and Maintenance of Facilities	151,527.64	
gal & Other Expenses re Patent Rights	2,060.52	
gal Salaries and Expense	30,573.43	
ntal of Studio and Facilities	334,464.61	
surance—General	33,635.91	
surance—Miscellaneous Compensation	54,051.30	
xes—City, County and State	72,461.51	
ilway Transportation	2,054.97	2367
iling Expense	11,[illegible]58.40	
inting and Stationery	14,745.02	
ock Library Expense	16,298.66	
n Mail Expense	2,514.53	
sses not covered by Insurance	496.65	
tertainment	8,440.23	
nations	6,928.99	
w York Office Expense In Connection with Production	149,520.31*	
amp Tax	432.72	

* This figure corrected to $151,125.59 (Rec., p. 738.)

Defendants' Exhibit 18-E1.

	Classification	Dr.	Cr.
2368	Salaries of Directors Unassigned	27,715.49	
	Miscellaneous Unclassified Expens	19,357.06	
	Rejected Continuity Charges and Songs	63,996.57	
	Accumulation on Rejected Pictures	151,686.80	
	Film Rentals for Studio Showing	3.05	
	Heating and Ventilation	6,357.82	
	Button Deposit		$ 18.00
	Salvage Yard		9.41
	Dues	24,765.60	
	Uncollectible Accounts Receivable	3,970.81	
	Home Office Unclassified	46,081.93	
	Freight & Handling		7,809.33
	Telephone Expense	86,677.60	
2369	Telegraph Expense	8,651.48	
	Experimental Work—Trick Cameras	24,678.10	
	Executive Dining Room Expense	8,485.20	
	Flowers for Executive Office	702.61	
	Private Dining Room in Commissary	1,501.43	
	Income from Use of Flowers		4,011.45
	Adjustment of Overhead for year ended 8/27/31		9,910.89

2370

Defendants' Exhibit 18-E2.

Schedule A (Continued)

STUDIO OVERHEAD

Classification			Dr.	Cr.	
Department Overhead (Balances):					2371
Unassigned Salaries—Domestic Stock Co.		$813,240.63			
Less: Percentage Charged to Productions		128,855.26			
		$684,385.37			
Less: Profit from Stock Talent Rentals		95,170.98			
		$589,214.39			
Less: Unassigned Salaries	$304,429.80				
Less: Directors	(12,000.00)				
Less: Foreign	(1,240.88)	291,188.92	$298,025.47		2372
Restaurant			2,470.83		
Overabsorbed Balance—Sound Overhead				$113,249.85	
Wardrobe Dept.				3,593.52	
Auto & Trucking				14,287.16	
Laboratory				861,839.24	
Still Room				20,573.48	
Construction Dept.			5,211.73		
Publicity			101.53		
Scenario Dept.				30,532.41	
Editorial Dept.			11,841.67		
Property Dept.			7,708.62		
Music Dept.			21,330.20		
Camera Dept.			9,781.52		
Precision Machine Shop			141.03		2373
Portrait Dept.			63.18		
Mechanical Dept.			9,379.54		
Art Dept.			15,204.64		
Miniature and Trick Dept.			12,280.69		
Newcombe Department			1,307.77		
Print Shop				439.75	
Salvage Yard				162.52	
Advertising Dept.			2,013.84		
Props—Rental				1,552.80	
Electrical Equipment Rentals				93.76	
Other Equipment Rentals				600.98	
Profit from Outside Producers				51,438.35	
Rental of Standing Sets				10,245.00	
Foreign Department Overhead (Unabsorbed)			17,173.36		
			$3,377,161.18	$1,130,367.90	

Classification			Dr.	Cr.	
Department Overhead (Balances):					2371
Unassigned Salaries—Domestic Stock Co.		$813,240.63			
Less; Percentage Charged to Productions		128,855.26			
		$684,385.37			
Less: Profit from Stock Talent Rentals		95,170.98			
		$589,214.39			
Less: Unassigned Salaries	$304,429.80				
Less: Directors	(12,000.00)				
Less: Foreign	(1,240.88)	291,188.92	$298,025.47		
					2372
Restaurant			2,470.83		
Overabsorbed Balance—Sound Overhead				$113,249.85	
Wardrobe Dept.				3,593.52	
Auto & Trucking				14,287.16	
Laboratory				861,839.24	
Still Room				20,573.48	
Construction Dept.			5,211.73		
Publicity			101.53		
Scenario Dept.				30,532.41	
Editorial Dept.			11,841.67		
Property Dept.			7,708.62		
Music Dept.			21,330.20		
Camera Dept.			9,781.52		
Precision Machine Shop			141.03		2373
Portrait Dept.			63.18		
Mechanical Dept.			9,379.54		
Art Dept.			15,204.64		
Miniature and Trick Dept.			12,280.69		
Newcombe Department			1,307.77		
Print Shop				439.75	
Salvage Yard				162.52	
Advertising Dept.			2,013.84		
Props—Rental				1,552.80	
Electrical Equipment Rentals				93.76	
Other Equipment Rentals				600.98	
Profit from Outside Producers				51,438.35	
Rental of Standing Sets				10,245.00	
Foreign Department Overhead (Unabsorbed)			17,173.36		
			$3,377,161.18	$1,130,367.90	
				2,246,793.28	
			$3,377,161.18	$3,377,161.18	

Defendants' Exhibit 18-F.

2374

METRO-GOLDWYN PICTURES CORP.

INTEREST ON INVESTMENT IN STUDIO PLANT AND EQUIPMENT
YEAR ENDED AUGUST 31, 1932

At August 31, 1931			
Land		$ 969,210.00	
Buildings	$3,528,251.97		
Less Reserve for Depreciation	838,154.54		
		2,690,097.43	
Equipment	$3,846,210.07		
2375 Less Reserve for Depreciation	2,166,959.25	1,679,250.82	
			$ 5,338,558.25
At August 31, 1932			
Land		$ 969,210.00	
Buildings	$3,578,538.57		
Less Reserve for Depreciation	1,013,196.57	2,565,342.00	
Equipment	$3,992,243.38		
Less Reserve for Depreciation	2,512,548.43		
		1,479,694.95	
2376			$ 5,014,246.95
			$10,352,805.20
Average Investment (one-half)			5,176,402.60
Interest at 6%			$ 310,584.16

Defendants' Exhibit 19.

2377

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION

NET INCOME FROM "LETTY LYNTON"

Film Rentals Income	$727,053.84	
Less: Metro Goldwyn Pictures Corp. Share (80%)	581,643.07	
Net Film Rental Income	$145,410.77	
Distributing Expense—76.87%	111,777.26	2378
Net Income from "Letty Lynton"		$33,633.51
Less: Federal Income Taxes 14½%		4,876.86
		$28,756.65

2379

2380 **Defendants' Exhibit 19-A.**

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION

TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME
YEAR ENDED AUGUST 31, 1932

Film Rental Income (excluding Canada)	$30,020,526.08	
Less: Metro Goldwyn Pictures Corp. Share (80%)	24,016,420.86	
Net Film Rental Income		$6,004,105.22
DISTRIBUTING EXPENSE		
2381 Home Office Expense—(as per Defendants' Exhibits 19-B, 18C-1, 18C-2 and 18C-3)	$1,304,984.38	
Branch Offices Expense—Per Schedule	3,246,888.31	
Franchise Offices Expense	277,707.19	
Depreciation Branch Equipment—Per Schedule	48,151.63	
Accounts Receivable Written Off	11,100.00	
Rental Projection Facilities	46,318.47	
Interest on Investment in Branch Office Equipment (Per Schedule)	20,375.62	
	$4,955,525.60	
LESS:		
2382 Sales of Advertising Accessories	$761,395.68	
Cost of Same	428,902.03	
	$332,493.65	
Miscellaneous Income	7,473.46	
	339,967.11	
Total Distributing Expense (76.87% of Net Film Rental Income)		$4,615,558.49

Defendants' Exhibit 19-B.

2383

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION

HOME OFFICE EXPENSES OF METRO-GOLDWYN PICTURES CORP. & METRO-GOLDWYN-MAYER DIST. CORP.

YEAR ENDED AUGUST 31, 1932.

Salaries—General (as per Schedules Ex. 18-C1, 18-C2, 18-C3)	$1,077,254.55	
Rent and Light	108,921.58	
Advertising	94,844.29	
General Expense	76,550.31	
Telephone and Telegraph	64,075.25	
Traveling	59,979.93	
Stationery and Printing	46,084.00	2384
Legal	56,552.02	
Film Repairs and Maintenance	33,450.70	
Office Supplies and Expense	27,560.63	
Postage	25,560.00	
Scenario	20,626.79	
"The Distributor" (Magazine)	20,586.72	
Branch Office Supplies and Expenses	19,051.45	
Taxes	17,855.43	
Branch Shipping Supplies and Expense	16,772.05	
Sound Instruction	15,305.96	
Exchange	15,143.35	
Insurance	13,501.69	
Accounting	13,016.50	
Branch Stationery and Printing Expense	11,742.34	
"Leo" (The Lion Tour)	9,248.52	2385
Trackless Train	8,822.50	
Shipping Supplies and Expense	6,904.27	
Freight and Express	4,484.24	
Sales Promotion	3,818.86	
Branch Postage	2,479.71	
Managers Convention	2,408.10	
	$1,872,601.74	
Absorbed by Metro-Goldwyn Pictures Corp.	567,617.36	
	$1,304,984.38	

Defendants' Exhibit 19-C.

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION
BRANCH OFFICE EXPENSES
YEAR ENDED AUGUST 31, 1932

	Total	Salaries Managers	Salaries Salesmen	Others	Salaries and Expense District Managers	Exploitation	Traveling	Rent, Light and Heat	Express and Film Delivery	Telephone and Telegraph	Postage	Checking and Clocking	Stationery and Supplies
Albany	$76,293.74	$6,708.00	$8,338.25	$25,553.66		$1,070.69	$9,724.09	$3,990.30	$3,313.55	$2,926.27	$1,543.76	$8,763.48	$883.6
Atlanta	116,390.80	6,450.00	12,119.50	35,183.99	$18,757.98	5,204.04	11,190.29	6,392.74	6,152.41	5,189.28	2,472.93	3,621.90	988.9
Boston	171,330.96	14,093.75	21,600.00	62,055.77	7.50	5,463.31	15,243.15	15,171.08	9,229.79	4,190.11	2,803.15	14,869.12	1,437.0
Buffalo	85,561.56	8,256.00	11,216.75	29,164.30		840.53	10,213.26	6,208.12	4,595.05	3,258.02	2,218.40	6,023.32	1,148.5
Charlotte	69,811.15	6,192.00	7,360.50	26,382.34		408.01	7,324.19	5,502.71	5,782.09	1,835.78	1,389.76	6,506.10	825.3
Chicago	201,366.30	11,610.00	17,097.70	71,752.15	22,730.38	8,541.74	10,182.04	17,066.19	16,226.08	5,728.88	3,452.49	9,044.31	2,048.4
Cincinnati	113,854.81	7,224.00	14,481.50	40,614.66		1,201.27	14,617.00	8,707.03	6,821.58	4,676.37	2,700.38	8,740.46	1,359.0
Cleveland	130,266.83	9,804.00	15,257.25	41,743.97		1,910.41	12,462.24	9,271.56	7,035.43	2,594.12	2,691.01	22,690.01	1,807.5
Dallas	101,542.79	8,514.00	15,426.00	38,750.91		1,435.39	14,318.77	7,684.35	6,793.66	2,075.51	2,713.22	773.82	1,134.3
Denver	74,059.24	5,195.00	9,907.50	27,797.71	18.00	159.61	10,993.29	5,271.05	4,419.42	3,720.59	1,569.65	1,666.80	1,152.1
Des Moines	65,943.48	7,740.00	9,665.00	22,587.63		331.14	7,925.16	6,290.09	3,521.50	1,884.60	1,219.07	2,511.27	567.9
Detroit	169,040.64	9,288.00	15,408.25	45,979.46	040.76	11,688.27	12,581.88	10,327.88	9,849.43	5,088.11	2,954.60	12,983.92	1,026.3
Indianapolis	93,643.01	9,030.00	11,944.50	30,278.56		632.91	8,897.93	10,244.18	5,898.40	3,076.32	1,055.37	9,314.09	1,002.6
Kansas City	139,848.58	7,740.00	16,500.50	41,562.28	20,674.62	4,596.50	15,027.52	8,524.78	7,952.61	3,987.94	2,916.56	5,532.63	1,428.5
Los Angeles	144,239.11	9,030.00	7,135.50	50,133.34	34,618.65	1,538.23	4,636.91	11,884.13	4,538.66	2,876.61	2,075.11	11,368.49	1,254.6
Memphis	55,398.88	6,708.00	5,324.33	20,640.82		267.91	6,989.93	4,624.30	3,057.69	2,065.85	1,489.45	1,516.38	968.3
Milwaukee	92,847.36	7,740.00	11,631.50	32,731.86		1,234.02	10,752.91	7,732.09	6,015.00	3,120.15	1,839.66	6,717.11	1,110.0
Minneapolis	108,598.77	8,514.00	17,728.00	40,030.48		1,215.99	16,909.00	4,195.98	6,620.94	2,750.23	2,417.45	3,599.83	860.9
New Haven	55,631.24	6,285.00	4,715.75	20,194.40		742.47	4,427.23	5,991.54	3,108.09	1,357.49	1,141.12	5,637.85	952.6
New Orleans	52,560.03	7,224.00	4,919.50	20,988.11		139.60	5,139.64	4,275.87	3,199.94	1,132.56	1,363.87	422.44	824.0
New York	296,707.65	14,448.00	14,989.75	118,219.57	17,140.43	2,400.55	8,214.48	33,981.15	11,875.28	5,544.91	2,436.80	52,914.66	2,773.0
Oklahoma City	62,757.59	7,740.00	7,845.00	23,504.64		418.28	8,061.58	4,314.86	4,063.05	1,827.96	1,015.88	608.41	455.1
Omaha	80,830.42	5,676.00	12,295.00	26,446.40		671.52	12,786.45	4,884.79	4,880.03	2,791.39	1,459.44	6,095.20	884.3
Pittsburgh	131,123.84	7,224.00	17,022.00	42,936.86		1,674.49	14,885.62	10,283.74	6,700.63	2,633.77	2,775.57	20,743.33	1,560.6
Portland	55,267.35	6,450.00	5,836.00	19,761.06		538.28	7,222.32	3,637.75	2,654.47	2,536.64	1,133.16	2,478.24	1,056.7
Salt Lake City	89,158.96	5,195.00	11,259.50	30,057.86		29.65	17,234.62	3,948.18	7,211.64	4,407.28	1,396.73	5,320.63	1,071.3
San Francisco	96,746.12	10,320.00	8,237.00	41,240.69	98.41	211.93	8,075.43	9,257.88	6,470.19	3,055.43	1,492.98	4,767.31	792.4
Seattle	66,379.20	6,450.00	7,552.50	21,514.42	16.60	4,109.76	8,125.00	4,385.02	3,278.20	3,908.70	1,487.10	2,349.37	914.8
St. Louis	117,817.10	12,178.50	12,711.50	47,439.97		525.25	13,007.94	9,088.74	7,763.05	3,511.85	851.72	7,156.47	908.0
Washington	131,870.80	9,288.00	13,402.50	48,129.43		4,871.29	10,138.36	7,329.44	6,255.88	3,761.83	2,493.36	22,364.76	834.8
Per Exhibit "D"	$3,246,888.31	$248,315.25	$348,928.53	$1,145,377.30	$143,403.33	$64,073.04	$317,308.23	$250,467.52	$183,283.74	$95,511.55	$58,567.75	$267,101.71	$34,042.9

(Figures in italics were red in original.)

Defendants' Exhibit 19-C.

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION

Branch Office Expenses

Year Ended August 31, 1932

ense pitation	Traveling	Rent, Light and Heat	Express and Film Delivery	Telephone and Telegraph	Postage	Checking and Clocking	Stationery and Supplies	Altera-tions, Repairs, etc.	Film Maintenance and Repairs	Taxes Local and State	Projection Expense	Supper Money	Adver-tising	General Expense
070.69	$9,724.09	$3,990.30	$3,313.55	$2,926.27	$1,543.76	$8,763.48	$883.69	$1,933.48			$475.50	$45.00		$1,024.02
204.04	11,190.29	6,392.74	6,152.41	5,189.28	2,472.93	3,621.90	998.90	14.00	*4.30*	$2,808.96	330.42			1,506.76
463.31	15,243.15	15,171.08	9,229.79	4,190.11	2,803.15	14,869.12	1,437.00	52.00		1,024.67	824.50	649.50		2,616.56
840.53	10,213.26	6,208.12	4,595.05	3,258.02	2,218.40	6,023.32	1,148.57	75.00			664.90	1.50		1,677.84
408.01	7,324.19	5,502.71	5,782.09	1,835.78	1,389.76	6,506.10	825.35		10.20	1,175.76	224.90	106.00		785.46
541.74	19,182.04	17,066.19	16,226.08	5,728.88	3,452.49	9,044.31	2,048.47		630.11	722.88	1,079.10	5.50		3,448.28
201.27	14,617.00	8,707.03	6,821.58	4,676.37	2,700.38	8,740.46	1,359.03			60.00	673.83	154.00		1,823.70
916.41	12,462.24	9,271.56	7,035.43	2,591.12	2,691.01	22,690.01	1,807.58	32.00		57.05	667.25	140.00		2,105.95
435.39	14,318.77	7,684.35	6,793.66	2,075.51	2,713.22	773.82	1,134.34		5.05	398.56	258.50			1,260.71
459.61	10,993.29	5,271.05	4,419.42	3,720.59	1,569.65	1,666.80	1,152.40	183.77	9.60	290.56	816.50	75.00		842.79
331.14	7,925.16	6,290.09	3,524.50	1,884.60	1,219.07	2,511.27	567.97	47.80		420.71	658.00			573.54
688.27	12,581.88	10,327.88	9,849.43	5,088.11	2,954.60	12,983.92	1,026.36			408.50	730.09	53.00		1,632.13
632.91	8,897.93	10,244.18	5,898.40	3,076.32	1,055.37	9,314.09	1,002.60	120.75	15.05	670.72	313.50		$10.00	1,138.13
596.50	15,027.52	8,524.78	7,952.61	3,987.94	2,916.56	5,532.63	1,428.57			484.05	1,467.00	14.00		1,439.02
538.23	4,636.91	11,884.13	4,538.66	2,876.61	2,075.11	11,368.49	1,254.68		69.76	1,016.87	100.00		17.00	1,945.17
267.91	6,989.93	4,624.30	3,057.69	2,065.85	1,489.45	1,516.38	968.30	13.50	4.54	503.14	277.00			947.74
234.02	10,752.91	7,732.09	6,015.00	3,120.15	1,839.66	6,717.11	1,110.07	182.42		271.18	753.87			1,015.52
215.99	16,909.00	4,195.98	6,620.94	2,750.23	2,417.45	3,599.83	860.95		278.15	783.79	770.45	55.00	353.99	1,514.54
742.47	4,427.23	5,991.54	3,108.09	1,357.49	1,141.12	5,637.85	952.62			262.13	24.00	40.00		751.55
139.60	5,139.64	4,275.87	3,199.94	1,132.56	1,363.87	422.44	824.06	48.83		1,878.06	51.00			952.55
400.55	8,214.48	33,981.15	11,875.28	5,544.91	2,436.80	52,914.66	2,773.06	181.80	4,204.05	4.05	15.29	1,115.00		6,251.82
418.28	8,061.58	4,314.86	4,063.05	1,827.96	1,015.88	608.41	455.16			295.91	17.00			589.86
671.52	12,786.45	4,884.79	4,880.03	2,791.39	1,459.44	6,095.20	884.35	273.20	*1.40*	252.24	559.84			875.97
671.49	14,885.62	10,283.74	6,700.63	2,633.77	2,775.57	20,743.33	1,560.62	81.90	175.00	198.31	406.50	94.45		1,729.05
538.28	7,222.32	3,637.75	2,654.47	2,536.64	1,133.16	2,478.24	1,056.73			589.22	665.00	5.00	88.96	614.52
29.65	17,234.62	3,948.18	7,211.64	4,407.28	1,396.73	5,320.63	1,071.33			281.73	795.50			949.31
211.93	8,075.43	9,257.88	6,470.19	3,055.43	1,492.98	4,767.31	792.48	34.50		623.04	381.50		217.45	1,169.90
109.76	8,125.00	4,385.02	3,278.20	3,908.76	1,487.10	2,349.37	914.82	68.00	*18.90*	584.36	416.70		180.43	1,057.12
525.25	13,007.94	9,088.74	7,763.05	3,511.85	851.72	4,156.47	908.02	97.50	2.64	348.31	685.75	117.38	19.00	1,463.51
871.29	10,138.36	7,329.44	6,255.88	3,761.83	2,493.36	22,364.76	834.88	65.87		193.19	310.53	136.00	669.23	1,626.25
073.04	$317,308.23	$250,467.52	$183,283.74	$95,511.55	$58,567.75	$267,101.74	$34,042.96	$3,506.32	$5,380.55	$16,604.95	$15,413.92	$2,806.33	$1,556.06	$45,539.27

(Figures in italics were red in original.)

Defendants' Exhibit 19-D.

2389

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION
DEPRECIATION—BRANCH EQUIPMENT
YEAR ENDED AUGUST 31, 1932

New York	$ 4,223.08
Buffalo	890.43
Boston	2,714.61
Washington	1,386.41
Pittsburgh	1,636.68
Cincinnati	1,513.64
Cleveland	1,578.56
Kansas City	4,600.52
Omaha	672.62
Minneapolis	747.26
Chicago	3,657.97
Dallas	1,127.93
San Francisco	1,336.66
Los Angeles	1,668.73
Seattle	649.94
Salt Lake City	885.41
Denver	1,199.01
Detroit	1,261.75
Atlanta	3,696.81
New Orleans	390.60
St. Louis	1,548.67
Oklahoma City	1,153.16
Indianapolis	1,572.90
Milwaukee	1,889.63
Portland	1,076.45
New Haven	948.95
Albany	1,237.71
Charlotte	1,337.76
Des Moines	1,366.97
Memphis	988.00
Philadelphia	2,192.81
	$48,151.63

2390

2391

Defendants' Exhibit 19-E.

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION
INTEREST ON INVESTMENT IN BRANCH OFFICE EQUIPMENT
YEAR ENDED AUGUST 31, 1932.

Branch	At August 31, 1931. Cost	Reserve	Net	At August 31, 1932. Cost	Reserve	Net
New York	$ 76,154.86	43,221.22	32,933.64	77,625.41	47,444.30	30,181.11
Buffalo	18,658.35	11,712.18	6,946.37	18,706.80	12,602.61	6,104.19
Boston	54,744.72	33,590.89	21,153.83	55,188.82	36,305.50	18,883.32
Washington	26,443.56	16,601.57	9,841.79	26,633.26	17,987.98	8,645.28
Pittsburgh	31,234.02	18,828.28	12,425.74	35,189.39	20,464.96	14,724.43
Cincinnati	21,096.72	10,329.85	10,766.87	21,145.31	11,843.49	9,301.82
Cleveland	24,073.67	11,904.89	12,168.78	24,227.50	13,483.45	10,744.05
Kansas City	27,506.40	14,665.57	12,840.83	27,753.25	16,266.09	11,487.16
Omaha	13,442.29	7,733.27	5,709.02	15,199.42	8,405.89	6,793.53
Minneapolis	15,674.94	10,545.65	5,129.29	15,728.34	11,292.91	4,435.43
Chicago	62,011.74	29,168.15	32,843.59	62,528.77	32,826.12	29,702.65
Dallas	17,568.62	9,459.19	8,109.43	17,619.27	10,587.12	7,032.15
San Francisco	20,923.59	9,896.99	11,026.60	21,062.74	11,233.65	9,829.09
Los Angeles	21,936.31	9,533.35	12,402.96	22,448.26	11,222.08	11,226.18
Seattle	13,673.87	9,046.97	4,626.90	13,635.27	9,696.91	3,958.36
Salt Lake City	13,303.25	6,821.22	6,484.03	13,300.95	7,706.63	5,594.32
Denver	17,916.49	8,035.31	9,881.18	17,984.84	9,234.32	8,750.52
Detroit	20,324.53	12,000.57	8,323.96	20,354.03	13,262.32	7,091.71
Atlanta	31,009.87	9,567.92	21,441.95	31,063.77	13,264.73	17,799.04
New Orleans	9,065.76	6,232.36	2,833.40	9,174.36	6,622.96	2,551.40
St. Louis	20,659.07	8,502.13	12,156.94	20,690.97	10,050.80	10,649.17
Oklahoma City	11,531.56	5,357.47	6,174.09	11,614.96	6,510.63	5,104.33
Indianapolis	15,728.97	4,952.99	10,775.98	15,809.87	6,525.89	9,283.98
Milwaukee	18,896.08	5,613.71	13,282.87	18,936.98	7,503.34	11,433.64
Portland	10,764.62	2,706.55	8,058.07	10,855.57	3,783.00	7,072.57
New Haven	9,489.42	3,213.89	6,275.53	9,530.32	162.84	5,367.48
Albany	12,377.11	6,036.37	6,340.74	12,951.58	7,274.08	5,677.50
Charlotte	13,377.60	4,583.15	8,794.45	13,478.80	5,920.91	7,557.89
Des Moines	13,670.44	4,398.59	9,271.85	13,804.49	5,765.56	8,038.93
Memphis	9,879.93	2,997.88	6,882.05	9,960.03	3,985.88	5,974.15
Philadelphia	31,214.54	9,286.40	21,928.14	31,840.84	11,479.21	20,361.63
Totals—	$704,394.90	$346,564.53	$357,830.37	$716,073.17	$394,716.16	$321,357.01
						357,830.37
						$679,187.38
				Average (½)		$339,593.69
				Interest at 6%		20,375.62

Defendants' Exhibit 20.

CULVER EXPORT CORPORATION
NET INCOME FROM "LETTY LYNTON"

Film Rental Income by Foreign Subsidiaries	$414,986.41		
Film Rental Income—Direct	2,876.10		
Film Rental Income	$417,862.51		
Less: Retained by Foreign Subsidiaries	142,339.84		
Culver Share Film Rental	$275,522.67		
Distributing Expense—4.55% of Same	12,536.28		
	262,986.39		
Total Production Cost	195,560.42		
Net Income From "Letty Lynton"		$67,425.97	
Less Federal Income Taxes (14½%)		9,776.76	
		$57,649.21	

Defendants' Exhibit 20-A.

CULVER EXPORT CORPORATION
TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME
YEAR ENDED AUGUST 31, 1933.

Film Rental Income	$15,563,592.34		
Less: Retained by Foreign Distributors	4,933,162.64		
Net Film Rental Income:		$10,630,429.70	
DISTRIBUTING EXPENSE			
Home Office Expense—Per Schedule	$470,951.78		
Accounts Receivable Written Off	6,803.91		
Taxes Paid Foreign Governments—Per Schedule	18,910.14		
	$496,665.83		
LESS			
Profits on Foreign Exchange $2,759.75			
Miscellaneous Income 9,847.93			
	12,607.68		
Total Distributing Expense (4.55% of Net Film Rental Income)		$484,058.15	

Defendants' Exhibit 20-B.

2398

CULVER EXPORT CORPORATION
SUNDRY SCHEDULES
Year Ended August 31, 1933

HOME OFFICE EXPENSES

Salaries, Per Schedule		$302,419.76
Rent and Light		11,861.00
Advertising		19,073.53
General Expense		4,174.30
Telephone and Telegraph		1,334.22
Traveling		45,363.14
Stationary & Printing		3,136.89
Legal		4,819.47
2399 Film Repairs and Maintenance		1,200.79
Office Supplies and Expense		2,630.61
Taxes		52,420.52
Insurance		556.50
Shipping Supplies and Expense		229.83
Freight and Express		1,459.56
Commissions		17,271.66
		$470,951.78

TAXES PAID-FOREIGN GOVERNMENTS

Autralia		251.69
Belgium		4,865.03
Mexico		7,265.21
2400 Philippine Islands		77.88
France		6,450.33
		$18,910.14

Defendants' Exhibit 20-C.

2401

CULVE EXPORT CORPORATION

SALARIES

Year Ended August 31st, 1933

Arthur M. Loew	$155,500.00
Morton A. Spring	14,700.00
Ludwig L. Lawrence	38,000.00
D. Blum	10,106.28
Sam Burger	5,200.00
Arthur Fiedelbaum	14,100.00
H. F. Krecke	8,820.00
H. C. Kleindienst	4,300.00
Paul H. Cohen	4,300.00
Robt. M. W. Vogel	4,300.00
Henry H. Eckman	1,200.00
P. N. Brinch	3,250.00
Arthur Sterling	2,340.00
Lillian Reiss	2,470.00
Norman Ogilvie	2,223.00
Melita J. Schmitt	2,223.00
Margaret Hill	1,976.00
Annette Miller	1,877.20
Louis Hershkowitz	1,729.00
Carmen De Pinillos	1,976.00
Kate Seidman	1,729.00
Rosa Lewis	1,729.00
Agnes V. Carroll	1,383.20
Gertrude Grumwaldt	1,482.00
Rose Isaacs	1,482.00
Orita Lage	1,383.20
Morris Frantz	1,235.00
Jeanne Roudot	1,235.00
Mary Wright	1,235.00
Helen Hauck	1,086.80
Anita Johns	1,037.40
Irving Frantz	839.80
Paul T. Lee	900.00
Various	5,071.88
	$302,419.76

2402

2403

2404

Defendants' Exhibit 20-D.

CULVER EXPORT CORPORATION
Cost of Production
"Letty Lynton"

Negative Cost

English Version (25% from Metro-Goldwyn Picture Corp'n.)		$106,582.99
German "	$12,600.50	
French "	13,619.33	
Italian "	10,741.10	36,960.93
		$143,543.92

2405 Prints

French Version	7,373.18	
German "	9,801.95	
Italian "	3,592.79	
Spanish "	2,275.70	
English "	22,001.90	45,045.52
E.R.P.I.—Royalty	3,456.00	
German Electric Co. Royalty	2,468.00	
Music Royalty	1,046.98	6,970.98
Total Production Cost Culver Export Corporation:		$195,560.42

2406

Defendants' Exhibit 21.

2407

FOREIGN SUBSIDIARIES
NET INCOME FROM "LETTY LYNTON"

Film Rental Income (Per Schedule)		$414,986.41	
Less Culver Export Corp. Share (Per Schedule)		272,646.57	
Net Film Rental Income (Per Schedule)		$142,339.84	
Distributing Expense		84,260.05	
		$58,079.79	
Less Minority Interest Share—Sweden		526.52	
		$57,553.27	
Cost of Prints—England	$6,619.27		2408
Cost of Negative—Spanish Version	7,638.94		
		14,258.21	
Net Income from "Letty Lynton"			$43,295.06
Less Federal Income Taxes—14½%			6,277.78
			$37,017.28

2409

Defendants' Exhibit 21-A1.

2410 FOREIGN SUBSIDIARIES

NET INCOME ATTRIBUTED TO "LETTY LYNTON" (FOREIGN VERSIONS SHOWING DISTRIBUTION OF PROFIT OF FOREIGN SUBSIDIARIES BY COUNTI
(Based on 1933 Percentage of Distributing Expense)

	1. Gross Rentals	2. Distributing Per Cent. (Per Schedule)	3. Expense Amount (Col. 2 x Col. 1)	4. Amount Retained by Subsidiary	5. Profit L Foreig Compa (Col. minus Col. 3
Austria	$ 4,339.75	34.80	$ 1,510.23	$ 1,735.91	$ 225
Belgium	16,919.27	12.76	2,158.90	3,111.76	952
Egypt	1,130.69	15.42	174.35	282.66	108
Finland	8.88	35.21	3.12	3.11	-
France	42,955.42	25.45	10,932.15	19,692.62	8,760
Germany	258.25	30.37	78.43	136.90	58
2411 Greece	531.33	31.63	168.06	161.53	6
Guatemala	87.47	41.42	36.23	30.61	5
Holland	4,007.87	22.28	892.95	985.26	92
Hungary	2,562.44	27.31	699.80	896.84	197
Italy	41,270.53	18.60	7,676.32	10,346.33	2,670
Jugo Slavia	1,399.70	87.77	1,228.52	629.86	598
Latvia	929.55	39.55	367.64	373.71	6
Panama	20.51	26.29	5.39	3.07	2
Portugal	271.81	23.73	64.50	95.11	30
Roumania	1,932.58	33.97	656.50	483.14	17
Spain	18,679.89	25.02	4,673.71	8,603.14	3,929
Switzerland	7,475.41	18.16	1,357.53	1,868.87	511
Turkey	1,225.00	26.06	319.24	367.50	48
Venezuela	575.06	31.17	179.25	226.75	47
2412	$146,581.41		$33,182.82	$ 50,034.68	$16,851
Sundries	170.62	22.64	38.63	230.52	191
TOTAL—Foreign Versions	$446,752.03		$33,221.45	$ 50,265.20	$17,043
Total—English Versions	268,234.38		51,038.60	92,074.64	41,036
	$414,986.41		$84,260.05	$142,339.84	$58,079
Less—Minority Interest—Sweden					526
					$57,553

(Words and figures in italics were red in original.)

Defendants' Exhibit 21-A2.

FOREIGN SUBSIDIARIES

2413

NET INCOME ATTRIBUTED TO "LETTY LYNTON" (ENGLISH VERSIONS)
SHOWING DISTRIBUTION OF PROFIT OF FOREIGN SUBSIDIARIES BY COUNTRIES
(Based on 1933 Percentage of Distributing Expense)

	1. Gross Rentals	2. Distributing Per Cent. (Per Schedule)	3. Expense Amount (Column 2 x Column 1)	4. Amount Retained by Subsidiary	5. Profit-*Loss* Foreign Company (Column 4 minus Column 3)
Argentina	$ 14,298.45	24.58	$ 3,514.56	$ 3,691.79	$ 177.23
Australia	24,294.83	24.92	6,054.27	9,687.08	3,632.81
Belgium	90.98	12.76	11.61	22.74	11.13
British West Indies	576.23	32.40	186.70	225.23	38.53
Brazil	10,181.86	22.37	2,277.68	3,054.54	776.86
Chile	1,586.74	25.49	404.46	476.00	71.54
China	1,863.77	18.63	347.22	559.13	211.91
Colombia	950.76	32.01	304.34	332.76	28.42
Cuba	3,239.80	41.06	1,330.26	1,152.26	*178.00*
Denmark	1,146.83	15.42	176.84	401.43	224.59
Dutch East Indies	2,092.26	38.29	801.13	762.69	*38.44*
Egypt	5,311.60	15.42	819.05	1,327.87	508.82
Finland	1,483.07	35.21	522.19	543.30	21.11
Great Britain	144,412.94	13.25	19,134.71	50,567.94	31,433.23
Greece	1,500.49	31.63	474.60	518.70	44.10
Guatemala	1,440.94	41.42	596.84	504.30	*92.54*
Hungary	77.58	27.31	21.19	27.16	5.97
India	5,508.97	18.62	1,025.77	1,652.71	626.94
Italy	552.14	18.60	102.70	193.25	90.55
Japan	825.63	35.21	290.70	288.96	*1.74*
Mexico	5,068.98	47.30	2,397.63	1,788.59	*609.04*
Norway	2,201.80	26.05	573.57	879.07	305.50
Panama	1,469.27	26.29	386.27	587.71	201.44
Peru	1,686.89	22.03	371.62	506.03	134.41
Philippines	3,120.55	24.88	776.39	916.02	139.63
Poland	7,489.87	29.25	2,190.79	2,625.09	434.30
Portugal	1,197.69	23.73	284.21	419.19	134.98
Puerto Rico	1,910.84	37.20	710.83	764.32	53.49
Roumania	2,068.85	33.97	702.79	517.20	*185.59*
South Africa	5,688.39	19.37	1,101.84	1,422.12	320.28

2414

2415

Defendants' Exhibit 21-A-2.

2416

	1. Gross Rentals	2. Distributing Per Cent. (Per Schedule)	3. Expense Amount (Column 2 x Column 1)	4. Amount Retained by Subsidiary	5. Profit-Loss Foreign Company (Column 4 minus Column 3)
Spain	4,015.33	25.02	1,004.64	1,765.31	760.67
Straits Settlements	1,016.28	26.46	268.91	355.67	86.76
Venezuela	1,181.61	31.17	368.31	418.33	50.02
TOTAL—Wholly Owned Subsidiaries	$259,552.22		$49,534.62	$88,954.49	$39,419.87
Sweden (Partly Owned Subsidiary)	6,152.26	16.60	1,021.28	2,153.30	1,132.02
	$265,704.48		$50,555.90	$91,107.79	$40,551.89
Sundries	2,529.90	19.08	482.70	966.85	484.15
	$268,234.38		$51,038.60	$92,074.64	$41,036.04
Less—100 215—Sweden—To Minority Interest					526.52
					$40,509.52

2417

(Words and figures in italics were red in original.)

2418

Defendants' Exhibit 21-BT.

FOREIGN COMPANIES

TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME

Year Ended August 31, 1933

	M-G-M de la Argentina (Argentine)	M-G-M Ltd. (Australia and New Zealand)	M-G-M Films G.m.b.H. (Austria)	M-G-M S. A. Belge (Belgium)	M-G-M of West Indies (British West Indies)	M-G-M de Brazil (Brazil)	M-G-M de Chile (Chile)	M-G-M of China (China)	M-G-M de Colombia (Colombia)	M-G-M de Cuba S.A. (Cuba)	M-G-M A. S (Denma
Film Rental Income	$725,878.39	$846,528.01	$60,326.41	$461,911.89	$21,935.21	$428,495.53	$137,447.43	$174,209.86	$68,928.76	$111,249.58	$88,70
Distributing Expense:											
Salaries	$ 87,032.97	$101,703.59	$ 9,861.24	$ 21,270.77	$ 3,932.25	$ 49,293.83	$ 13,198.55	$ 17,116.73	$10,717.11	$ 25,831.00	$11,33
Traveling, Entertaining and Auto Expense	9,928.78	14,135.95	2,076.26	3,880.58	413.22	4,077.30	1,542.11	3,527.23	2,860.18	1,514.21	1,15
Advertising	4,193.50	14,123.10	1,172.84	1,360.04	259.68	2,464.58	1,001.43	668.17	356.68	1,269.55	1,46
Rent, Heat, Light, Power, Cleaning, etc.	12,031.70	12,098.68	1,385.66	3,909.34	800.51	5,118.56	1,452.83	2,153.65	1,347.55	1,720.25	2,38
Printing and Stationery	3,045.30	3,723.52	452.73	797.30	385.50	1,582.50	742.90	642.65	654.92	1,051.72	61
Postage, Telegraph, Cables and Telephone	5,756.04	7,840.79	1,094.92	906.74	239.39	2,773.95	1,322.51	2,168.28	1,390.25	626.52	96
Repairs and Maintenance	1,497.98	2,137.41	474.32	779.70	13.42	1,468.05	125.45	161.44	55.20	540.66	11
Cartage, Freight, etc.	10,992.16	5,825.82	41.72	*104.86*	43.76	1,592.53	652.15	1,407.70	963.67		48
Legal and Auditing	1,834.12	2,779.67	472.23	2,061.60	715.49	1,813.31	682.03	694.81	787.26	540.70	5
Insurance	67.90	409.01	677.82	1,408.27		204.82	193.92	81.77		123.97	9
Commissions		*63.84*	579.45	765.34		2,196.52					69
New York Overhead Charged (Salaries and Traveling—Field Supervisors)	2,423.51		24.01	8,532.85	22.66	22,247.60	3,539.83	1,289.74	385.30		2,4
General Expenses	2,768.59	2,032.74	306.09	383.41	171.40	1,586.57	436.34	684.84	364.71	293.50	1
Taxes	9,070.25	32,508.65	982.41	9,955.83		4,057.55	3,980.72	13.08	275.68	5,222.56	
Depreciation	7,035.43	4,956.71	1,644.87	2,168.30	774.83	5,216.99	1,473.60	565.05	421.41	100.79	7
Accounts Receivable Written Off		3.23	*89.11*	*327.81*				89.82		*67.07*	
Foreign Exchange and Bank Charges—Local	50.41	23,412.84	244.22	1,833.32	*971.52*	1,387.49	58.07	*173.04*	293.25	647.47	
Checking Expense	17,908.67	185.70	26.44	709.10	406.92	5,780.74	2,548.12	444.68	1,886.20	5,269.26	1
	$175,634.31	$227,783.57	$21,677.79	$ 60,290.02	$ 7,207.51	$112,562.89	$ 32,950.56	$ 34,536.63	$22,956.37	$ 44,985.09	$23,5
Less:											
Profit on Outside Producers' Pictures		$ 886.00	$ *70.05*	$ 126.19		$ 132.22					$ 9,1
Profit on Sale of Advertising Accessories	$ *3,044.33*	14,645.98	152.99	1,227.01	$ 54.68	3,121.04	$ *7,206.26*	$ 2,081.88	$ 711.02	$ *725.10*	
Other Income	249.83	1,330.30			45.14		29.67		175.08	33.98	3
	$ *2,794.50*	$ 16,862.28	$ 82.94	$ 1,353.20	$ 99.82	$ 3,253.26	$ *7,176.59*	$ 2,081.88	$ 889.10	$ *691.12*	$ 9,8
Total Distributing Expense	$178,428.81	$210,921.29	$20,994.85	$ 58,936.82	$ 7,107.69	$109,309.63	$ 40,127.15	$ 32,454.75	$22,067.27	$ 45,676.21	$13,6
Percentage Distriounting Expense of Film Rental Income	24.58	24.92	34.80	12.76	32.40	22.37	25.49	18.63	32.01	41.06	1

(Figures in italics were red in original.)

Defendants' Exhibit 21-B1.

FOREIGN COMPANIES

TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME

Year Ended August 31, 1933

M-G-M de la rgentina rgentine)	M-G-M Ltd. (Australia and New Zealand)	M-G-M Films G.m.b.H. (Austria)	M-G-M S. A. Belge (Belgium)	M-G-M of West Indies (British West Indies)	M-G-M de Brazil (Brazil)	M-G-M de Chile (Chile)	M-G-M of China (China)	M-G-M de Colombia (Colombia)	M-G-M de Cuba S.A. (Cuba)	M-G-M A. S. (Denmark)	M-G-M Oriental, Inc. (Dutch East Indies)	M-G-M of Egypt (Egypt)	O. Y. M-G-M Films O. B. (Finland)
5,878.39	$846,528.01	$60,326.41	$461,911.89	$21,935.21	$428,495.53	$157,447.43	$174,209.86	$68,928.76	$111,249.58	$88,701.15	$128,836.91	$143,183.56	$77,557.91
7,632.97	$101,703.59	$ 9,861.24	$ 21,270.77	$ 3,932.25	$ 49,293.83	$ 13,198.55	$ 17,116.73	$10,717.11	$ 25,831.00	$11,338.37	$ 24,982.91	$ 7,821.72	$15,736.52
9,928.78	14,135.95	2,076.26	3,880.58	413.22	4,077.30	1,542.11	3,527.23	2,860.18	1,514.21	1,158.46	4,539.44	1,703.32	1,775.49
1,193.50	14,123.10	1,172.84	1,360.04	259.68	2,164.58	1,001.43	668.17	356.68	1,269.55	1,467.30	1,525.11	302.99	674.62
2,031.70	12,098.68	1,385.66	3,909.54	800.51	5,118.56	1,452.83	2,153.65	1,347.55	1,720.25	2,383.10	2,078.32	1,046.73	2,127.38
3,045.30	3,723.52	452.73	797.30	385.50	1,582.50	742.90	642.65	651.92	1,051.72	613.55	815.48	337.24	253.51
5,756.04	7,810.79	1,094.92	906.74	239.39	2,773.95	1,322.51	2,168.28	1,390.25	626.52	968.58	3,537.02	1,030.85	916.19
1,497.98	2,137.41	474.32	779.70	13.42	1,468.05	125.45	461.44	55.20	540.66	111.87	97.56	296.19	168.00
0,992.16	5,825.82	41.72	*104.86*	43.76	1,592.53	652.15	1,407.70	963.67		487.72	1,115.54	80.65	*488.39*
1,831.12	2,779.67	472.23	2,061.60	715.49	1,813.31	682.03	694.84	787.26	540.70	564.42	4,149.25	*30.93*	1,619.99
67.90	409.01	677.82	1,408.27		204.82	193.92	81.77		123.97	95.85	24.32	59.83	76.52
	63.84	579.45	765.34		2,196.52					698.15			
2,423.51		24.01	8,532.85	22.66	22,247.60	3,539.83	1,289.74	385.30		2,441.30		7,651.84	2,529.62
2,768.39	2,032.74	306.09	383.41	171.10	1,586.57	436.34	684.84	564.71	293.50	165.94	5,756.30	1,542.80	39.97
9,070.25	32,508.65	982.41	9,955.83		4,057.55	3,980.72	13.08	275.68	5,222.56	78.20	101.26		2,417.72
7,035.43	1,956.71	1,644.87	2,168.30	774.83	5,216.99	1,473.60	565.05	421.41	400.79	764.23	575.81	1,103.17	821.11
	3.23	*439.44*	*327.81*				89.82		*67.07*				
50.41	23,412.84	244.22	1,833.32	*971.52*	1,387.49	58.07	*173.04*	293.25	647.47	13.37	*75.56*	52.17	*305.72*
7,908.67	185.70	26.44	709.10	406.92	5,780.74	2,548.12	444.68	1,886.20	5,269.26	178.94	774.06	193.98	
5,634.31	$227,783.57	$21,077.79	$ 60,290.02	$ 7,207.51	$112,562.89	$ 32,950.56	$ 34,536.63	$22,956.37	$ 44,985.09	$23,529.35	$ 46,996.85	$ 23,192.55	$28,362.86
	$ 886.00	$ *70.05*	$ 126.19		$ 132.22					$ 9,102.15	$ 345.39	$ 129.22	
3,044.43	14,645.98	152.99	1,227.01	$ 54.68	3,121.04	$ *7,206.26*	$ 2,084.88	$ 714.02	$ *725.10*	422.15	*2,875.10*	927.50	$ 976.23
249.83	1,330.30			45.14		29.67		175.08	33.98	334.72	195.73	54.94	79.59
3,294.26	$ 16,862.28	$ 82.94	$ 1,353.20	$ 99.82	$ 3,253.26	$ *7,176.59*	$ 2,084.88	$ 889.10	$ *691.12*	$ 9,856.02	$ *2333.98*	$ 1,111.66	$ 1,055.82
8,428.81	$240,921.29	$20,994.85	$ 58,936.82	$ 7,107.69	$109,309.63	$ 40,127.15	$ 32,451.75	$22,067.27	$ 45,676.21	$13,673.33	$ 49,330.83	$ 22,080.89	$27,307.04
24.58	24.92	34.80	12.76	32.40	22.37	25.49	18.63	32.01	41.06	15.42	38.29	15.42	35.21

(Figures in italics were red in original.)

MICRO CARD 22
TRADE MARK ®
39
MATTHEW BENDER & COMPANY
14155
656
microcard

Defendants' Exhibit 21-B2.

FOREIGN COMPANIES

TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME

Year Ended August 31, 1933

	M-G-M S. A. (France)	M-G-M Films A. G. (Germany)	M-G-M Pictures, Ltd. (Great Britain)	M-G-M Pictures Hellas (Greece)	Culver Export Corporation (Guatemala)	N/V M-G-M Films Co. (Holland)	M-G-M Distributing Corp. (Hungary)	M-G-M India, Ltd. (India)	S.A.I. M-G-M Films (Italy)	M-G-M Company, Ltd. (Japan)	M-G-M (J
Film Rental Income	$769,354.35	$513,408.12	$5,441,154.50	$24,736.96	$71,520.38	$246,801.61	$71,650.81	$299,672.14	$942,410.76	$217,830.46	$1
Distributing Expense:											
Salaries	$106,759.75	$ 75,240.31	$266,457.54	$ 4,580.13	$16,404.00	$ 20,835.10	$ 9,161.30	$ 23,323.35	$ 86,925.02	$ 27,412.82	$
Traveling, Entertaining and Auto Expense	16,227.66	20,949.43	33,885.18	292.57	2,652.49	3,769.60	1,614.01	339.00	9,302.21	5,597.74	
Advertising	10,090.31	17,597.20	120,979.22	188.73	300.75	5,415.17	2,143.85	58.64	3,772.58	7,852.62	
Rent, Heat, Light, Power, Cleaning, etc.	11,326.76	12,276.10	34,938.89	586.83	972.45	3,976.95	1,194.39	3,404.96	15,247.21	5,861.97	
Printing and Stationery	3,159.15	2,147.34	11,398.71	151.48	857.94	629.92	528.19	1,302.92	2,503.16	1,280.88	
Postage, Telegraph, Cables and Telephone	8,062.15	8,566.94	16,332.73	255.12	1,352.35	1,802.10	1,127.09	4,190.58	4,910.20	3,626.03	
Repairs and Maintenance	4,656.90	1,216.44	7,110.42	45.17	114.13	260.70	330.60	389.32	935.24	508.84	
Cartage, Freight, etc.	6,324.79	3,878.96	18,780.08	69.71	1,186.29	2,955.50	416.56	*215.76*	1,810.10	3,018.07	
Legal and Auditing	2,851.44	1,648.40	6,723.35	551.41	287.50	1,049.06	1,189.50	977.39	2,299.25	994.94	
Insurance	3,046.49	3,934.10	7,145.81	9.18		343.83	524.54	202.64	1,506.01	188.60	
Commissions					839.94		237.74		3,874.49	564.55	
New York Overhead Charged (Salaries and Traveling—Field Supervisors)	7,234.44	2,575.30	27,830.18	598.13		14,356.33	988.34	8,709.93	9,366.56	9,838.66	
General Expenses	*1,702.42*	5,643.54	17,443.19	56.38	25.00	272.21	1,866.58	462.03	2,683.19	733.57	
Taxes	22,925.64	11,537.37	149,374.36	105.12	347.95	449.25	912.94	15,153.26	8,962.21		
Depreciation	14,006.01	7,758.72	25,470.49	460.52	1,097.96	1,896.91	1,990.73	4,430.08	6,933.45	3,201.66	
Accounts Receivable Written Off	*4,608.00*	*5,424.24*	*2,989.68*		281.21	*16.31*					
Foreign Exchange and Bank Charges—Local	*86.07*	*5,099.83*		64.62	103.57	*966.79*	1,890.13	180.15	2,255.68	38.50	
Checking Expense	26.89	19.56			414.86		507.01	117.09	6,782.39	4,044.76	
	$210,301.89	$164,465.61	$740,880.47	$ 8,015.10	$27,238.39	$ 57,029.53	$26,623.50	$ 63,025.58	$170,068.95	$ 74,764.21	$1
Less:											
Profit on Outside Producers' Pictures	$ *1,735.18*	$ 3,119.25	$ *27,315.50*				$ 5,511.09		$ *368.92*	$ 21.65	
Profit on Sale of Advertising Accessories	15,840.78	5,031.62	46,622.10	$ *37.40*	$ *2,321.69*	$ 2,043.76	1,393.43	$ 7,067.66	*5,032.50*	*2,565.26*	$
Other Income	384.58	379.29	376.21	229.32	139.36		148.03	166.47	144.86	600.54	
	$ 14,490.18	$ 8,530.16	$ 19,682.81	$ 191.92	$ *2,182.33*	$ 2,043.76	$ 7,052.55	$ 7,234.13	$ *5,256.56*	$ *1,943.67*	$
Total Distributing Expense	$195,811.71	$155,935.45	$721,197.66	$ 7,823.18	$29,620.72	$ 54,985.77	$19,570.95	$ 55,791.45	$175,325.51	$ 76,707.28	$1
Percentage Distributing Expense of Film Rental Income	25.45	30.37	13.25	31.63	41.42	22.28	27.31	18.62	18.60	35.21	

(Figures in italics were red in original.)

Defendants' Exhibit 21-B2.

FOREIGN COMPANIES

Total Distributing Expense Ratio to Film Rental Income

Year Ended August 31, 1933

M ... ny)	M-G-M Pictures, Ltd. (Great Britain)	M-G-M Pictures Hellas (Greece)	Culver Export Corporation (Guatemala)	N/V M-G-M Films Co. (Holland)	M-G-M Distributing Corp. (Hungary)	M-G-M India, Ltd. (India)	S.A.I. M-G-M Films (Italy)	M-G-M Company, Ltd. (Japan)	M.G.J.D.Z.P.F. (Jugo-Slavia)	Film Industrie A. G. M-G-M (Latvia)	M-G-M de Mexico (Mexico)	M-G-M A. S. (Norway)
08.12	$5,441,154.50	$24,736.96	$71,520.38	$246,801.61	$71,650.81	$299,672.14	$942,410.76	$217,830.46	$16,659.96	$50,903.58	$288,424.03	$70,369.20
10.31	$266,457.54	$ 4,580.13	$16,404.00	$ 20,835.10	$ 9,161.30	$ 23,323.35	$ 86,925.02	$ 27,412.82	$ 6,907.79	$ 8,871.62	$ 56,629.60	$ 6,880.55
9.43	33,885.18	292.57	2,652.49	3,769.60	1,614.01	339.00	9,302.21	5,597.74	1,674.03	1,535.76	10,244.90	1,726.87
7.20	120,979.22	188.73	300.75	5,415.17	2,143.85	58.64	3,772.58	7,852.62	378.16	391.17	12,656.37	1,591.44
6.10	34,938.89	586.83	972.45	3,976.95	1,194.39	3,404.96	15,247.21	5,861.97	1,389.76	2,797.09	4,404.06	1,251.85
7.34	11,398.71	151.48	857.94	629.92	528.19	1,302.92	2,503.16	1,280.88	454.77	372.72	3,627.78	450.15
6.94	16,332.73	255.12	1,352.35	1,802.10	1,127.09	4,190.58	4,910.20	3,626.03	1,105.17	1,092.88	6,259.08	1,114.04
6.44	7,110.42	45.17	114.13	260.70	330.60	389.32	935.24	508.84	116.27	386.16	2,022.64	242.05
8.96	18,780.08	69.71	1,186.29	2,955.50	416.56	*215.76*	1,810.10	3,018.07	*526.26*	1,739.16	10,579.86	161.83
8.40	6,723.35	551.41	287.50	1,049.06	1,189.50	977.39	2,299.25	994.94	1,012.83	1,099.76	1,950.03	220.00
4.10	7,145.81	9.18		343.83	524.54	202.64	1,506.01	188.60	195.97	301.63	132.38	92.94
			839.94		237.74		3,874.49	564.55		87.71	94.55	1,595.10
5.30	27,830.18	598.13		14,356.33	988.34	8,709.93	9,366.56	9,838.66	448.77	298.10	2.31	137.63
3.51	17,443.19	56.38	25.00	272.21	1,866.58	462.03	2,683.19	733.57	294.03	186.10	1,541.02	2,141.65
7.37	149,374.36	105.12	347.95	449.25	912.94	15,153.26	8,962.21		906.67	1,957.38	4,320.69	1,904.06
8.72	25,470.49	460.52	1,097.96	1,896.91	1,990.73	4,430.08	6,933.45	3,201.66	2,499.60	1,253.84	1,555.64	*122.12*
4.24	*2,989.68*		281.21	*16.31*					*1,826.47*		1,179.65	*1,373.96*
9.83		64.62	103.57	*966.79*	1,890.13	180.15	2,255.68	38.50	207.74	*3,356.28*	889.94	849.21
19.56			414.86		507.01	117.09	6,782.39	4,044.76		31.09	10,016.61	
5.61	$740,880.47	$ 8,015.10	$27,238.39	$ 57,029.53	$26,623.50	$ 63,025.58	$170,068.95	$ 74,764.21	$15,238.83	$19,045.89	$128,104.08	$18,863.29
9.25	*$ 27,315.50*				$ 5,511.09		*$ 368.92*	$ 21.65		*$ 16.63*		
1.62	46,622.10	*$ 37.40*	*$ 2,521.69*	$ 2,043.76	1,393.43	$ 7,067.66	*5,032.59*	*2,565.26*	$ 349.31	*1,071.81*	*$ 8,487.63*	$ 67.36
9.29	376.21	229.32	139.36		148.03	166.47	144.86	600.54	266.78		155.93	463.14
0.16	$ 19,682.81	$ 191.92	*$ 2,382.33*	$ 2,043.76	$ 7,052.55	$ 7,234.13	*$ 5,256.56*	*$ 1,943.07*	$ 616.09	*$ 1,088.44*	*$ 8,331.70*	$ 530.80
5.45	$721,197.66	$ 7,823.18	$29,620.72	$ 54,985.77	$19,570.95	$ 55,791.45	$175,325.51	$ 76,707.28	$14,622.74	$20,134.33	$136,435.78	$18,332.49
37	13.25	31.63	41.42	22.28	27.31	18.62	18.60	35.21	87.77	39.55	47.30	26.05

(Figures in italics were red in original.)

Defendants' Exhibit 21-B3.

FOREIGN COMPANIES

TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME.

Year Ended August 31, 1933

	M-G-M de Panama (Panama)	M-G-M del Peru (Peru)	M-G-M Manila, Inc. (Philippines)	T/F M-G-M (Poland)	M-G-M de Puerto Rico (Porto Rico)	M-G-M Films Ltda. (Portugal)	M. G. Film S.A.R. (Roumania)	M-G-M Films S. A. Proprietary Ltd. (South Africa)	M-G-M Iberica S. A. (Spain)	M-G-M Oriental, Inc. (Singapore)	Filmactiebolag Le Mat M.G. Stockholm (Sweden)
Film Rental Income	$61,379.97	$85,974.92	$143,365.48	$136,037.52	$77,099.71	$50,034.72	$97,386.80	$276,958.86	$649,570.06	$65,545.37	$281,304.6
Distributing Expense:											
Salaries	$ 8,733.00	$ 4,207.08	$ 12,144.66	$ 15,433.29	$17,498.75	$ 6,081.82	$15,814.19	$ 16,184.93	$ 58,988.35	$ 8,946.65	$ 29,136.86
Traveling, Entertaining and Auto Expense	2,040.26	1,961.09	1,101.10	3,818.30	3,616.42	327.58	1,322.72	3,235.84	21,105.51	2,519.49	2,531.68
Advertising	216.22	707.97	651.56	1,000.62	155.00	335.84	1,112.02	693.61	11,089.60	114.37	13,415.79
Rent, Heat, Light, Power, Cleaning, etc.	1,392.65	621.54	1,174.65	1,781.83	1,374.38	564.27	1,906.24	2,827.60	5,250.53	1,218.80	3,843.20
Printing and Stationery	413.08	456.59	387.67	676.37	364.47	239.19	541.02	656.61	2,587.78	354.58	966.74
Postage, Telegraph, Cables and Telephone	724.41	870.40	1,313.84	1,716.26	927.80	352.57	1,399.39	2,909.10	6,800.51	1,322.58	2,682.86
Repairs and Maintenance		244.72	166.11	286.61	165.71	48.58	373.02	1,151.73	1,498.27	81.30	245.68
Cartage, Freight, etc.	27.41	318.18	1,003.12	624.00	1,055.18	402.10	*103.04*	1,236.72	6,264.46	30.21	1,163.81
Legal and Auditing	471.70	1,205.84	556.33	752.74	708.45	548.94	390.62	424.02	1,493.27	446.87	3,451.52
Insurance	20.00	28.68	88.48	1,422.42	8.48	134.23	132.92	111.10	1,534.34		153.32
Commissions		2,851.88	15.80	372.62	1,010.31		61.20		23.61		
New York Overhead Charged (Salaries and Traveling—Field Supervisors)		3,662.58	8,675.50	233.36		1,671.11	1,635.28	2,439.56	17,080.06		4,367.81
General Expenses	262.98	78.93	446.67	445.78	47.41	153.35	620.87	953.99	1,740.54	211.56	119.75
Taxes		215.06	1,378.72	7,338.46	714.46	1,340.27	4,964.64	20.35	47,237.77		*14,184.30*
Depreciation	625.73	269.18	60.95	5,317.37	345.12	636.56	2,397.23	22,504.39	1,423.39	593.95	1,519.85
Accounts Receivable Written Off			55.64	*1,323.65*		*118.38*	*73.55*	293.39	*4,028.51*		
Foreign Exchange and Bank Charges—Local	38.42	164.53	1,224.91	395.08	*421.75*	*84.48*	*368.43*	178.34	*11,086.36*	*53.68*	153.50
Checking Expense	366.50	1,621.45	3,146.56	178.29			566.65	148.22	257.10	370.61	911.07
	$15,332.36	$19,485.67	$ 33,591.97	$ 40,469.75	$27,570.19	$12,633.55	$32,692.99	$ 55,969.50	$169,260.22	$16,157.29	$ 50,479.02
Less:											
Profit on Outside Producers' Pictures						$ *109.02*	$ 935.63	$ *2,269.03*	$ 8.36	$ 11.08	$ 1.93
Profit on Sale of Advertising Accessories	$ *966.90*	$ 537.06	$ *2,424.39*	$ 461.02	$ *361.13*	858.31	*1,551.23*	4,586.22	4,223.78	*1,215.52*	3,199.17
Other Income	161.92	8.79	346.89	213.78	250.00	11.70	223.39		2,527.97	20.85	585.5
	$ *804.98*	$ 545.85	$ *2,077.50*	$ 674.80	$ *111.13*	$ 760.99	$ *392.21*	$ 2,317.19	$ 6,760.11	$ *1,183.59*	$ 3,786.6
Total Distributing Expense	$16,137.34	$18,939.82	$ 35,669.47	$ 39,794.95	$27,681.32	$11,872.56	$33,085.20	$ 53,652.31	$162,500.11	$17,340.88	$ 46,692.3
Percentage Distributing Expense of Film Rental Income	26.29	22.03	24.88	29.25	37.20	23.73	33.97	19.3	25.02	26.46	16.60

(Figures in italics were red in original)

Defendants' Exhibit 21-B3.

FOREIGN COMPANIES

TOTAL DISTRIBUTING EXPENSE RATIO TO FILM RENTAL INCOME

Year Ended August 31, 1933

M-G-M de Panama (Panama)	M-G-M del Peru (Peru)	M-G-M Manila, Inc. (Philippines)	T/F M-G-M (Poland)	M-G-M de Puerto Rico (Porto Rico)	M-G-M Films Ltda. (Portugal)	M. G. Film S.A.R. (Roumania)	M-G-M Films S.A. Proprietary Ltd. (South Africa)	M-G-M Iberica S.A. (Spain)	M-G-M Oriental, Inc. (Singapore)	Filmactiebolaget Le Mat M.G. Stockholm (Sweden)	M-G-M S. A. Geneva (Switzerland)	M-G-M S. A. (Turkey)	M-G-M de Venezuela (Venezuela)
$61,379.97	$85,974.92	$143,365.48	$136,037.52	$77,099.71	$50,034.72	$97,386.80	$276,958.86	$649,570.06	$65,545.37	$281,304.63	$135,437.91	$37,288.23	$88,660.06
$ 8,733.06	$ 1,207.08	$ 12,144.66	$ 15,433.29	$17,498.75	$ 6,081.82	$15,814.49	$ 16,184.93	$ 58,988.35	$ 8,946.65	$ 29,136.86	$ 12,558.54	$ 5,627.49	$14,550.57
2,040.26	1,961.09	1,1[illegible].10	3,818.30	3,616.42	327.58	1,322.72	3,235.84	21,145.51	2,519.49	2,531.68	2,920.42	355.04	5,062.13
216.22	707.97	65[illegible]	1,000.62	155.00	335.84	1,112.02	693.61	11,089.60	114.37	13,415.79	592.53	168.80	204.76
1,392.65	621.51	1,174.65	1,781.83	1,374.38	564.27	1,906.24	2,827.60	5,250.53	1,218.80	3,843.20	1,382.03	805.66	1,821.92
413.08	456.59	387.67	676.37	364.47	239.19	541.02	656.61	2,587.78	354.58	966.74	530.41	168.29	442.60
724.44	870.40	1,313.54	1,716.26	927.80	352.57	1,399.39	2,909.10	6,800.51	1,322.58	2,682.86	1,458.89	423.57	1,170.45
	244.72	166.11	286.61	165.71	48.58	378.02	1,151.73	1,498.27	81.30	245.69	291.63	168.71	73.37
27.41	318.18	1,003.12	624.00	1,055.18	402.10	*103.04*	1,236.72	6,264.46	30.21	1,163.84	388.24	268.85	1,354.67
471.70	1,205.84	356.33	752.74	708.45	548.94	390.62	424.02	1,493.27	446.87	3,451.52	1,109.86	407.64	243.20
20.00	28.68	88.48	1,422.42	8.46	134.23	132.92	111.10	1,534.34		153.32	226.84	27.67	56.54
	2,851.88	15.80	372.62	1,010.31		61.20		23.61					
	3,662.58	8,675.50	233.36		1,671.11	1,635.28	2,439.56	17,080.06		4,367.81	1,041.41	533.07	725.65
262.98	78.93	446.67	445.78	47.41	153.35	620.87	953.99	1,740.54	211.56	[illegible]9.55	280.84	169.22	548.51
	215.06	4,378.72	7,338.46	714.46	1,340.27	4,964.64	20.35	47,237.77		*14,184.30*	294.78	293.94	265.30
625.73	269.18	60.95	5,317.37	345.12	636.56	2,397.23	22,504.39	1,423.39	593.95	1,519.83	876.65	506.18	377.77
		55.64	*1,323.65*		*118.38*	73.55	293.39	*4,028.51*					
38.42	164.53	1,224.91	395.08	*424.75*	*84.48*	*368.43*	178.34	*11,086.36*	*53.68*	153.56	107.88	*24.81*	1,256.85
366.50	1,621.45	3,146.56	178.29			566.65	148.22	257.10	370.61	911.07			998.60
$15,332.36	$19,485.67	$ 33,591.97	$ 40,469.75	$27,570.19	$12,633.55	$32,692.99	$ 55,069.50	$169,260.22	$16,157.29	$ 50,479.02	$ 24,060.95	$ 9,899.32	$29,152.89
					$ *109.02*	$ 935.63	$ *2,269.05*	$ 8.36	$ 11.08	$ 1.93		$ 2.31	
$ *966.90*	$ 537.06	$ *2,424.39*	$ 461.02	$ *361.13*	858.31	*1,531.23*	4,586.22	4,223.78	*1,215.52*	3,199.17	$ *543.93*	131.74	$ 1,517.20
161.92	8.79	346.89	213.78	250.00	11.70	223.39		2,527.97	20.85	585.54		46.80	
$ *804.98*	$ 545.85	$ *2,077.50*	$ 674.80	$ *111.13*	$ 760.99	$ *392.21*	$ 2,317.19	$ 6,700.11	$ *1,183.59*	$ 3,786.64	$ *533.93*	$ 180.85	$ 1,517.20
$16,137.34	$18,939.82	$ 35,669.47	$ 39,794.95	$27,681.32	$11,872.56	$33,085.20	$ 53,652.31	$162,560.11	$17,340.88	$ 46,692.38	$ 24,594.88	$ 9,718.47	$27,635.69
26.29	22.03	24.88	29.25	37.20	23.73	33.97	19.3	25.02	20.46	16.60	18.16	26.06	31.17

(Figures in italics were red in orginal.)

Defendants' Exhibit 22.

METRO-GOLDWYN-MAYER

CULVER CITY STUDIO

ANALYSES OF CHANGES IN CONTINUITY AND PRODUCTION BALANCES

	Continuities (Exclusive of Book)			Productions		
	1930	1931	1932	1930	1931	1932
Balance—Beginning of Year	$ 881,793.27	$ 861,531.58	$1,097,997.89	$3,845,708.64	$6,603,217.60	$4,057,298.54
Charges During Year	$2,248,643.70	$2,290,877.27	$2,134,630.66	$19,303,057.23	$19,247,149.54	$16,204,197.54
Used or Sold During Year	1,763,725.52	2,076,831.99	1,552,835.35	16,376,807.96	21,455,748.93	16,928,816.12
Excess Charges (*Consumption*)	$ 484,918.18	$ 214,045.28	$ 581,795.31	$ 2,926,249.27	*$ 2,208,599.39*	$ *724,618.58*
Written Off (Less reinstated) During Year	505,179.87	*22,421.03*	51,368.16	168,740.31	337,319.67	151,686.80
Net Increase—*Decrease* in Balance	*20,261.69*	236,466.31	530,427.15	2,757,508.96	*2,545,919.06*	*876,305.38*
Balance—End of Year	$ 861,531.58	$1,097,997.89	$1,628,425.04	$6,603,217.60	$4,057,298.54	$3,180,993.16

STUDIO EXPENDITURES

	1930	1931	1932
Total	$24,096,396.91	$23,361,826.38	$19,266,251.82
Decrease over Previous Year		*734,570.53*	*4,095,574.56*

(Words and figures in italics were red in original.)

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Defendants' Exhibit 22.

SCHEDULE "1"

METRO-GOLDWYN-MAYER

CULVER CITY STUDIO

ANALYSES OF CHANGES IN CONTINUITY AND PRODUCTION BALANCES

	Continuities (Exclusive of Book)			Productions		
	1930	1931	1932	1930	1931	1932
Balance—Beginning of Year	$ 881,793.27	$ 861,531.58	$1,097,997.89	$3,845,708.64	$6,603,217.60	$4,057,298.54
Charges During Year	$2,248,643.70	$2,290,877.27	$2,134,630.66	$19,303,057.23	$19,247,149.54	$16,204,197.54
Used or Sold During Year	1,763,725.52	2,076,831.99	1,552,835.35	16,376,807.96	21,455,748.93	16,928,816.12
Excess Charges (*Consumption*)	$ 484,918.18	$ 214,045.28	$ 581,795.31	$ 2,926,249.27	*$ 2,208,599.39*	$ *724,618.58*
Written Off (Less reinstated) During Year	505,179.87	*22,421.03*	51,368.16	168,740.31	337,319.67	151,686.80
Net Increase—*Decrease* in Balance	*20,261.69*	236,466.31	530,427.15	2,757,508.96	*2,545,919.06*	*876,305.38*
Balance—End of Year	$ 861,531.58	$1,097,997.89	$1,628,425.04	$6,603,217.60	$4,057,298.54	$3,180,993.16

STUDIO EXPENDITURES

	1930	1931	1932
Total	$24,096,396.91	$23,361,826.38	$19,266,251.82
Decrease over Previous Year		*734,570.53*	*4,095,574.56*

(Words and figures in italics were red in original.)

Defendants' Exhibit 23.

2431

M-G-M STUDIO

CONTINUITIES—USED AND REJECTED
1930 to 1936 Inclusive

Year Ended	Charges	Used or Sold	Rejected Net After Reinstated	Transferred to New York Cosmo Settlement
August 1930	$ 2,248,643.70	$ 1,763,725.52	$ 505,179.87	
1931	2,290,877.27	2,076,831.99	*22,421.03*	
1932	2,134,630.66	1,552,835.35	51,368.16	
1933	2,159,317.17	1,581,029.72	1,291.12	
1934	2,570,604.85	1,682,713.68	34,754.94 (A)	
1935	3,386,989.22	2,314,353.83	189.90	$203,922.37
			(17,080.81 (B)	
1936	4,391,628.68	2,478,921.16	(3,076,439.21 (C)	
Total	$19,182,691.55	$13,450,411.25	$3,663,882.98	$203,922.37

2432

Rejected (Net) Continuities represent 19.1% of Charges and 27.1% of Used

Therefore, based on % of Charges—1932 loss was $407,714.46
do. % of used do. 420,818.38

(A) Sold—Sales Price less than cost of book—hence continuity considered rejected.

2433

(B) Rejected—Charged to Overhead.

(C) Rejected—Charged to Reserve.

(Figures in italics were red in original.)

Defendants' Exhibit 24.

METRO-GOLDWYN-MAYER CORPORATION
CULVER CITY STUDIO

Comparative Statement of Direct Production Costs
For the Fiscal Years Ended 1930 to 1936, Inclusive

Other Than Stories and Continuities		Total Stories and Continuities		Original Stories, Continuities, Dialogue and Script Expense		Book	
Amount	Per Cent.	Amount	Per Cent.	Amount	Per Cent.	Amount	Per Cent.
$ 16,854,085.65	87.3	$ 2,448,971.58	12.7	$ 1,756,952.21	9.1	$ 692,019.37	3.6
16,267,344.77	84.5	2,979,804.77	15.5	2,097,693.48	10.9	882,111.29	4.6
13,964,002.80	86.3	2,240,194.74	13.7	1,553,696.79	9.5	686,497.95	4.2
16,254,183.56	86.9	2,445,115.37	13.1	1,543,150.82	8.3	901,964.55	4.8
19,435,784.44	89.0	2,407,851.96	11.0	1,658,107.86	7.6	749,744.10	3.4
20,985,985.43	88.3	2,776,785.23	11.7	2,294,145.20	9.7	482,670.03	2.0
22,404,213.27	88.4	2,960,282.12	11.6	2,479,008.48	9.7	481,273.64	1.9
$126,165,599.92	87.3	$18,259,005.77	12.7	$13,382,724.84	9.3	$4,876,280.93	3.4

Defendants' Exhibit 25.

2437

APPORTIONMENT OF STUDIO OVERHEAD
ON BASIS OF GROSS RECEIPTS FROM PICTURES PRODUCED AT STUDIO

Gross Receipts

	All Pictures	Pictures Produced at Studio	"Letty Lynton"	"Letty Lynton" % of Gross
ited States 1932	$30,020,526.08			
ss Outside Producers	5,238,631.30			
		$24,781,894.78	$ 727,053.84	2.93
reign 1933	$15,563,592.34			
ss Outside Producers	1,572,044.25			
		13,991,548.09	417,862.51	2.99
nada 1932	$ 1,544,629.84			
ss Outside Producers	298,606.56			
		1,246,023.28	27,369.72	2.20
TOTAL		$40,019,466.15	$1,172,286.07	2.93

2438

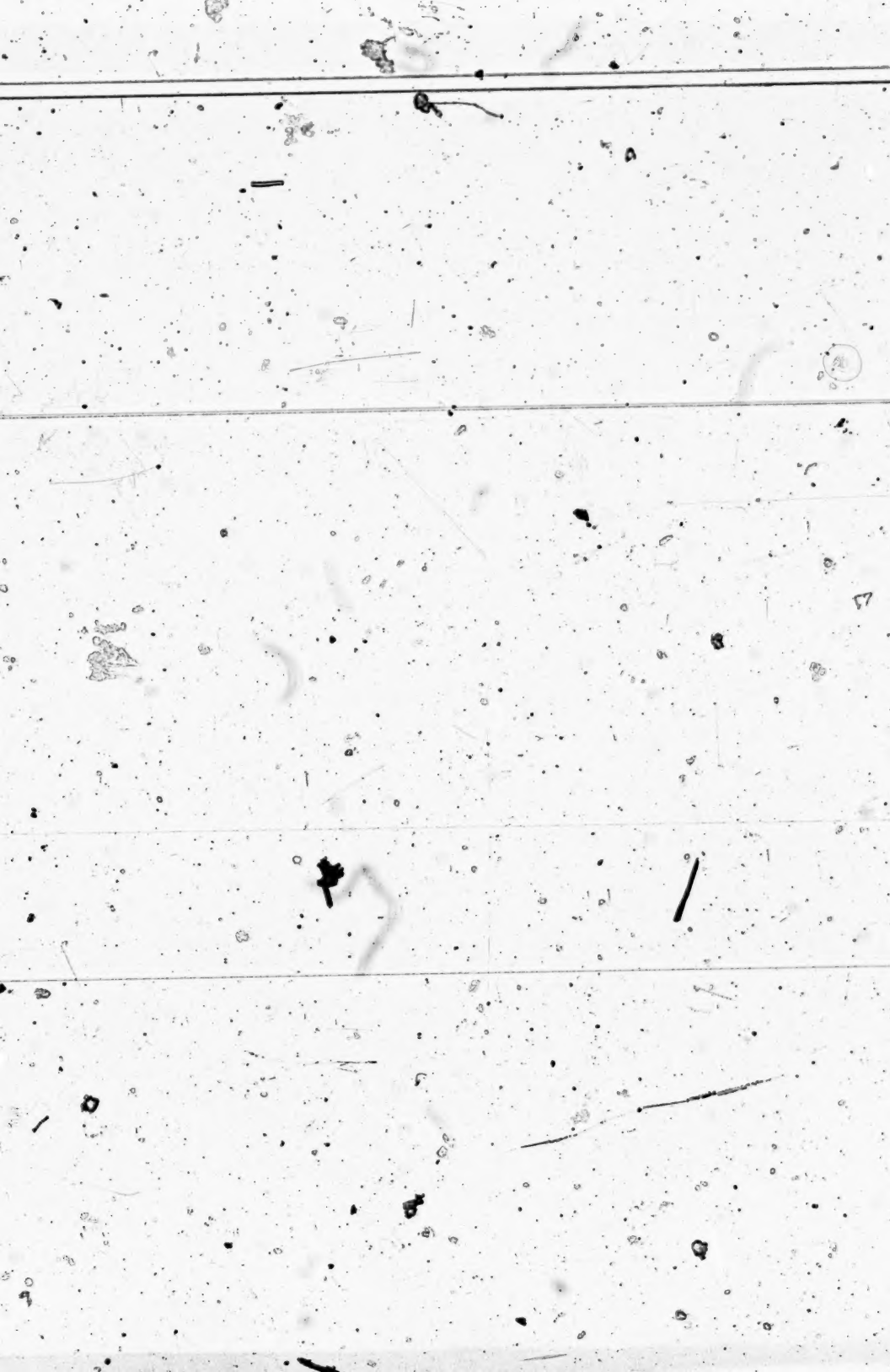
tal Studio Overhead—Per EXHIBIT 18-D5	$5,891,374.57	
udio Overhead apportioned "Letty Lynton" on Gross Receipts Basis—2.93% x $5,891,374.57		172,647.27
36 Basis (2.77% x $5,891,374.57)		163,649.29

2439

METRO-GOLDWYN-MAYER CORPORATION
CULVER CITY STUDIO

Comparative Statement of Direct Production Costs
For the Fiscal Years Ended 1930 to 1936, Inclusive

Year Ended	Total Costs Charged to Production Amount	Per Cent.	Other Than Stories and Continuities Amount	Per Cent.	Total Stories and Continuities Amount	Per Cent.	Original Stories, Continuities, Dialogue and Script Expense Amount	Per Cent.	Boo Amount
1930	$ 19,303,057.23	100.0	$ 16,854,085.65	87.3	$ 2,448,971.58	12.7	$ 1,756,952.21	9.1	$ 602,019.
1931	19,247,149.54	100.0	16,267,344.77	84.5	2,979,804.77	15.5	2,097,693.48	10.9	882,111.
1932	16,204,197.54	100.0	13,964,002.80	86.3	2,240,194.74	13.7	1,553,696.79	9.5	686,497.
1933	18,699,298.93	100.0	16,254,183.56	86.9	2,445,115.37	13.1	1,543,150.82	8.3	901,964.
1934	21,843,636.40	100.0	19,435,784.44	89.0	2,407,851.96	11.0	1,658,107.86	7.6	749,744.
1935	23,762,770.66	100.0	20,985,985.43	88.3	2,776,785.23	11.7	2,294,115.20	9.7	482,670.
1936	25,364,495.39	100.0	22,404,213.27	88.4	2,960,282.12	11.6	2,479,008.48	9.7	481,273.
Total	$144,424,605.69	100.0	$126,165,599.92	87.3	$18,259,005.77	12.7	$13,382,724.84	9.3	$4,876,280.



Defendants' Exhibit 26.

2440

May 3, 1932.

Mr. Sam Dembow, Jr.

COMPOSITE REVIEW

LETTY LYNTON

Metro Goldwyn Distr. Corp.
7515 ft. 9 reels 84 min.
Director—Clarence Brown

Cast—Joan Crawford
Robert Montgomery
Lewis Stone
Nils Asther

2441

Unanimously "A" and several "AA". One of the best Crawford's to date in which the star gives a superb dramatic performance. In addition, Robert Montgomery comes back in a role that suits him to a "T". The combination of Crawford and Montgomery is superb. Nils Asther performs with unusual zest and small bits by Lewis Stone and Mary Robson help to round out a sure-fire box office hit. Cannot fail to go over.

Louis Notarius

2442

Defendants' Exhibit 27-A.

244

LOEW'S INCORPORATED

OFFICERS

President	Nicholas M. Schenck
1st Vice President	Arthur M. Loew
Vice President	David Bernstein
"	David L. Loew
"	Edward A. Schiller
Secretary	Leopold Friedman
Treasurer	David Bernstein
Assistant Treasurer	Charles K. Stern
"	Charles C. Moskowitz
"	Len Cohen
Assistant Secretary	Jesse T. Mills 244
"	H. Hellborn
"	Isidor Frey

DIRECTORS

David Bernstein
Harley L. Clarke
Leopold Friedman
Arthur M. Loew
David L. Loew
William A. Phillips
Daniel E. Pomeroy
Harry M. Rice
J. Robert Rubin
Nicholas M. Schenck 244
Charles M. Schwab
David Warfield

Defendants' Exhibit 27-B.

ETRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION.

OFFICERS

President	Nicholas M. Schenck
Vice President	J. Robert Rubin
"	Arthur M. Loew
"	David Bernstein
"	Edward Bowes
"	Felix F. Feist
Treasurer	David Bernstein
Secretary	J. Robert Rubin
Assistant Secretary	Jesse T. Mills
"	Leopold Friedman
"	S. S. Braunberg
Assistant Treasurer	Charles K. Stern
"	David L. Loew
"	C. C. Moskowitz
"	R. Lazarus

DIRECTORS

Nicholas M. Schenck
Louis B. Mayer
David Bernstein
J. Robert Rubin
Arthur M. Loew

Defendants' Exhibit 27-C.

METRO-GOLDWYN PICTURES CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice President	J. Robert Rubin
"	David Bernstein
"	Arthur M. Loew
"	Edward Bowes
Treasurer	David Bernstein
Secretary	J. Robert Rubin
Assistant Treasurer	Charles K. Stern
"	David L. Loew
"	C. C. Moskowitz
"	R. Lazarus
Assistant Secretary	Jesse T. Mills
"	Leopold Friedman
"	S. S. Braunberg
"	Hattie Helborn

DIRECTORS

Nicholas M. Schenck
David Bernstein
J. Robert Rubin
David Warfield
Arthur M. Loew
David L. Loew
Messmore Kendall
Leopold Friedman
Edward Schiller
Felix F. Feist
E. M. Saunders
William Braden
Jesse T. Mills
Edward Bowes
C. C. Moskowitz

Defendants' Exhibit 27-D.

252

CULVER EXPORT CORPORATION

OFFICERS

President	Arthur M. Loew
Vice President	M. A. Spring
Treasurer	Henry F. Krecke
Secretary	David Blum
Assistant Secretary	Lillian Reiss
Assistant Treasurer	Harry C. Kleindienst
"	Charles K. Stern
"	J. T. Mills

253

DIRECTORS

Arthur M. Loew
M. A. Spring
David Blum

254

Defendants' Exhibits 28-A to 28-E.

Country	Company	Date Of Organization	Under Laws Of	Countries In Which Distributed	Officers
Argentina	Metro-Goldwyn-Mayer De La Argentina	2/26/27	New Jersey	Argentina & Paraguay	David O. Decker—Pres. Charles E. Quick—Vice Pres. Len Cohen—Treas. Lillian Reiss—Secy. Stuart B. Dunlap—Ass't Secy
Australia	Metro-Goldwyn-Mayer, Ltd.	6/12/25	New South Wales	Australia, New Zealand & Pacific Islands	N. B. Freeman—Managing Director T. E. Ferguson—Secy-Treas.
Austria	Metro-Goldwyn-Mayer Filme G.M.B.H.	2/4/28	Austria	Austria	
Belgium	Metro-Goldwyn-Mayer S.A.B.	5/11/26	Belgium	Belgium & Belgian Congo	S. Habib—Managing Director
Brazil	Metro-Goldwyn-Mayer do Brazil	7/21/26	New Jersey	Brazil	D. O. Decker—Pres. C. E. Quick—Vice Pres. Lillian Reiss—Secy B. Fried—Ass't Secy Stuart B. Dunlap—" Len Cohen—Treas.
British West Indies	Metro-Goldwyn-Mayer Of The West Indies	5/10/32	New Jersey	British West Indies, Martinique & Guadeloupe & French and Dutch Guiana	David O. Decker—Pres. Charles E. Quick—Vice Pres. Lillian Reiss—Secy Len Cohen—Treas. Wm. L. Engelhardt—Ass't Treas. Bertha Fried—Ass't Secy
Bulgaria	Metro-Goldwyn-Mayer A.G.	1/9/31	Bulgaria	Bulgaria	
Chile	Compania Cinematografia Metro-Goldwyn-Mayer De Chile	9/30/27	New Jersey	Chile	D. O. Decker—Pres. Chas. E. Quick—Vice Pres. Len Cohen—Treas. Lillian Reiss—Secy Bertha Fried—Ass't Secy Stuart B. Dunlap—" "
China	Metro-Goldwyn-Mayer Of China	7/22/30	New Jersey	China, Hong Kong & Macao	David O. Decker—Pres. Charles E. Quick—Vice Pres. Lillian Reiss—Secy Len Cohen—Treas. Bertha Fried—Ass't Secy

Defendants' Exhibits 28-A to 28-E (continued).

Directors	Country	Company	Date Of Organization	Under Laws Of	Countries In Which Distributed	Officers
D. O. Decker C. E. Quick Len Cohen	olombia	Metro-Goldwyn-Mayer de Colombia, Inc.	8/30/30	New Jersey	Colombia	David O. Decker—Pres. Charles E. Qu k—Vice Pres. Lillian Reiss—Secy Bertha Fried—Ass't Secy Len Cohen—Treas.
N. B. Freeman T. E. Ferguson D. Lake F. W. N. Becker L. L. Lawrence G. Trussart	uba	Metro-Goldwyn-Mayer de Cuba	1/29/26	Cuba	Cuba	David O. Decker—Pres. Charles E. Quick—Vice Pres. Jose Manuel Rodriquez Garcia—Secy Pedro V. Jorge—Ass't Secy Charles E. Quick—Treas. Edward F. O'Connor—Ass't Treas.
D. O. Decker C. E. Quick Len Cohen	zecho-Slovakia	Metro-Goldwyn-Mayer, Akt. Ges.	3/24/25	Czecho	Czecho	
	enmark	Metro-Goldwyn-Mayer. A/S	11/25/29	Denmark	Denmark & Iceland	
D. O. Decker C. E. Quick Len Cohen	utch East Indies	Metro-Goldwyn-Mayer (Oriental) Co. Inc.	8/1/29	N. J.	Dutch East Indies	David O. Decker—Pres. C. E. Quick—Vice Pres. Lillian Reiss—Secy Len Cohen—Treas.
L. L. Lawrence Leo F. Berger J. M. Kerbel	gypt	Metro-Goldwyn-Mayer Of Egypt, Inc.	2/7/31	New Jersey	Egypt Sudan, Palestine, Syria, Iraq, Iran, Arabia, Ethiopia	D. O. Decker—Pres. C. E. Quick—Vice Pres. L. L. Lawrence—" " L. Reiss—Secy B. Fried—Ass't Secy L. Cohen—Treas. W. L. Engelhardt—Ass't Treas.
D. O. Decker Charles E. Quick Len Cohen	sthonia	Metro-Goldwyn-Mayer	10/25/35	Esthonia	Esthonia	
	nland	Oy. Metro-Goldwyn-Mayer Films A/B.	5/29/29	Finland	Finland	
Len Cohen Charles K. Stern David O. Decker	ance	Metro-Goldwyn-Mayer S.A.F.	12/21/31	France	France, Algeria, Morocco, Dakar, Martinique, Guadeloupe, Guiana Indo China, Mauritius Reunion & Madagascar	Allan Byre—Managing Director

Defendants' Exhibits 28-A to 28-E (continued).

2.

Directors	Country	Company	Date Of Organization	Under Laws Of	Countries In Which Distributed	Officers
	Germany	Metro-Goldwyn-Mayer Film A.G.	8/27/31	Germany	Germany	
D. O. Decker C. E. Quick Len Cohen	Great Britain	Metro-Goldwyn-Mayer Pictures, Ltd.	8/20/24	England	British Isles	S. Eckman, Jr.—Chairman & Managing Director G. R. Webb—Secy
David O. Decker J. M. Rodriquez Gar Pedro V. Jorge Edward F. O'Connor	Greece	Metro-Goldwyn-Mayer Films Hellas Ltd.	12/15/28	Greece	Greece, Albania & Island Of Cypress	L. L. Lawrence—Pres. E. S. Harty—Vice Pres. G. Nicholas—Secy
	Guatemala	Metro-Goldwyn-Mayer De La America Central	2/23/35		Guatemala, Salvador, Honduras, Nicaragua, Costa Rica & British Honduras	D. O. Decker—Pres. Charles E. Quick—Vice Pres. Len Cohen—Treas. Lillian Reiss—Secy Bertha Fried—Ass't Secy Wm. L. Engelhardt—Ass't Treas.
O. Metall Judr Henrich Friedman Ju Leo. Beran Charles Valenta	Holland	N.V. Metro-Goldwyn-Mayer Film Maatschappij	7/9/30	Holland	Holland	F. L. D. Strengholt—Managing Director
L. L. Lawrence P. Olufsen	Hungary	Metro-Goldwyn-Mayer Distributing Corp.	2/3/28	Hungary	Hungary	
David O. Decker C. E. Quick Len Cohen	India	Metro-Goldwyn-Mayer India Ltd.	10/25/28	New Jersey	India, Burma, Ceylon & Afghanistan	D. O. Decker—Pres. C. E. Quick—Vice Pres. Lillian Reiss—Secy Bertha Fried—Ass't Secy Len Cohen—Treas. R. Lazarus—Ass't Secy W. L. Engelhardt—Ass't Treas.
David O. Decker Charles E. Quick Len Cohen						
	Italy	Metro-Goldwyn-Mayer Films S.A.I.	4/18/25	Italy	Italy & Colonies	L. L. Lawrence—Managing Director A. Bedini Jacobini—Secy
L. L. Lawrence N. Ivanov J. Prits	Japan	Metro-Goldwyn-Mayer Ltd.	3/30/26	Delaware	Japanese Empire (Incl. Korea & Formosa) and Manchukuo	D. O. Decker—Pres. C. E. Quick—Vice Pres. L. Reiss—Secy B. Fried—Ass't Secy Len Cohen—Treas.
Allan Byre Henry Lastique Louis L. M. Chatain Andre Elie	Jugo Slavia	Metro-Goldwyn-Mayer D.D.	9/1/28	Jugo Slavia	Jugo Slavia	

Defendants' Exhibits 28-A to 28-E (continued).

Directors	Country	Company	Date Of Organization	Under Laws Of	Countries In Which Distributed	Officers
F. L. D. Strengh						
S. Eckman, Jr. Arthur M. Loew James C. Squier J. Robert Rubin H. Sydney Wright	Latvia	Filmindustrie Aktiengesellschaft Metro-Goldwyn-Mayer	12/22/30	Latvia	Latvia	L. Model—Managing Director
	Lithuania	F. W. N. Becker Metro-Goldwyn-Mayer Films	8/1/31	Lithuania	Lithuania	
W. D. King O. Capadais	Norway	Metro-Goldwyn-Mayer A/S	5/28/29	Norway	Norway	
D. O. Decker Charles E. Quick Len Cohen	Panama	Metro-Goldwyn-Mayer de Panama S.A.	11/11/30	Panama	Panama, Canal Zone, Isl. of Jamaica	D. O. Decker—Pres. C. E. Quick—Vice Pres. Lillian Reiss—Secy B. Fried—Ass't Secy Len Cohen—Treas. W. L. Engelhardt—Ass't Treas.
F. W. N. Becker L. L. Lawrence	Peru	Metro-Goldwyn-Mayer del Peru	2/26/31	New Jersey	Peru, Ecuador & Bolivia	D. O. Decker—Pres. C. E. Quick—Vice Pres. Lillian Reiss—Secy B. Fried—Ass't Secy L. Cohen—Treas. W. L. Engelhardt—Ass't Treas. S. B. Dunlap—Ass't Secy
L. L. Lawrence Dr. A. Lehel						
D. O. Decker C. E. Quick Len Cohen	Philippine Isl.	Metro-Goldwyn-Mayer Manila, Inc.	1/20/27	Philippine Islands	Philippine Islands	D. O. Decker—Pres. C. E. Quick—Vice Pres. L. Cohen—Secy L. Reiss—Ass't Secy Len Cohen—Treas. H. C. Kleindienst—Ass't Treas. Paul Cohen—Ass't. Secy
Aiv. E. Giobbe della Bitta L. L. Lawrence A. Bedini Jacobini	Poland	Tow. Filmowe Metro-Goldwyn-Mayer Sp. Z. Ogr. Odp.	6/3/29	Poland	Poland	
D. O. Decker C. E. Quick Len Cohen	Puerto Rico	Metro-Goldwyn-Mayer Co. de Puerto Rico	7/8/26	Delaware	Puerto Rico, Vieques, Virgin Islands, Dominican Republic, Netherland West Indies	D. O. Decker—Pres. C. E. Quick—Vice Pres. Len Cohen—Treas. L. Reiss—Secy B. Fried—Ass't Secy
L. L. Lawrence Leo F. Berger Miroslav Berger	Portugal	Metro-Goldwyn-Mayer Films Limitada	6/21/27	Portugal	Portugal, Azores, Madeira, Angola & Beira	

Directors
L. L. Lawrence L. Model M. Stillbach
L. L. Lawrence F. W. N. Becker
D. O. Decker Len Cohen C. E. Quick
D. O. Decker C. E. Quick L. Cohen
L. Cohen Len Cohen D. O. Decker Charles E. Quick Lillian Reiss
F. W. N. Becker A. Field
D. O. Decker C. E. Quick Len Cohen

Defendants' Exhibits 28-A to 28-E (continued).

Country	Company	Date Of Organization	Under Laws Of	Countries In Which Distributed	Officers	Directors
Roumania	Metro-Goldwyn-Mayer Film S.A.R.	9/21/26	Roumania	Roumania	G. N. Ghica—Pres.	L. L. Lawrence J. S. Ferguson R. Monta M. Wallfisch Em. Zaharovici G. N. Ghica
South Africa	Metro-Goldwyn-Mayer Films S.A. (Pty) Ltd	12/31/30	Union Of South Africa	Africa, South Of The Equator, Kenya & Uganda	M. I. Davis—Manager Ernest Hughes—Secy	D. O. Decker Len Cohen C. E. Quick
Spain	Metro-Goldwyn-Mayer, Iberica, S.A.	7/12/28	Spain	Spain & Colonies	A. Seres—Pres. L. G. Clot Junoy—Secy J. Edelstein—Treas. L. Echevarria—Ass't Treas.	
Straits Settlements	Metro-Goldwyn-Mayer Oriental Co., Inc.	8/1/29	New Jersey	Straits Settlements, Federated & Unfederated Malay States, Siam, Sarawak & British North Borneo	D. O. Decker—Pres. C. E. Quick—Vice Pres. Lillian Reiss—Secy Len Cohen—Treas.	Charles K. Stern Lillian Reiss George Berry
Sweden	Film A/B Le Mat Metro-Goldwyn	9/2/25	Sweden	Sweden		L. S. Lannby L. L. Lawrence Y. Schartan
Switzerland	M-G-M S.A. (A.G.)	12/27/27	Switzerland	Switzerland		L. L. Lawrence H. A. Baumann Dr. Otto Frikker
Uruguay	Metro-Goldwyn-Mayer Del Uruguay	8/7/34	New Jersey	Uruguay	D. O. Decker—Pres. C. E. Quick—Vice Pres. Len Cohen—Treas. Lillian Reiss—Secy Bertha Fried—Ass't Secy Stuart B. Dunlap—Ass't Secy Wm. Engelhardt—Ass't Treas.	D. O. Decker C. E. Quick Len Cohen
Venezuela	Metro-Goldwyn-Mayer De Venezuela	4/8/31	New Jersey	Venezuela	D. O. Decker—Pres. C. E. Quick—Vice Pres. Lillian Reiss—Secy Bertha Fried—Ass't Secy Len Cohen—Treas. W. L. Engelhardt—Ass't Treas.	D. O. Decker C. E. Quick Len Cohen

Defendants' Exhibits 29-A to 29-B.

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These exhibits consist of a list of sales of motion picture rights in plays (1932) made up by Sidney R. Fleischer, printed herein at pages 675 to 676.

Defendants' Exhibit 30 for Identification.

Portions of letter of July 14, 1937, from Ligon Johnson, Esq. to Samuel D. Cohen, containing statement as to runs of plays embraced in Fleischer's list (Exhibit 29-A to 29-B), printed herein at pages 680 to 685.

2471

2472

Defendants' Exhibit 31.

EXTRACTS FROM

CERTIFICATE OF INCORPORATION

OF

MOTION PICTURE PRODUCERS AND DISTRIBUTORS OF AMERICA, INC.

We, the undersigned, all being of full age and citizens of the United States, and a majority of us being residents of the State of New York, desiring to form a corporation pursuant to Article 12 of the Membership Corporations Law of the State of New York, do hereby certify as follows:

FIRST: The name of the proposed corporation is:

MOTION PICTURE PRODUCERS AND DISTRIBUTORS OF AMERICA, INC.

SECOND: The object for which the corporation is to be created is to foster the common interests of those engaged in the motion picture industry in the United States, by establishing and maintaining the highest possible moral and artistic standards in motion picture production, by developing the educational as well as the entertainment value and the general usefulness of the motion picture, by diffusing accurate and reliable information with reference to the industry, by reforming abuses relative to the industry, by securing freedom from unjust or unlawful exactions, and by other lawful and proper means.

EXTRACTS FROM

BY-LAWS

OF

MOTION PICTURE PRODUCERS AND DISTRIBUTORS OF AMERICA, INC.

ARTICLE II

MEMBERSHIP

SECTION 1. The membership of the Association shall be divided into five classes, to-wit:

Defendants' Exhibit 31 (continued):

2476 Class A—Consisting of producers of motion pictures.

Class B—Consisting of distributors of motion pictures.

SECTION 2. Any person, firm or corporation regularly engaged in the business of producing motion pictures in the United States shall be eligible to become a member of Class A. * * *

SECTION 3. Any person, firm or corporation regularly engaged in the business of distributing motion pictures in eight or more different states of the United States shall be eligible to become a member of Class B. * * *

2477

ARTICLE III

FEES, DUES AND ASSESSMENTS

SECTION 1. The incorporators, by the vote of a majority thereof, at the first annual meeting of the Association, or at any adjournment thereof, shall fix the amount of the membership fee and the membership dues to be paid by the members of Class A, or the basis upon which and method by which the same are to be computed and determined, and the time or times when the same are to be payable, and no increase, decrease or other change with reference
2478 thereto shall be made, except by the vote of four-fifths of all the members of Class C and two-thirds of all the members of Class D at a special meeting of the Association called for the purpose.

SECTION 2. The incorporators, by the vote of a majority thereof, at the first annual meeting of the Association, or at any adjournment thereof, shall fix the amount of the membership fee and membership dues to be paid by the members of Class B, or the basis upon which and method by which the same are to be computed and determined, and

Defendants' Exhibit 31 (continued).

the time or times when the same are to be payable, and no increase, decrease or other change with reference thereto shall be made, except by the vote of four-fifths of all the members of Class D and two-thirds of all the members of Class C at a special meeting of the Association called for the purpose. 2479

SECTION 5. All membership fees paid by members of Class A or Class B shall be held by the Association intact and as a special fund (hereinafter called the membership fund) which shall not be, or be held to be, an asset of the Association, and shall not be used or disbursed for any purpose, except as provided in these by-laws. The membership fund shall be invested and reinvested from time to time in such securities as may be lawfully purchased and held by trustees and/or savings institutions under the laws of the State of New York, and in no others. The income from such securities shall be paid, as and when accrued and collected, into the general funds of the Association and may be used for the current expenses or other purposes of the Association. 2480

SECTION 6. All membership dues paid by members of Class A or Class B shall be paid into the general funds of the Association and may be used for the current expenses or other purposes of the Association. 2481

Defendants' Exhibit 32.

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MOTION PICTURE PRODUCERS AND DISTRIBUTORS OF AMERICA, INC.

APPLICATION FOR CLASS A MEMBERSHIP

The undersigned, being a corporation regularly engaged in the business of producing motion pictures in the United States, hereby applies for Class A Membership in the Motion Picture Producers and Distributors of America, Inc.
183 (hereinafter called the Association) subject to, and in accordance with, the by-laws of the Association, and hereby appoints

as the individual to be elected a member of Class C of the Association.

In consideration of the election of the undersigned as a member of Class A and of the individual above appointed as a member of Class C of the Association, the undersigned

Hereby agrees to pay to the Association the membership
184 fee and membership dues which shall become payable by the undersigned as a member of Class A, in accordance with the by-laws of the Association, the resolution with reference to fees and dues adopted by the incorporators of the Association (of which a copy is hereto attached) and any increase, decrease or other change with reference to fees and/or dues which shall become effective and binding upon the undersigned as a member of Class A in accordance with the by-laws of the Association; and

Hereby accepts and agrees to be bound by all the provisions of the by-laws of the Association.

Defendants' Exhibit 32 (continued).

The amount of the gross revenue to be used as the basis for computing the membership fee payable by the undersigned and the membership dues payable by the undersigned as a member of Class A during the present calendar year is 2485

_____

IN WITNESS WHEREOF, the undersigned has caused this application to be executed by its officers thereunto duly authorized the day of , 19 .

.....

By.....

President. 2486

Attest:

.....

Secretary.

RESOLUTION WITH REFERENCE TO FEES AND DUES ADOPTED BY THE INCORPORATORS OF THE ASSOCIATION.

RESOLVED, pursuant to Sections 1 and 2 of Article III of the by-laws:

1. Each member of Class A shall pay to the Association, upon election to membership (or prior thereto if required by the Association) as a membership fee, the sum of $1,000. 2487

2. Each member of Class A shall pay to the Association each week as membership dues (*a*) a sum equal to 1/100th of 1% of the gross revenue received by such member during the preceding calendar year from the sale, rental or other disposition for exhibition within the United States, of motion pictures produced by such member and not handled by a distributor, and also (*b*) a sum equal to 1/100th of

Defendants' Exhibit 32 (continued).

1% of the gross revenue received by any distributor during the preceding calendar year from the sale, rental or other disposition for exhibition within the United States, of motion pictures produced by such member and handled by such distributor, excepting any gross revenue so received by any distributor who is a member of Class B when the dues are payable. If any such member shall sell or otherwise dispose of any such motion picture to any distributor without retaining any interest in the revenue thereafter received from the exhibition of such pictures within the United States, such picture shall not be deemed to be handled by a distributor within the meaning of this paragraph.

3. Each member of Class B shall pay to the Association upon election to membership (or prior thereto if required by the Association) as a membership fee, a sum equal to 1/10th of 1% of the gross revenue received by such member during the preceding calendar year from the sale, rental or other disposition of motion pictures for exhibition within the United States.

4. Each member of Class B shall pay to the Association each week as membership dues, a sum equal to 1/100th of 1% of the gross revenue received by such member during the preceding calendar year from the sale, rental or other disposition of motion pictures for exhibition within the United States.

5. Each member of Class A and each member of Class B shall furnish to the Board of Directors in advance the amount of the gross revenue to be used as the basis for computing the membership fee and/or dues of such member, and the Board shall have power, in behalf of the Association, to accept the amount so furnished by any member. If any member shall fail to furnish such amount in advance, or if the Board does not accept the amount so furnished by any member, the Board shall, from any in-

Defendants' Exhibit 32 (continued).

formation available to it, fix tentatively the amount of the gross revenue to be used as the basis for computing the amount of the membership fee and/or dues of such member. The member may then assume the burden of establishing the amount of such gross revenue to the satisfaction of the Board, and/or may require that the amount of such gross revenue be determined by three arbitrators, one to be the President of the Association or appointed by the President, another to be appointed by the member, and the third to be appointed by the two arbitrators so chosen. The arbitrators may be, but need not be, directors or members of the Association. The decision of any two of such arbitrators given in writing shall be final and binding upon the Association and the member. The certificate of a certified public accountant of good standing in the City of New York shall be accepted by the Association and the arbitrators as conclusive evidence of the amount of such gross revenue, but no member shall be under any obligation to furnish such a certificate. 2491 2492

6. Until the amount of such gross revenue shall finally be determined by agreement between the member and the Association, or by arbitrators appointed as herein provided, or by the certificate of a certified public accountant of good standing in the City of New York, the amount of the gross revenue fixed tentatively by the Board shall be used as the basis for computing the amount of the membership fee and/or dues of the member, and the member shall make payments to the Association on that basis. If the amount of such gross revenue shall finally be determined by such agreement, such arbitrators or such certificate, the Association and the member shall make such adjustment as may be necessary with respect to payments previously made for or on account of membership fee and/or dues, the Association refunding any excess and the member paying any shortage which may exist with respect to such payments previously made. 2493

Defendants' Exhibit 33.

AGREEMENT made this 7th day of April, 1924, between METRO PICTURES CORPORATION, a corporation duly organized and existing under and by virtue of the laws of the State of New York, hereinafter called the party of the first part, and Louis B. Mayer Pictures Inc., a corporation duly organized and existing under and by virtue of the laws of the State of Delaware, hereinafter called the party of the second part.

WITNESSETH:

WHEREAS, the party of the first part is engaged in the manufacture and distribution of motion picture photo-plays throughout the world; and

WHEREAS, the party of the second part is now engaged in the production of motion picture photo-plays, some of which are being distributed throughout the world by Metro Pictures Corporation under existing contracts; and

WHEREAS, Louis B. Mayer, Irving Thalberg and J. Robert Rubin constitute the Board of Directors and officers of the party of the second part, and have contracted for their services with the said party of the second part for a term extending beyond the period of this agreement and any renewal thereof; and

WHEREAS, the party of the first part is desirous of engaging the party of the second part, including the services of its officers, as stated above, to supervise, manage and generally control the manufacture of all pictures to be produced by Metro Pictures Corporation, for a period of three (3) years from the date hereof except as hereinafter limited, upon the terms and conditions hereinafter more fully stated; and

Defendants' Exhibit 33 (continued).

WHEREAS, the party of the second part is willing to supervise and manage the manufacture of all pictures for the party of the first part exclusively, as herein stated (except as herein limited) and for that purpose to furnish the services of its personnel, to wit:—Louis B. Mayer, Irving Thalberg and J. Robert Rubin: 2497

NOW, therefor, in consideration of the premises and the sum of One Dollar, and other good and valuable considerations, by each of the parties hereto to the other in hand paid, the receipt whereof is hereby acknowledgd,

IT IS AGREED AS FOLLOWS:—

The party of the first part hereby engages the party of the second part, with its personnel, consisting of Louis B. Mayer as General Manager of studio and production, and Irving Thalberg as supervisor of production, and J. Robert Rubin, as New York representative of producing activities of the party of the second part of all motion pictures to be produced by the party of the first part, its subsidiaries, or the Metro-Goldwyn Corporation, or any other corporation into which the Metro Pictures Corporation may merge, or by which its capital stock shall be owned, during a period of three years from the date hereof, including in such 2498
engagement the full and complete management and operation of each and every studio maintained by the party of the first part, its subsidiaries, or the said Metro-Goldwyn Corporation or any other corporation into which the party of the first part may merge, or by which its capital stock shall be owned, SUBJECT to the right of the party of the first part to have manufactured at its studio or studios, the pictures of Coogan and Ingram, as hereinafter provided. 2499

The party of the second part agrees to act as such supervisor and Manager of all motion pictures to be produced by Metro Pictures Corporation (except those expressly excepted by these presents), during the period stated in

Defendants' Exhibit 33 (continued).

2500 the preceding paragraph, and to that end and purpose agrees to give, to the party of the first part, its best efforts and devote its time and services exclusively and furnish at all times the exclusive picture manufacturing services of Louis B. Bayer and Irving Thalberg, and at least the same amount of time and attention of J. Robert Rubin as he is now being given by the latter to the business of the Louis B. Mayer Productions, Inc., and Louis B. Mayer Pictures, Inc.

For the purpose of this agreement, the corporate entity of Louis B. Mayer Pictures Inc. shall continue in existence.

2501 The party of the second part agrees for itself and its personnel, that neither it or they will during the term of agreement, directly or indirectly, produce or attempt to produce or engage in the production of any photo-plays whatsoever, for any other than the party of the first part, and will not use or allow to be used the services of any director, star, actor, actors, author or employee, whose services the party of the second part controls, or permit to be used any property for the production of such photo-plays, other than for the sole and exclusive use and benefit and in the production of the photo-plays of the party of the first part hereto.

2502 The party of the second part hereby represents that it has contracts with various artists, directors and others, a list of which is hereto attached, marked "EXHIBIT A." It also has a certain equipment, fixtures and furniture, a list of which is hereto attached, marked "EXHIBIT B." It likewise has certain stories, a list of which is hereby attached, marked "EXHIBIT C," and has prepared and begun production on certain motion picture photo-plays set forth in "EXHIBIT D" hereto attached.

The party of the second part hereby agrees to sell, assign and transfer unto the party of the first part all its right, title and interest in and to each and every of said con-

Defendants' Exhibit 33 (continued).

tracts set forth in Exhibit A, and in the event that any 2503
said contract shall by its terms be unable to be assigned,
the party of the second part shall nevertheless perform
such agreement for the benefit and at the expense of the
party of the first part, and the party of the first part hereby
agrees to take over and carry out all the terms and receive
all the benefits of said contracts.

The party of the first part further agrees to take over
and to pay for, at cost, all the furniture and fixtures set
forth in Exhibit B and to take over and pay for, at cost
all the stories set forth in Exhibit C, and to take it over,
pay for and complete the productions set forth in Exhibit
D, and to pay therefor all the moneys expended thereon,
with interest at seven percent. from the time said money 2504
was expended.

The party of the second part does further assign, trans-
fer and set over to the party of the first part, all of its
rights, title and interest in and to the remaining two pic-
tures to be produced under and pursuant to a certain agree-
ment between Louis B. Mayer Productions, Inc. and John
M. Stahl, and likewise assigns, sets forth and transfers unto
the party of the first part all of its rights and benefits in
and to a certain distribution contract between the party of
the second part and the Associated National Pictures, Inc.,
for the distribution of the said two motion picture photo-
plays to be produced by John M. Stahl, and the party of the 2505
first part hereby agrees to accept said assignment of said
contract and to carry out the terms and conditions of them
both.

The party of the second part represents that under its
agreement of distribution of Stahl Pictures with Associated
First National Pictures, Inc. it receives fifty (50%) percent
of the gross receipts from distribution after the distributor
has recouped the advance to the Producer, on delivery of
negative. As to such gross receipts to be received from

Defendants' Exhibit 33 (continued).

2506 Associated First National on account of the remaining two pictures, the party of the first part shall first be entitled to receive and retain the cost of production advanced by it, including any production royalty or additional compensation. Thereafter, sixty (60%) percent (for its sole use and benefit) of the net amount of the receipts (over and above the cost of production and additional compensation required to be made out of the receipts under production contracts), and the party of the second part shall receive the remaining forty (40%) percent.

All pictures produced by the party of the second part for and on behalf of the party of the first part, as herein provided, shall be distributed by the party of the first
2507 part, or its subsidiary, in the best possible manner, to the end that said pictures shall bring the highest possible returns consistent with good business policy, in the same manner that the party of the first part is now distributing the motion pictures heretofor produced by the Louis B. Mayer Productions, Inc., and released through the party of the first part, but shall there be no interference or right to approval of contract, of any kind by the party of the second part in the distribution of said pictures.

The party of the first part agrees that it will accord to each photo-play produced during the term of this agreement, under the supervision and management of the party
2508 of the second part, general and special advertising in trade papers and otherwise, which in standard, quality and prominence shall be at least equal to the advertising and publicity now accorded to the party of the second part on photo-plays heretofor produced by the Louis B. Mayer Productions, Inc., and distributed by the party of the first part. Nothing herein contained, however, shall limit the right of the party of the first part to freely advertise said productions as Metro Pictures. Each motion picture pro-

Defendants' Exhibit 33 (continued).

duced, as herein provided shall contain on the main title 2509
the following:—

LOUIS B. MAYER

Presents

.....

(name of star or name of picture, or such other statement as may be necessary under the contract with the star or director or author), and shall carry in said main title the words, "Produced by Louis B. Mayer," or, at the option of the party of the second part, "Produced by the Metro-Goldwyn-Mayer Corporation," and in all advertising and paid publicity the name of Louis B. Mayer shall be prom- 2510
inently mentioned as the producer of said motion picture photo-plays.

The party of the first part shall organize or shall provide a corporation, domiciled in the State of California, which shall be the corporation that shall control the studio, which shall be known as Metro-Goldwyn-Mayer Studio and produce all the motion pictures to be produced hereunder. The name of this corporation, whose stock shall be owned or controlled wholly by the party of the first part, shall be the Metro-Goldwyn-Mayer Corporation, of which said Louis B. Mayer shall be the First Vice-President and General Manager and Irving Thalberg shall be the Second Vice- 2511
President and Supervisor of Productions, and J. Robert Rubin shall be Secretary, and the said Louis B. Mayer, Irving Thalberg and J. Robert Rubin shall likewise be directors of said corporation together with a majority designated by the party of the first part. All contracts with stars and directors and for stories and plays, shall be made by the said Louis B. Mayer, Irving Thalberg and J. Robert Rubin, in the name of said producing corporation. No contract, however, shall be entered into by said persons, on behalf of the corporation, until the same has

Defendants' Exhibit 33 (continued).

2512 first been submitted to the party of the first part, and approved by any two of the following persons on behalf of the party of the first part, to wit:—Marcus Loew (or his successor in office as President of Loew's Incorporated) Nicholas M. Schenck (or his successor in office as Vice President of Loew's Incorporated) and J. Robert Rubin.

The party of the first part shall also have the right to propose to the party of the second part for production stories, plays, directors and actors, and when approved by the party of the second part, same shall be accepted.

All actors and employees and other persons working at the studio or studios in connection with production of
2513 pictures, shall be engaged and be subject to the general control of Louis B. Mayer, except that the party of the first part shall maintain its own financial, auditing and accounting staff whose salary shall be charged as part of the studio operating expense. Such staff shall be under control of the party of the first part.

The party of the first part hereby agrees to provide necessary studios, equipment, paraphernalia, now in the studio, for which a rental shall be charged to production and finances to carry out the terms and conditions of this agreement.

The party of the first part further agrees to cause the said Louis B. Mayer to be made a Vice-President of the
2514 Metro-Goldwyn Corporation.

The party of the first part further agrees that it will not engage in the manufacture or to be interested, either directly, or indirectly, in the manufacture of any motion picture photo-play, except that of Jackie Coogan and that of Rex Ingram, under circumstances hereinafter provided.

It is understood and agreed between the parties hereto that the title and ownership of all motion picture photo-plays and the negatives and positives thereof, shall at all times be and remain the property of the party of the first part, free from any lien of the party of the second part.

Defendants' Exhibit 33 (continued).

but the party of the second part shall be entitled to its 2515
compensation, as hereinafter set forth.

All pictures heretofor produced and delivered by the Louis B. Mayer Productions Inc., for distribution by the party of the first part shall be continued to be distributed under the contracts heretofore existing, and all pictures now in the process of manufacturing, except those set forth in Exhibit D, shall be distributed upon the same terms and conditions as is provided in the said distribution contract and shall not be affected by these presents.

It is understood and agreed between the parties hereto that the party of the second part shall have no interest in the Jackie Coogan Productions, and shall receive the compensation herein provided on future Rex Ingram Productions only in the event that the party of the first part determines that the said pictures be made in the studio managed by the party of the second part, and/or shall be under the supervision and control of the party of the second part. 2516

It is further expressly understood that nothing herein contained shall prevent Metro Pictures Corporation from distributing any photo-plays manufactured by outside producers and as to these, the party of the second part, shall not be called upon to supervise or manage said productions, nor shall the party of the second part be entitled to any compensation arising from distribution thereof or otherwise by Metro Pictures Corporation. 2517

The party of the second part shall make no charge of any kind to the party of the first part, except for the services of Louis B. Mayer of $1500.00 per week, the sum of $650.00 per week for the services of Irving Thalberg, and $600.00 per week for J. Robert Rubin, and the actual cost of maintaining an office for the party of the second part in New York, of a size and with staff to be approved by the party of the first part. Upon the death of either of the above his salary ceases.

Defendants' Exhibit 33 (continued).

2518 The rental on the studio or studios to be used for the production of the pictures herein provided for, shall be fixed by mutual agreement of J. Robert Rubin and Nicholas M. Schenck, acting for the respective parties.

In arriving at the cost of production, there shall be charged to each production or photo-play all moneys actually paid or expense incurred in its production, including an equitable proportion of the studio rental, plus depreciation (if studio rental is not a fixed sum per annum) and overhead, which overhead shall include a proportionate part of the salary herein allowed for the services of Louis B. Mayer, Irving Thalberg and J. Robert Rubin, and the
2519 expense of maintaining the New York office for the party of the second part. There shall be no charge for interest on moneys advanced for production.

The party of the first part shall keep true, accurate and complete books of account in the customary form and manner, showing all expense entering into the cost of production and the maintenance of studio or studios, which books shall at all times be open to the party of the second part, and it shall keep further complete records of all receipts and intakes of all kinds and character from the distribution or other disposition of each of said photoplays produced as herein above set forth. The party of the first part, or such subsidiary as it shall have to dis-
2520 tribute said pictures, or the Metro-Goldwyn Corporation, or such other corporation as shall be the actual distributor of the said pictures, shall furnish to the party of the second part on the 20th day of each month, true and accurate statements of said moneys, receipts or intakes of each of said photoplays received by it for the week ending the last Saturday of the previous month. The party of the first part shall accompany such statements with a check for any amount shown to be due to the party of the second part, and the party of the second part shall have the right of access at all reasonable and proper times to examine

Defendants' Exhibit 33 (continued).

the books of the party of the first part, insofar as they relate to and involve the production and distribution of photo-plays produced under this agreement. 2521

And as for its compensation hereunder the party of the second part shall be entitled to receive, and the party of the first part hereby agrees to cause to be paid, a sum equal to twenty (20%) percent of the net receipts of the Metro Pictures Corporation, or the actual distributors of said pictures, from the distribution or other disposition of each of said pictures produced, as herein provided. Said compensation shall be arrived at as follows:

The pictures shall be placed in groups of four in order of release. 2522

Out of the gross receipts derived by Metro Pictures Corporation, or the actual distributor of said pictures, from the distribution or other disposition of said pictures, there shall be deducted, and retained for its own use at all times, a sum equal to thirty (30%) percent of such gross receipts to cover expenses of distribution and overhead. The remainder 70% of said gross receipts (hereinafter called net receipts) shall be applied by Metro Pictures Corporation to reimburse itself for the cost of production, as hereinbefore defined, including therein any royalty or additional compensation required to be made out of the receipts under production contracts and positive prints. 2523 After the party of the first part has reimbursed itself out of the said 70% of the gross receipts for all cost of production, including royalty or other payments required to be made out of the gross receipts and prints, the party of the first part shall pay out of the net receipts, to wit:— 70% of the gross receipts, (after the party of the first part has reimbursed itself for cost of production) a sum equal to 20% of the net receipts and

Defendants' Exhibit 33 (continued):

2524 retain for itself the remaining 80% of such net receipts.

For the purpose of determining the compensation to be paid to the party of the second part under the provisions of this article, it is expressly understood and agreed that the party of the first part shall first reimburse itself for the cost of production of each group of four pictures, as hereinbefore defined. If at the end of eighty (80) weeks from the date of release of the fourth picture of said group of four, the party of the first part has not been fully reimbursed for all costs and advances made by it on account of such group of productions,
2525 then any deficiency shall be repaid proportionately by the party of the second part, but only to the extent of any moneys already paid to it on account of its compensation hereunder, and any further deficiency shall be chargeable and paid out of the net profits of any succeeding group or groups of productions, until the party of the first part shall have been repaid, all cost of production and advances of the preceding group or groups.

The term "GROSS RECEIPTS" shall mean all sums of money actually collected by the party of the first part and/or its exchanges from exhibitors for rental
2526 and/or booking of prints in the United States. As to foreign territory, where the distributor does not maintain its own exchanges, gross receipts shall mean all sums of money actually collected by the party of the first part, from such foreign territory.

In the event of the death of Louis B. Mayer, or the simultaneous incapacity of both Louis B. Mayer and Irving Thalberg, extending over a period of six (6) months, then this agreement, may at the option of the party of the first part, be terminated and cancelled as to any pro-

Defendants' Exhibit 33 (continued).

duction not then begun, and the salary allowance to said Louis B. Mayer, Irving Thalberg and J. Robert Rubin shall cease, upon ten (10) days written notice of the election to terminate this agreement. Except that during such simultaneous incapacity of Louis B. Mayer and Irving Thalberg, continuing for a period of thirty days, the party of the first part shall have the right to cause their duties to be performed by someone else. Should the party of the first part exercise said option of termination, then these presents shall come to an end and be terminated as to any pictures not made, or not in process of manufacture at the date of said notice. 2527

If in the judgment and discretion of the party of the first part, it shall be necessary or advisable because of general conditions in the motion picture industry to discontinue for a time the production of pictures, not to exceed three (3) months in any one year, then and in that event, the party of the first part shall have the right to require the party of the second part to discontinue for such time, the production of said motion pictures, but such discontinuance shall nevertheless in no way interfere with the compensation to be paid to the individuals whose salary is expressly provided for by these presents. 2528

This agreement is personal and shall not be assigned or disposed of in any way by either party hereto.

This agreement shall in no wise be construed as, or is it intended to create a partnership or joint venture between the parties hereto, and neither party shall be liable for or bound by any representation whatsoever of the other. 2529

The agreement shall be effective as of April 7th, 1924, and shall include each and every picture made, begun or completed, except any picture in course of production and more than half finished during the period of three (3) years from the date hereof, by or on behalf of the party of the first part, its successors, subsidiaries or any corpo-

Defendants' Exhibit 33 (continued).

2530 ration with which it may be merged, or by any corporation which shall own all the capital stock of the party of the first part, except as hereinbefore excluded. No picture shall be commenced less than thirty days before the termination of this agreement. As to any pictures in course of production at the expiration of this agreement, the party of the second part will complete the same.

This agreement may, at the option of the party of the first part, be extended for a further term of three (3) years from the date hereinbefore fixed for its termination, provided written notice is given to the party of the second part on or before May 1st, 1926. In the event that such notice is given, then these presents shall continue in force
2531 during the extended period upon the same terms and conditions as apply to the original term of three years, except that the salary of said Mayer for the optional period shall be $2000.00 per week, and the salary of said Thalberg shall be $1000.00 per week and providing further, that during each of said first two years of the term of this contract, there shall have been made not less than fifteen pictures. If, after the first two years of the term of this agreement, there shall be produced in any one year less than fifteen pictures, then the party of the second part, shall have the right to terminate this agreement upon ninety (90) days written notice to the party of the first
2532 part.

The party of the second part agrees, simultaneously with the execution of these presents, to procure the written consent to this agreement of Louis B. Mayer, Irving Thalberg and J. Robert Rubin, who hereby agree to be bound by all terms and conditions hereof insofar as they refer to them as individuals.

It is agreed that the services of the party of the second part and all those individuals (its personnel) herein specifically mentioned, are of a special, extraordinary and unique nature because of the skill, knowledge and experi-

Defendants' Exhibit 33 (continued).

ence of the party of the second part, its personnel and 2533
employees, and that the party of the first part will suffer irreparable injury which cannot be compensated by damages obtained at law, if the party of the second part shall breach this agreement. It is therefore expressly understood and agreed that the party of the first part, shall have the right to obtain appropriate and proper injunctive or other relief in equity therefor.

In WITNESS WHEREOF, the parties hereto have caused these presents to be signed and sealed the day and year first above written.

METRO PICTURES CORPORATION
By MARCUS LOEW 2534
Pres.

LOUIS B. MAYER PICTURES, INC.
By LOUIS B. MAYER
L. B. MAYER
I. THALBERG
J. ROBERT RUBIN

STATE OF NEW YORK,
CITY & COUNTY OF NEW YORK, } ss.:

On this 10th day of April, 1924, before me came MARCUS 2535
LOEW, to me known, who being by me duly sworn did depose and say: that he resides in the City of New York; that he is the PRESIDENT OF METRO PICTURES CORPORATION, the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation; and that he signed his name thereto by like order.

LEOPOLD FRIEDMAN
Comm. of Deeds,
N. Y. City.

Defendants' Exhibit 33 (continued).

2536 STATE OF NEW YORK, }
CITY & COUNTY OF NEW YORK, } ss.:

On this 10th day of April, 1924, before me came LOUIS B. MAYER, to me known, who being by me duly sworn did depose and say: that he resides in Los Angeles, California; that he is the President of Louis B. Mayer Pictures, Inc. the corporation described in, and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed to said instrument by order of the board of directors of said corporation; and
2537 that he signed his name thereto by like order.

LEOPOLD FRIEDMAN
Comm. of Deeds,
N. Y. City.

STATE OF NEW YORK, }
CITY & COUNTY OF NEW YORK, } ss.:

On this 10th day of April, 1924, before me personally came LOUIS B. MAYER, IRVING THALBERG and J. ROBERT RUBIN, to me known and known to me to be the individuals described in and who executed the foregoing instrument,
2538 and they severally duly acknowledged to me that they executed the same.

LEOPOLD FRIEDMAN
Comm. of Deeds,
N. Y. City.

Defendants' Exhibit 33 (continued).

EXHIBIT A.

CONTRACTS.

FRED NIBLO, after "RED LILY" now being begun, five (5) additional pictures.

REGINALD BARKER, "DIXIE" now being begun and two (2) more.

JOHN M. STAHL, Two (2) pictures as set forth in the main agreement.

HOBART HENLEY, "FREE LOVE" and three (3) more with option for four (4) additional pictures.

ELINOR GLYN, "HIS HOUR" and one (1) additional story, with an option of one (1) more.

HARRY RAPF, three (3) pictures.

HUNTLEY GORDON

RENE ADOREE

NORMA SHEARER

ROBERT FRAZIER

BENJAMIN F. GLAZER

HEDDA HOPPER

2539

2540

2541

Defendants' Exhibit 33 (continued).

2542

SCHEDULE B.

STUDIO EQUIPMENT, ETC.

CAMERAS & ACCESSORIES		16,994.75
AUTOS AND TRUCKS		6,743.46
OFFICE EQUIPMENT		4,421.00
ELECTRICAL EQUIPMENT:		
Generator Set	9,236.97	
Wind Machines	1,976.94	
Lights	3,870.85	
Miscellaneous	249.50	15,334.26
GENERAL STORES		840.70
2543 STEREOPTICON LIBRARY OF International views for Research purposes		881.38
FILM LIBRARY—See Footnote		11,816.70
MISCELLANEOUS STUDIO MATERIAL		994.45
WARDROBE—Replacement Value $12,000. Depreciated Value		6,000.00
SCENERY—Consisting of Flats, Doors, Windows, Arches, Sections, Fire Place Mantels, Parallels, Niggers—Replacement Value $14,527.88. Depreciated Value		7,263.94
PROPS		1,270.50
918 Shares of Cinema Mercantile Stock at $10.		9,180.00
Cash Surrender Value of life insurance policy—		
2544 John M. Stahl		884.75
		$82,625.89

FILM LIBRARY—This consists of 125,000 feet of negative and 75,000 feet of positive of unique stock shots available for current production. The value of this material would range, when used, from $1. to $5, per foot for negative. It is here included however, at only the cost of the raw stock and development—5½¢ per foot, plus $816.70 for clerical labor in classifying and cataloging this material.

STUDIO EQUIPMENT, ETC.	$82,625.89
NEW YORK OFFICE EQUIPMENT, per Schedule	3,958.00
TOTAL	$86,583.89
FINALLY SET AT	$76,583.89

Defendants' Exhibit 33 (continued).

STORIES

2545

GREATER LIGHT	5,016.00
EVERY WOMAN'S EXPERIENCE	2,000.00
DANGER	1,000.00
JUDGMENT OF MEN	1,000.00
PLAYTHINGS OF DESIRE	1,200.00
FOOLISH YOUTH	500.00
WATCH YOUR WIFE	800.00
IS MARRIAGE A FAILURE	500.00
BITTER CUP	800.00
FLAMES OF BLUE RIDGE	4,500.00
NOTHING TO WEAR (Los Angeles)	5,342.00
SPAN OF LIFE—Story $4,000. Continuity $6,148.00	10,148.00
THE HERO	1,800.00
THE MIDDLEMAN	7,500.00
VOLUNTEER ORGANIST	7,500.00
FASHIONS FOR MEN	5,500.00
TRIAL OF '98—Story 16,500. Continuity 3,572.	20,072.00
THE WANING SEX	11,008.00
MARRIED STRANGERS	1,500.00
	$87,686.00

2546

PICTURES IN PROGRESS

2547

HIS HOUR
FREE LOVE
DIXIE
ENEMIES BY COMMAND
GREAT DIVIDE

Defendants' Exhibit 33 (continued).

2548 COPY

April 9, 1924.

Louis B. Mayer Pictures, Inc.,
3800 Mission Road,
Los Angeles, Cal.

Gentlemen:—

Upon the delivery of the motion picture "BROKEN BARRIERS," the advance to be paid you on delivery, shall be increased by the sum of Fifty one thousand ($51,000.) Dollars, which represents the excess cost of production
2549 of the pictures, "THE ETERNAL STRUGGLE," and "WOMEN WHO GIVE." Said excess cost to be treated as part of the negative cost of "BROKEN BARRIERS," in accordance with the terms of the agreement between Metro Pictures Corporation and Louis B. Mayer Productions, Inc. assigned by the latter to Louis B. Mayer Pictures, Inc.

The foregoing understanding is to form part of the contract above referred to.

Yours very truly,

METRO PICTURES CORPORATION,
By MARCUS LOEW,
2550 Pres.

ACCEPTED:—

LOUIS B. MAYER PICTURES, INC.,
By L. B. MAYER, Pres.

Defendants' Exhibit 33 (continued).

COPY

2551

April 9, 1924.

Louis B. Mayer Pictures, Inc.,
3800 Mission Road,
Los Angeles, Calif.

Gentlemen:—

In respect to the cost of production of the motion picture photoplays "STRANGERS OF THE NIGHT" and "THY NAME IS WOMAN," the sum of $58062.99 is to be paid within eight months from the date hereof and the amount thereof to be added to an advance against the picture "STRANGERS OF THE NIGHT," and if there is not sufficient return from the 70% of the gross receipts of "STRANGERS OF THE NIGHT," to repay the aforesaid sum, then and in that event, the deficiency shall be charged as an advance against the negative cost of the motion picture "THY NAME IS WOMAN," and shall be recouped in each instance by the Metro Pictures Corporation in accordance with the terms of the agreement between Metro Pictures Corporation and Louis B. Mayer Productions, Inc.

2552

This shall be considered as part of the contract between Metro Pictures Corporation and Louis B. Mayer Productions Inc. covering Fred Niblo.

2553

Yours very truly,

METRO PICTURES CORPORATION,
By MARCUS LOEW,
Pres.

ACCEPTED:—

LOUIS B. MAYER PICTURES, INC.,
By L. B. MAYER, Pres.

Defendants' Exhibit 33 (continued).

2554 COPY

April 10th, 1924.

Louis B. Mayer Pictures, Inc.,
3800 Mission Road,
Los Angeles, Cal.

Gentlemen:—

In reference to the contract executed this day between Metro Pictures Corporation and yourself, it is understood and agreed that in the event that there is a merger between Metro Pictures Corporation and Goldwyn Pictures Corp. the motion picture "GREED" produced by the Goldwyn Pictures Corp. shall not be included and be considered as one of the pictures produced under said agreement.

2555

It is also provided in said contract (for the purchase of determining your compensation) that the pictures produced are to be placed in groups of four. It is expressly understood that the picture "BEN HUR" (which is included in our agreement) shall be considered entirely separate from any group.

It is well, at this time to state, that in the contract this day executed simultaneously with this letter, it is contemplated that a merger will take place between Metro Pictures Corporation and Goldwyn Pictures Corp.; that the pictures to be produced under said agreement shall be

2556

such pictures as are incomplete and in the process of making in the Goldwyn Pictures Corp. and in the Metro Pictures Corporation, as well as Louis B. Mayer Pictures, Inc.

In the event that Metro Pictures Corporation does not merge with Goldwyn Pictures Corp. their Goldwyn Pictures will be excluded from the consideration of the contract.

Yours very truly,

METRO PICTURES CORPORATION,
By MARCUS LOEW,
Pres.

ACCEPTED:—

LOUIS B. MAYER PICTURES, INC.,
By L. B. MAYER, Pres.

Defendants' Exhibit 33 (continued):

October 6th, 1925. 2557

METRO GOLDWYN PICTURES CORPORATION
Attention Mr. Nicholas M. Schenck,
1540 Broadway
New York, N. Y.

Gentlemen:

This is to confirm the oral arrangement made between us yesterday in reference to the modification of the contract existing between Metro-Goldwyn Pictures Corporation and Louis B. Mayer Pictures Inc., dated April 9th, 1924, which modifications are as follows: 2558

1—(a) Metro Goldwyn Pictures Corporation guarantees Louis B. Mayer Pictures, Inc. that the twenty per cent (20%) of the net profits provided to be paid to the said Louis B. Mayer Pictures, Inc., under said agreement of April 9th, 1924, shall, for each year's pictures released during the life of the aforesaid agreement, as amended herein, be not less than $500,000.00.

(b) Each year's pictures shall be the pictures released or pre-released during the period from July 15th of one year up to and including July 14th of the following year.

(c) The aforesaid guarantee of twenty per cent (20%) 2559
shall be advanced to Louis B. Mayer Pictures, Inc., in four (4) quarterly installments of $125,000.00 each, beginning November 1st of each year, and continuing at intervals of three (3) months apart, until the whole $500,000.00 has been paid.

(d) The guarantee is to go into effect at once, and shall cover the product released during the season 1925-1926 and 1926-1927, and the first payment hereunder shall be due on November 1st, 1925, and shall not apply to pictures released prior to July 15th, 1925.

Defendants' Exhibit 33 (continued)

2560. (e) Metro Goldwyn Pictures Corporation may retain the percentage due Louis B. Mayer Pictures, Inc., on account of the pictures against which a guaranteed advance has been paid, until it has repaid itself therefrom the $500,000.00 advanced; thereafter it shall continue to pay the said percentages, as provided in the agreement of April 9th, 1924.

(f) Should, however, the percentages payable to the Louis B. Mayer Pictures, Inc. for the pictures released during the seasons 1925-1926 and 1926-1927 for which said guarantee is made be less than the aforesaid $500,000.00 per year; and should the Louis B. Mayer Pictures, Inc.
2561 continue thereafter to produce pictures as provided for in Paragraph (h) herein, then in that event all percentages of profits payable to the Louis B. Mayer Pictures Inc. on account of pictures released during the season of 1927-1928 in excess of Five Hundred Thousand Dollars ($500,000.00) may be applied by the Metro Goldwyn Pictures Corporation in repaying itself any deficits that have accrued by reason of the payment of said guaranteed percentages during the seasons 1925-1926 and 1926-1927.

(g) Should Louis B. Mayer Pictures, Inc. not continue to produce pictures after the season 1926-1927 as above provided, and the percentages payable to Louis B. Mayer
2562 Pictures, Inc. for the pictures released during the season 1925-1926 be less than the guarantee of Five Hundred Thousand Dollars, then and in that event all percentages of profits payable to Louis B. Mayer Pictures Inc. on account of pictures released during the season 1926-1927 in excess of the guarantee of Five Hundred Thousand Dollars may be applied by Metro-Goldwyn Pictures Corporation in repaying itself any deficits that may have accrued by reason of the payment of said guaranteed percentages for the season 1925-1926 and similarly if the percentages payable to Louis B. Mayer Pictures, Inc. for pictures to be

Defendants' Exhibit 33 (continued):

released during the season 1926-1927 be less than the guarantee of $500,000. then and in that event all percentages of profits payable to Louis B. Mayer Pictures, Inc. on account of pictures released during the season 1925-1926 in excess of the guarantee of $500,000.00 may be applied by Metro-Goldwyn Pictures Corporation in repaying itself any deficits that may have accrued by reason of the payment of said guarantee percentages for the season 1926-1927. 2563

(h) The aforesaid $500,000 guarantee is based upon the understanding that Metro-Goldwyn-Mayer Studios (unless a lesser number of pictures is requested by Metro-Goldwyn Pictures Corporation) shall produce and have ready for release in each year not less than forty four pictures. In the event, however, that the studios shall fail to produce in said year the said forty-four pictures, the aforesaid guarantee shall be reduced proportionate to the number of pictures so produced and ready for release. This production is to be made from the last payment due under said guarantee for the particular year. 2564

Should the contract of April 9th, 1924, (as amended herein) terminate according to its original provisions, that is, April 9th, 1927, then and in that event the guarantee to be paid in respect to the pictures to be released during the season 1926-1927 shall (anything hereinbefore contained to the contrary notwithstanding) be that portion of $500,000 which the number of pictures completed and ready for release on the 9th day of April, 1927, shall bear to forty-four as above provided; for example, if on April 9, 1927, there shall be finished and ready for release twenty two pictures then the guarantee shall be $250,000.00, or if there shall be completed and ready for release forty four pictures, then the guarantee shall be $500,000. 2565

(i) Metro-Goldwyn Pictures Corporation may, however, withdraw said guarantee for any year, (except for the years

Defendants' Exhibit 33 (continued).

2566 above provided) by notifying Louis B. Mayer Pictures Inc. in writing, on or before June 1st of any year, that it elects not to pay the said guarantee on account of pictures to be released in the following year, as above defined. Thereupon the said Louis B. Mayer Pictures, Inc. may terminate the agreement of April 9, 1924, as herein amended, by notifying Metro-Goldwyn Pictures Corporation, in writing, on or before July 1st following said notice that said agreement, as amended, shall terminate as of October 1st following.

Unless said contract is so terminated, it shall continue and the pictures released during that year, as herein defined, shall be distributed as provided in the contract, but 2567 no guaranteed advance shall be made; but, at the end of the year, the guarantee herein provided shall again apply, unless Metro-Goldwyn Pictures Corporation shall on June 1st following the last notice again notify Louis B. Mayer Pictures, Inc. that it elects not to pay said guarantee for the pictures to be released during the following year.

It is the intention of the parties that the guarantee shall be paid for each year's product, as above provided, unless notice is sent by Metro-Goldwyn Pictures Corporation on June 1st of any year, as above provided, and that Louis B. Mayer Pictures Inc. and Messrs. Mayer, Rubin and Thalberg shall likewise continue under this agreement unless 2568 the said guarantee has been withdrawn, as aforesaid, and the Louis B. Mayer Pictures, Inc., has terminated the agreement, as herein provided after the receipt of said notice of withdrawal.

2. It is also understood that the agreement of April 9, 1924, is further modified by providing that the option therein granted Metro-Goldwyn Pictures Corporation to continue the services of Louis B. Mayer Pictures, Inc., Mr. Mayer, Mr. Rubin and Mr. Thalberg shall be for a period of five years from April 9, 1927, instead of three years,

Defendants' Exhibit 33 (continued).

and that the salaries to be paid during the optional period to Mr. Mayer, Mr. Rubin and Mr. Thalberg shall be respectively, $2,500., $1,000., and $2,000. 2569

If this conforms to your understanding, will you kindly sign the annexed copy, under the words "As agreed."

Very truly yours,

LOUIS B. MAYER PICTURES, INC.,
by LOUIS B. MAYER, Pres.

As Agreed

METRO GOLDWYN PICTURES CORPORATION
by N. M. SCHENCK, Vice Pres. 2570

We, the undersigned, hereby agree to be bound by the terms of this amended agreement of October 6th, 1925, and hereby agree to give our services according to the terms and conditions of the agreement of April 9, 1924, as modified heretofore and herein.

LOUIS B. MAYER
J. R. RUBIN
IRVING G. THALBERG

2571

MICRO CARD 22
TRADE MARK ®
39
14415 2
MATTHEW BENDER & COMPANY
MB
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microcard

Defendants' Exhibit 33 (continued).

2572

J. ROBERT RUBIN
COUNSELLOR AT LAW

Phone Cortlandt 323
Cable Address Robrub, New York

165 Broadway
New York

April 19, 1926

Metro-Goldwyn Pictures Corporation
1540 Broadway,
New York City.

Gentlemen:

2573

Louis B. Mayer, J. Robert Rubin and Irving Thalberg have formed a co-partnership under the names Louis B. Mayer Pictures, for the purpose of carrying on the various functions they have heretofore carried on in connection with Louis B. Mayer Pictures Inc.

By agreement dated November 28, 1925, said Louis B. Mayer Pictures Inc. did assign and transfer to the new co-partnership composed of Louis B. Mayer, J. Robert Rubin and Irving Thall rg, all of its right, title and interest in and to the contract of April 9, 1924, as amended, between Louis B. Mayer Pictures Inc. and Metro Pictures Corporation (now known as Metro-Goldwyn Pictures Cor-

2574

poration) and Louis B. Mayer, J. Robert Rubin and Irving Thalberg.

The newly created co-partnership composed as aforesaid, together with the individuals constituting the same have accepted and do hereby reaffirm their acceptance of the assignment of the foregoing contract as amended and agree to carry out all of the terms, covenants and conditions of said contract, as amended.

Since the assignment of the aforesaid contract it is desired to dissolve the Louis B. Mayer Pictures Inc. and to

Defendants' Exhibit 33 (continued).

obtain your consent to this dissolution; and to the payment 2575
of all future remittances to Louis B. Mayer Pictures instead of Louis B. Mayer Pictures Inc.

Will you kindly evidence your consent to the dissolution of the corporation, the assignment of the contract and the payment to Louis B. Mayer Pictures by subscribing your name under the words "Accepted."

Yours very truly,

LOUIS B. MAYER PICTURES INC.
By: J. ROBERT RUBIN
Secretary

2576

ACCEPTED:

METRO-GOLDWYN PICTURES CORP.,
By N. M. SCHENCK
Vice-Pres.

LOUIS B. MAYER PICTURES
LOUIS B. MAYER
I. THALBERG
J. ROBERT RUBIN

2577

Defendants' Exhibit 33 (continued).

2578 THE AMBASSADOR

LOS ANGELES Oct. 15, 1926

Mr. Nicholas M. Schenck,
Metro Goldwyn Mayer Corporation,
1540 Broadway,
New York City.

My dear Nick:—

You have asked me to state to you if the arrangement that you and I have made in reference to my annual income from my services and percentages in connection with the Metro Goldwyn Mayer Pictures as hereinafter provided
2579 that I will consider this adjustment final and shall not ask for any new financial arrangement during the term of the present contract. That I gladly promise. I can assure you with that arrangement I am perfectly happy and contented and shall be for the remainder of the period of the present agreement and shall not ask for a further adjustment or any additional financial arrangement. I can now devote myself fully to my labors and feel that my future is assured and protected. The arrangement is a most happy one.

My understanding of the terms of my new arrangement is as follows. I am to receive a salary of four thousand dollars a week, and am to be guaranteed that my per-
2580 centage interest in Louis B. Mayer Pictures shall equal the difference between my salary and four hundred thousand dollars per annum. In other words my yearly compensation or income shall equal four hundred thousand dollars. The percentages are to be paid me quarterly beginning from September first, 1926.

Let me take this occasion to thank you for your courteous treatment and your understanding of my problem. With kindest regards and best wishes, I am,

Yours sincerely,

(Signed) IRVING G. THALBERG.

Defendants' Exhibit 33 (continued).

AGREEMENT made February 16, 1927, between LOEW'S 2581
INCORPORATED, a Delaware corporation and sometimes referred to herein as LOEW'S, and LOUIS B. MAYER, J. ROBERT RUBIN and IRVING THALBERG, as co-partners operating under the trade name and title of LOUIS B. MAYER PICTURES, and sometimes referred to herein as the partnership, and METRO-GOLDWYN PICTURES CORPORATION, a Delaware corporation.

WHEREAS, METRO PICTURES CORPORATION and its successor METRO-GOLDWYN PICTURES CORPORATION, each subsidiaries of LOEW'S, heretofore contracted that LOUIS B. MAYER PICTURES, INC., would exclusively supervise the production of motion pictures to be made and distributed by 2582
METRO (METRO-GOLDWYN), by contract dated April 7, 1924, which was modified and supplemented by agreement dated October 6, 1925, and by writing dated April 19, 1926, it was consented that said LOUIS B. MAYER PICTURES, INC. be dissolved, and in its place be substituted the aforesaid partnership LOUIS B. MAYER PICTURES; and

WHEREAS, the parties now desire mutually to change and modify the said agreements as now in force;

NOW, THEREFORE, the parties hereto do mutually agree as follows: 2583

The agreements aforesaid are hereby taken over from METRO-GOLDWYN PICTURES CORPORATION by said LOEW'S and assumed by said LOEW'S, all as herein modified, and as of and after September 1st, 1926, LOEW'S is hereby made a party thereto with METRO-GOLDWYN PICTURES CORPORATION until April 7, 1932 and hereby obligates itself to said partnership as to all the terms and provisions of said agreements as herein modified until April 7, 1932, after which LOEW'S shall no longer be a party hereto, but METRO-GOLD-

Defendants' Exhibit 33 (continued).

2584 WYN PICTURES CORPORATION shall thereafter be solely liable hereunder.

The said agreements are hereby modify as of September 1st, 1926, as follows:

(1) The term is hereby extended to April 7th, 1932, and with no provisions for further extension.

(2) In substitution and in lieu of the compensation to the partnership LOUIS B. MAYER PICTURES of twenty per cent (20%) of the net profits (as therein defined) from the sale and distribution of productions made and to be
2585 made thereunder, it is agreed that on and after September 1st, 1926, and for and during the term of this agreement expiring April 7th, 1932, the said partnership shall receive from and be paid by LOEW'S, a sum equal to the following percentage of the combined annual net profits of LOEW'S INCORPORATED and all its subsidiaries and its companies and ventures for such period, said sum to be determined as follows:—There shall be deducted from such combined net profits a sum proportionate to $2,121,560. per year (which represents $2.00 per share on its present issued and outstanding capital stock) and in this the partnership shall have no percentage. On remaining net profits up
2586 to a sum proportionate to the next $2,500,000. per year, the partnership shall have and receive a sum equal to twenty per cent (20%) thereof, and on all further net profits (that is net profits over and above said $2,121,560. and the next $2,500,000. per year) the partnership shall receive a sum equal to fifteen percent (15%) thereof.

During the term of this agreement if LOEW'S should issue additional shares of the said no par value stock of LOEW'S INCORPORATED, and sell or exchange them for a bona fide consideration in cash or property, approximately equal to the then market value of such stock, in that event

Defendants' Exhibit 33 (continued).

for each said additional share so sold or exchanged, the sum of $2.00 shall then and thereafter be added to the said first $2,121,560. per year, on which the partnership is to have no percentage. Anything hereinbefore contained to the contrary notwithstanding, it is agreed that any stock issued upon the exercise of the present outstanding stock purchase warrants, or any other stock hereafter issued upon the exercise of stock purchase warrants given by LOEW'S, in connection with future financing by way of bonds, debentures or preferred stock, shall be considered as part of the issued capital stock for which an allowance of $2.00 per share shall be added to the amount of dividends allowed before determining compensation of the partnership. The said combined net profits shall be computed and ascertained by sound accounting methods, but it is agreed that in computing and ascertaining said net profits that the present accounting methods and practices of LOEW'S and its said subsidiaries and ventures, as they have been applied and followed since April, 1924, are now generally approved by all parties and are recognized as "sound accounting methods" in the sense that this term is used herein, and the theory and practise so heretofore followed shall be a general guide to all accounting hereunder. The combined net profits above referred to shall be LOEW'S share (direct and indirect) of the combined net earnings and profits of all companies, subsidiaries and ventures in which LOEW'S shall have any direct or indirect interest by stock ownership or otherwise, for the particular period, and it is understood that the same shall be taken from their combined statement of profit and loss, determined as herein provided, and that both the operating losses and profits of particular companies or ventures shall be reflected in such combined net profit account for the particular period. Income and corporate taxes, State and Federal, for the particular period only are to be deducted first in determining such net profits,

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Defendants' Exhibit 33 (continued).

2590 except that taxes arising from profits on property where such profit is not included as income for the benefit of the partnership shall not be charged in this computation. In this computation neither profits nor losses from sales or exchanges of real estate buildings or leaseholds, or stocks in corporations owning real estate, buildings or leaseholds where the property or stock was purchased prior to September 1, 1926, shall be included, nor shall such profits or losses be included where a sale takes place after April 7, 1932, but where both the purchase, and the sale or exchange, take place within the period of this agreement, such profits and losses shall be included.

2591 Where all or part of the said sale price is in other than cash, the profit represented by other than cash shall not be reflected as income until such part of the purchase price, not cash, is actually paid or realized upon; and if such payment or realization takes place after April 7, 1932, nevertheless the accounts shall then be adjusted to give the partnership benefit thereof.

(3) The fact that dividends are or are not declared by any of the said companies or ventures or the amount of dividends declared, shall not be taken into consideration, but the said combined net profits shall be computed solely on the basis of LOEW's direct or indirect actual share in

2592 all net profits for the period, provided always that in the case of companies or ventures where LOEW's has less than a twenty-five percent (25%) interest or ownership by way of common or voting stock, (as for example, those listed in Ex. A annexed where such is now a fact) the profit and loss account of such are not to be shown or included in the combined net profits account of LOEW's but if LOEW's receives any dividend or any return from the same during the period of this agreement, than such to the extent they actually belong to LOEW's and are earned during the period of this agreement are to be shown

as receipts in said combined net profit account, and if such dividends or receipts are received after the period of this agreement, the partnership shall then receive an adjustment by reason thereof based upon the proportionate part thereof earned by such company or venture during the period of this agreement. 2593

(4) Where preferred stock of a company is outstanding and held by others than LOEW'S (as for example, in Metro-Goldwyn Pictures Corporation) the preferential interest payable on such stock shall (to the extent such stock is not owned by LOEW'S) be a charge first to be deducted before LOEW'S share of net profits is computed, as the same is deemed to represent the share of profits of METRO-GOLDWYN PICTURES CORPORATION belonging to others than LOEW'S. Similarly, if LOEW'S should hereafter create and sell and issue or issues of preferred stock, then the required cumulative dividends on such preferred stock, (not exceeding seven percent (7%) per annum) shall first be deducted annually as an expense in determining compensation of the partnership. Sinking fund requirements for stock, bonds or debt, shall not be a charge, but interest on bonds, mortgages and money borrowed shall be a charge, and bonuses and expenses in connection therewith or in connection with issues of preferred stock may be amortized and charged. 2594 2595

(5) For the purposes of this agreement annual depreciation shall be computed and allowed on present real and personal property and on that hereafter acquired during the term of this agreement, at the rate and in the same manner as is now done by LOEW'S, and such depreciation shall constitute a deduction in determining net profits, except

(a) no depreciation whatever shall be charged or deducted as to the Hollywood Studio.

Defendants' Exhibit 33 (continued).

(b) all buildings (excepting those of the said Hollywood Studio and those of the Culver City Studio) which are owned in fee shall be depreciated annually only to one-half the extent as is now done by LOEW'S. "Owned in fee" as here used shall mean that where 51% or more of the aggregate value of the land on which the building is erected is owned in fee, then the building is considered as owned in fee.

(c) No depreciation shall be charged on newly constructed theatres from the date of their opening to the end of the then fiscal year.

(6) Reserves for proper purposes may be set up to the extent sound accounting methods shall make essential, but not in excess thereof. If any reserves shall be set up for future contingent liability or otherwise, with the effect of then reducing the amount of combined net profits due the partnership, and it later appears that such reserves have proven to be excessive, or by sound accounting methods the same shall later be reduced wholly or in part, the partnership shall then be entitled to such additional sums as would be due it if the reserve had originally been for the lesser amount; and if any said reserves are found later to be insufficient, in the same manner LOEW'S shall be entitled to recover accordingly from the partnership or may deduct such sums against any further sums due the partnership. Such adjustment shall be made to either party even though the period of the contract has expired, but shall not be made after five years from April 7, 1932. Depreciation for purposes hereof shall not be deemed a reserve.

(7) At the termination of this agreement (April 7th, 1932) the compensation to the partnership of said per

Defendants' Exhibit 33 (continued).

centage of said combined net profits shall cease, but com- 2599
mencing on said date, the partnership shall thereafter receive and be paid by METRO-GOLDWYN PICTURES CORPORATION a sum equal to twenty percent (20%) of the net profits from the further distribution after such date, of all pictures produced under the said supervision of the partnership from April 7th, 1924 to April 7th, 1932, so long as there shall be receipts therefrom. Such net distribution profits shall be the gross receipts from the license, use and/or distribution of said pictures, less actual cost of distribution, and less production cost not already charged off before September 1st, 1926, or charged off in the said combined net profit account for the period of this 2600
agreement, and such distribution profits shall be computed as provided in the agreement of April 7, 1924, except that the charge for distribution hereafter shall be the actual net cost thereof rather than the fixed thirty percent (30%) otherwise provided in the contract of April 7, 1924. The returns from pictures after April 7, 1932, shall be considered and accounted for (except Ben Hur) in groups of four (4) in order of release date, as provided in the agreement of April 7, 1924. Returns from the reissue of any picture shall be considered returns from the said original picture. Remakes shall not be made until five (5) years after the first picture's release, nor shall story rights be sold within such period. After such period, 2601
pictures may be remade or stories of pictures made sold, and then the only interest the partnership shall have therein shall be in Metro-Goldwyn's interest in the story value, twenty percent (20%) whereof shall be paid to the partnership at the time of remake or sale. If the parties cannot agree on such story value, it shall be fixed by arbitration under the "Arbitration Law" of the State of New York as it shall then be in effect.

Such twenty percent (20%) interest in pictures and stories values shall not give the partnership any lien

2602 or property right in said stories or pictures, but it shall have the right of compensation from METRO-GOLDWYN.

(8) Effective from and after September 1, 1926, the following guarantee is hereby made to the partnership by LOEW'S in lieu of all other guarantee provisions. There shall be paid the partnership by LOEW'S a guaranteed sum at the rate of $500,000.00 per year until April 7, 1932, payable in thirteen (13) equal installments every four (4) weeks at the end of such period of four weeks. A tentative combined net profit statement of LOEW'S, showing the approximate sum due the partnership for each such four week period shall be rendered the partnership by LOEW'S
2603 before the end of the next succeeding period. If such tentative statement shows that the partnership was then entitled to an excess beyond the sums already paid to it, Fifty percent (50%) of such excess shall then be paid the partnership. If it should show that more had been paid than was due, the next following guarantee installment may be reduced to that extent, but never to less than a sum which will maintain the guaranteed sum to that date.

(9) Within four (4) months after the end of each year (September 1st to September 1st) LOEW'S shall furnish the partnership with a detailed and audited combined net
2604 profit statement of all its said companies and ventures computed as herein provided, and the percentage due the partnership for said year shall then be formally ascertained by the parties according to the terms of this agreement, and any excess due and unpaid for such year shall then be paid to the partnership. Each two year period commencing September 1st (1926-1928, 1928-1930), and the last period from September 1st, 1930 to April 7th, 1932, shall be considered as three (3) separate accounting and settlement periods, as follows:—In each said period at the close thereof the accounts for that period shall be

Defendants' Exhibit 33 (continued).

finally settled (except as to factors not there appearing or known, such as delayed dividends from less than twenty-five percent (25%) owned companies, and excess or too small reserves) and such account shall then be settled without reference to prior periods, and for the next period the account shall begin anew. In each said period the partnership shall always receive and retain the guaranteed rate and it shall never to any date fall below the same, but the partnership for such period shall not be entitled to receive more than the said guarantee unless it has earned (as shown by the tentative monthly reports in the first year of the period and the prior annual account and subsequent monthly statements in the second year) more than the rate of guarantee, and if the amount found due after the first year of the period is less than the guarantee, the guarantee shall continue but that sum may be set off against any excess of earnings over the guarantee during the last (second) year of the said period. 2605 2606

(10) The partnership shall have full access to all reasonable times through its members and agents to all books, records, accounts and contracts of Loew's and its said companies and ventures, and may audit and examine the same during the period the partnership shall have rights to the payment of any sums hereunder, and Loew's agrees that it will keep and preserve (or cause the same to be done) full, true and correct books, records, accounts and entries relating to all dealings, transactions and properties affecting such net profits (or such gross income and expenses of distribution after April 7, 1932.) The partnership shall also be kept currently informed as to bookings and earnings of all pictures made hereunder and given any information desirable to ascertain the trade value of the various types of pictures produced. 2607

(11) It is understood that the partnership accepts the newly provided percentage of the combined net profits of

Defendants' Exhibit 33 (continued).

2608 Loew's with the understanding that it shall receive until April 7, 1932, a sum equal to such percentage from such combined net profits as herein defined of all companies and ventures in which Loew's has or hereafter shall acquire an interest; and that in event that Metro-Goldwyn shall cease to be a subsidiary of Loew's the combined net profits from all sources and ventures, including Metro-Goldwyn shall be computed and included in the net profits of Loew's as if no change had so occurred.

(12) All provisions for the salaries to the said individual members of the partnership and the cost of the
2609 partnership's New York office shall continue and are separate and in addition to the percentage compensation to the partnership here provided and said salaries shall continue at the rate now (January 1, 1927) paid, except the salary of Louis B. Mayer shall be $2500.00 per week after April 7, 1927, as provided in the contract of October 6, 1925. Such shall be a proper cost charge in computing combined net profits, but the percentage compensation to the partnership shall not be a cost in such computation.

(13) Consent that the partnership be substituted in place of Louis B. Mayer Pictures, Inc. (the corporation originally entering into this agreement) is hereby reaffirmed.

2610 The paragraph of the contract of April 7, 1924, granting rights of termination upon death of Louis B. Mayer, or simultaneous incapacity of Mayer and Thalberg for six months, is entirely eliminated and the following substituted:

In the event of the death of Louis B. Mayer, Irving Thalberg or J. Robert Rubin, or the incapacity of any of them for a continuous period of over six months; Loew's thereupon shall have the right to reduce the percentage compensation to the partnership from the combined net profits of Loew's, by thereafter deducting as to said de-

ceased or incapacitated partner, his partnership share thereof, which said share shall be the same percentage as now owned by each in the partnership. If the remaining partners shall provide a substitute satisfactory to LOEW'S the full percentage shall again be paid to the partnership, and the cost of such substitute shall be deducted by the partnership from the share of the incapacitated partner. If the said incapacity ceases within the next following six months after said substitution or said deduction, then the said partner shall resume his duties and continue on as formerly and receive thereafter his said share as formerly but if his incapacity does not cease within such additional six months then such partner shall cease to be a partner. If there is a simultaneous incapacity of any two of the said partners continuing for thirty days, then LOEW'S has the right to cause the duties of each to be performed by another and to charge the cost thereof against the salary and the share in the partnership of the partner so incapacitated. The death or incapacity of any partner shall not terminate this agreement, or affect it except as above provided, and the percentage due after April 7, 1932, under paragraph (7) herein, shall in all events continue as to each partner or his estate as to all pictures completed (or over half completed) while he was a partner. 2611 2612

(14) The parties have agreed that "BEN HUR" stands alone and in a different position from other productions supervised by the partnership, and it is hereby agreed: 2613

(a) That it shall not be grouped with any other pictures in computing the partnership's twenty percent (20%) share of net distribution profits therefrom after April 7, 1932;

(b) That from September 1, 1926, to April 7, 1932, all receipts therefrom less actual distribution cost and sums due Classical Cinematograph Corporation shall be applied against its production cost; and

Defendants' Exhibit 33 (continued).

(c) That until April 7, 1930, no more shall be charged off than is provided in (b) but after April 7, 1930, the balance of production cost then not so charged off, shall be charged off one-half each year for the two (2) remaining years, and the said share of returns for each said year April 7, 1930-32 shall first be applied thereto, and the balance, if any, necessary to make up such fifty percent (50%) for the said year, shall be charged off in the combined net profit account for each said year.

(15) In all other respects the said principal agreement is confirmed and remains effective and is extended to April 7, 1932.

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and sealed this day and year first above written.

METRO-GOLDWYN PICTURES CORPORATION
By N. M. SCHENCK
(Seal) Vice-President

LOEW'S INCORPORATED
By N. M. SCHENCK
(Seal) Vice-President

LOUIS B. MAYER (L. S.)
J. ROBT. RUBIN (L. S.)
IRVING THALBERG (L. S.)
Individually and as co-partners of
Louis B. Mayer Pictures, Inc.

Defendants' Exhibit 33 (continued).

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.: 2617

On this 16th day of February, 1927, before me personally came NICHOLAS M. SCHENCK, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Manhattan, City and County of New York; that he is a Vice-President of METRO-GOLDWYN PICTURES CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 2618

S. S. BRAUNBERG
Notary Public, Westchester County

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 16th day of February, 1927, before me personally came NICHOLAS M. SCHENCK, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Manhattan, City and County of New York; that he is a Vice President of LOEW'S INCORPORATED, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order. 2619

S. S. BRAUNBERG
Notary Public, Westchester County

Defendants' Exhibit 33 (continued).

2620 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 16th day of February, 1927, before me personally came and appeared LOUIS B. MAYER to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

S. S. BRAUNBERG
Notary Public, Westchester County

2621 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 16th day of February, 1927, before me personally came and appeared J. ROBERT RUBIN, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

S. S. BRAUNBERG
Notary Public, Westchester County

2622 STATE OF CALIFORNIA, }
COUNTY OF LOS ANGELES, } ss.:

On this day of February, 1927, before me, a Notary Public in and for the County of Los Angeles, personally appeared IRVING THALBERG, known to me to be the person whose name is subscribed in the within instrument, and acknowledged that he executed the same.

Defendants' Exhibit 33 (continued).

Tel. 9850 Bryant 2623

LOEW'S INCORPORATED
"THEATRES EVERYWHERE"

Executive Offices
Loew Building
Broadway at 45th Street
New York

February 16th, 1927.

Mr. Irving Thalberg,
Culver City, California.

Dear Sir:

This is to confirm the arrangement made by us on October 15th last along the lines of your letter of that date. 2624

You are to continue in the employ of the Metro Goldwyn Mayer Corporation in your present capacity and continue in your present work until April 7th, 1932. You are to receive a salary of Four Thousand Dollars weekly, beginning October 1st, 1926, which, of course, you have been receiving since that date. We hereby guarantee that your income for each of the years of your employment from your said salary and your proportionate share (20%) of the income received by Louis B. Mayer Pictures from its contract with Loew's Incorporated, entered into this day, shall not be less than Four Hundred Thousand Dollars. 2625

In the event that your said salary and your proportionate share of the income of the Louis B. Mayer Pictures shall not equal Four Hundred Thousand Dollars per annum, we agree to make up to you such deficiency. Such deficiency, if any, shall be paid you on or about January 1st of each year covering the previous fiscal year.

In the event that you should be incapacitated as provided in paragraph 13 of the agreement entered into this day between Loew's Incorporated and Louis B. Mayer Pictures, then and in that event the amount deducted from your

Defendants' Exhibit 33 (continued).

2626 salary and or percentages under that provision shall likewise be deducted from the guarantee and it shall be reduced by that amount.

During the period from September 1st, 1931, to April 7th, 1932, being less than a year, the guarantee shall be for that proportionate period and shall be paid in the same manner as the yearly guarantee.

This arrangement goes into effect as of September 1st, 1926, insofar as the guarantee is concerned, but the salary of Four Thousand Dollars instead of Two Thousand Dollars is effective as of October 1st, 1926.

We believe this covers all the details of our arrange-
2627 ment, and we have every reason to believe this will be eminently satisfactory to you as well as ourselves, as set forth in your letter of October 15th.

Very truly yours,

LOEW'S INCORPORATED
By N M SCHENCK
Vice President.

Accepted:

Signed IRVING THALBERG

2628 (Seal)

Address all communications to the undersigned company

Defendants' Exhibit 33 (continued).

ARS GRATIA ARTIS 2629

METRO-GOLDWYN
PICTURES
LOEW BUILDING—1540 BROADWAY
NEW YORK

Legal Department
J. ROBERT RUBIN
General Counsel

February 16th, 1927.

Loew's Incorporated,
1540 Broadway,
New York, N. Y.

Gentlemen:

2630

In consideration of your agreement to guarantee to Mr. Irving Thalberg the income of Four Hundred Thousand Dollars per year, as set forth in your letter of this day, we agree that in the event that there should be a deficiency between the Four Hundred Thousand Dollars guarantee and the amount that Mr. Thalberg should receive as salary and percentages as set forth in your said letter in any year of the agreement, then and in that event we will pay twenty per cent (20%) of said deficiency. Our payments shall be made at the same time as are yours upon two days' notice from you of the amount due.

Very truly yours, 2631

LOUIS B. MAYER PICTURES,
By LOUIS B. MAYER
J. R. RUBIN.

No agreement or order will be binding on this corporation unless in writing and signed by an officer

Defendants' Exhibit 33 (continued).

2632 AGREEMENT made December 19th 1929, between LOEW'S INCORPORATED, a Delaware corporation and sometimes referred to herein as LOEW'S, and LOUIS B. MAYER, J. ROBERT RUBIN and IRVING THALBERG, as co-partners operating under the trade-name and title of LOUIS B. MAYER PICTURES, and sometimes referred to herein as the partnership, and METRO-GOLDWYN PICTURES CORPORATION, a Delaware corporation, sometimes referred to herein as METRO.

WHEREAS, METRO PICTURES CORPORATION and its successor METRO, each subsidiaries of LOEW'S, heretofore contracted that LOUIS B. MAYER PICTURES, INC., since succeeded by LOUIS B. MAYER PICTURES the aforesaid partnership, would exclusively supervise the production of motion pictures to be made and distributed by METRO by contract dated April 7th 1924, which said agreement was modified and supplemented by written agreement dated October 6, 1925, and by written agreement between the parties hereto dated February 16, 1927, and

2633

WHEREAS, the parties now desire mutually to change and modify the said agreements as now in force, in respect to the period of the term thereof;

2634 NOW, THEREFORE, the parties hereto do mutually agree as follows:

The said agreements of April 7th 1924, October 6th 1925 and February 16, 1927, are hereby modified and amended, effective as of this date, as follows:

The term thereof fixed in said agreement of February 16th 1927 as ending April 7th 1932 is hereby extended for a further period of five (5) years, that is until April 7th Nineteen hundred and thirty-seven (1937), and with no further provision for further extension, and all the parties hereto shall be bound to the terms and conditions

Defendants' Exhibit 33 (continued).

of said agreements until April 7th 1937; and wherever the date April 7th 1932 appears in the agreement of February 16th 1927 such date shall be changed to read April 7th 1937, to the end that said agreement shall be read and construed as if it provided originally for its continuance until April 7th 1937, in place of April 7th 1932. Wherever necessary fully to effectuate the foregoing, such other modifications in dates and periods shall be deemed to have been made as the case may require. For example, the second sentence of paragraph "(9)" of said agreement of February 16th 1927 shall be construed (with reference to the two year periods therein referred to) to read "Each two year period commencing September 1st (1926-1928, 1928-1930, 1930-1932, 1932-1934, 1934-1936,) and the last period from September 1st 1936 to April 7th 1937 shall be considered as six (6) separate accounting and settlement periods, as follows:" 2635 2636

IN WITNESS WHEREOF the parties hereto have caused these presents to be signed and sealed this day and year first above written.

METRO-GOLDWYN-PICTURES CORPORATION
By N. M. SCHENCK
President.

2637

LOEW'S INCORPORATED
By N. M. SCHENCK
President.

LOUIS B. MAYER (L. S.)
J. ROBERT RUBIN (L. S.)
I. THALBERG (L. S.)
Individually and as co-partners of
LOUIS B. MAYER PICTURES.

Defendants' Exhibit 33 (continued).

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 8th day of May, 1930, before me personally came NICHOLAS M. SCHENCK, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Manhattan, City and County of New York; that he is President of METRO-GOLDWYN PICTURES CORPORATION, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

IRVING H. GREENFIELD
Notary Public,
Kings County
Kings Co. Clerk's No. 16, Register's No. 2022
Cert. Filed N. Y. Co. Clk's No. 114, Reg. No. 2G50
Cert. Filed Queens Co. Clk's No. 56, Reg. No. 1479
Commission Expires March 30, 1932

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 8th day of May, 1930, before me personally came NICHOLAS M. SCHENCK, to me known, who, being by me duly sworn, did depose and say, that he resides in the Borough of Manhattan, City and County of New York; that he is President of LOEW'S INCORPORATED, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal;

Defendants' Exhibit 33 (continued).

that it was so affixed by order of the Board of Directors 2641
of said corporation, and that he signed his name thereto by like order.

IRVING H. GREENFIELD
Notary Public,
Kings County
Kings Co. Clerk's No. 16, Register's No. 2022
Cert. Filed N. Y. Co. Clk's No. 114, Reg. No. 2650
Cert. Filed Queens Co. Clk's No. 56, Reg. No. 1479
Commission Expires March 30, 1932

2642

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 20th day of December, 1929, before me personally came and appeared LOUIS B. MAYER, to me known and known to me to be the individual described in and who executed the foregoing instrument. and he duly acknowledged to me that he executed the same.

ANTONIO C. GONZALEZ
Notary Public, New York County
New York County Clerk's No. 160
New York Co. Register's No. 0-361 2643
Term Expires March 30, 1930

Defendants' Exhibit 33 (continued).

2644 STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 20th day of December, 1929, before me personally came and appeared J. ROBERT RUBIN, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

ANTONIO C. GONZALEZ
Notary Public, New York County
New York County Clerk's No. 460
New York Co. Register's No. 0-361
2645 Term Expires March 30, 1930

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 20th day of December, 1929, before me personally came and appeared IRVING THALBERG, to me known and known to me to be the individual described in and who executed the foregoing instrument, and he duly acknowledged to me that he executed the same.

2646 ANTONIO C. GONZALEZ
Notary Public, New York County
New York County Clerk's No. 160
New York Co. Register's No. 0-361
Term Expires March 30, 1930

Defendants' Exhibit 34.

2647

MINUTES of the Adjourned Monthly Meeting of the Board of Directors of LOEW'S INCORPORATED, held at the Office of the Company, #1540 Broadway, in the Borough of Manhattan, City of New York, on the 8th day of May, 1930, at four o'clock, P.M.

PRESENT:—

NICHOLAS M. SCHENCK
ARTHUR M. LOEW
DAVID L. LOEW
J. ROBERT RUBIN 2648
LEOPOLD FRIEDMAN
CHARLES M. SCHWAB
JACOB L. RUBENSTEIN, constituting a quorum of the Board.

Mr. Nicholas M. Schenck presided as Chairman and Mr. Leopold Friedman acted as Secretary.

* * * * * * * * * * * *

The Secretary directed the Board's attention to a consideration of the matter of the agreement with Messrs. Mayer, Thalberg and Rubin (doing business as Louis B. Mayer Pictures) which was the subject of discussion at 2649 previous meetings of the Board, and stated that it was proposed to extend the existing agreement for a period of five (5) years from its present expiration date, to wit:—April 7th, 1932.

On motion of Mr. Chas. M. Schwab, seconded by Mr. Jacob L. Rubenstein, the following resolution was duly adopted, (Mr. Rubin not voting):—

RESOLVED, that the President be and he hereby is authorized and empowered to execute, acknowledge

Defendants' Exhibit 34 (continued).

2650 and deliver for and in behalf of this Company, an agreement (in form submitted to this meeting which had been approved by Counsel) extending the existing contract with Louis B. Mayer, Irving Thalberg and J. Robert Rubin (doing business as Louis B. Mayer Pictures) for a period of five years from April 7th, 1932, on the same terms and conditions generally set forth in the agreement now in effect.

* * * * * * * * * * * * *

There being no further business the meeting was adjourned.

LEOPOLD FRIEDMAN
2651 Secretary.

2652

Defendants' Exhibit C-24.

2653

SHORTS

Prod. No.	Title	Date Released	No. of Reels	Fiscal Year Ending. 1931	Fiscal Year Ending. 1932	% of 1932 to Total Cost	Total	
556	Trader Airdale Dog Comedies	11-28-31	2	$36,509.73	5,058.88	12.2	$41,568.61	
567	Olympic Events Sport	3-5-32	1	29,262.25	6,733.58	18.7	35,995.83	
583	Wrestling Short	2-18-33	1	7,413.51	3,442.85	29.2	11,807.58	
585	Billiard Short	1-7-33	1	9,384.61	4,222.41	31.0	13,613.50	
588	Puppy Love	Rejected		11.26	1,824.63	99.4	1,835.89	
589	Pearls and Devilfish	9-19-31	1	19,841.33	3,025.61	13.2	22,866.94	2654
590	Sharks and Swordfish	10-24-31	1	6,616.39	1,815.31	21.5	8,431.70	
591	Trout Fishing	4-2-32	1	202.88	6,144.15	96.8	6,347.03	
592	Aquarium Short	4-23-32	1		7,788.05	100.00	7,788.05	
593	Bull Fight Short	10-15-32	1		17,229.61	99.9	17,239.85	
594	Sea Elephants	11-28-31	1		3,294.93	100.0	3,294.93	
597	Motor Boating	9-17-32	1		11,460.47	100.0	11,460.47	
607	Trapeze Short	10-10-32	1		9,946.00	99.9	9,951.00	
613	Winter Sports	8-20-32	1		5,781.56	99.2	5,827.46	
617	Auto Racing	3-11-33	1		10,293.50	89.1	11,556.09	
619	South Sea Shorts	8-13-33	1		1,531.43	100.0	1,531.43	
621	Perils of the Desert	9-10-32	1		2,559.28	69.6	3,679.03	2655
622	Duck Hunting	11-5-32	1		1,858.61	63.4	2,929.31	
630	Motorcycle Racing	4-1-33	1		3,461.08	40.3	8,586.13	
641	Pigskin College	10-22-32	1		2,378.94	10.1	23,451.20	
642	Over the Counter	11-15-32	2		280.98	.9	43,761.55	
	Total			$109,241.96	110,231.86	37.6	$293,523.58	

Defendants' Exhibit C-25.

Statement Showing Production Costs Accrued on Features During Fiscal Year 1932 and Percentage of Completed Costs and Shooting Time:

d. o.	Title	Cost at Aug. 26, 1931 Days	Cost at Aug. 26, 1931 Amount	Increase for Fiscal Year End. 8-24-32 Days	Increase for Fiscal Year End. 8-24-32 Hrs.	Increase for Fiscal Year End. 8-24-32 Amount	Total Days	Total Hrs.	Final Cost Complete	Final Cost Rejected	% Completed in 1932 % Features By Days	% Completed in 1932 % Features By Cost
3	Bugle Sounds					6,589.92				6,589.92		
2	Broadway to Hollywood					50,044.51	27		270,524.72			18.5
3	Hell Divers	36	594,141.83	21		220,796.16	58		814,932.99		36.2	27.1
1	Susan Lennox	33	458,194.22	16		114,444.43	49		572,638.65		32.6	20.
9	Sidewalks of New York	33	271,247.62			7,912.35	33		279,159.97		0.	2.8
0	Sin of Madeline Claudet	34	308,323.87	8		54,684.57	42		363,014.17		19.	15.1
4	Emma		54,571.59	35		290,093.08	35		344,664.67		100.	84.2
6	Boarding School	4	108,786.67			*38,381.75*				70,404.92		
7	Get Rich Quick Wallingford	33	326,627.55		15½	54,613.94	33	15½	381,241.99		6.	14.3
8	West of Broadway	25	489,104.10	7		50,019.50	32		539,123.60		22.	9.3
9	Mata Hari		63,560.15	43		488,914.85	43		552,475.00		100.	88.5
0	Flying High	15	231,405.92	25		291,755.89	40		527,936.81		62.5	55.3
1	Possessed		117,749.09	26		220,837.66	26		370,862.08		100.	59.5
2	A Family Affair		35,579.32			*8,864.03*				26,715.29		
4	Cuban Love Song	15	293,042.07	28		243,129.87	43		536,221.86		65.1	45.3
6	The Champ	6	188,724.12	26		160,674.66	32		349,537.45		81.	46.
7	Private Lives		95,650.93	40		395,266.86	40		490,917.79		100.	80.5
5	Tarzan		4,652.63	60		648,022.73	60		652,675.36		100.	99.3
6	Arsene Lupin		1,269.45	28		415,989.35	28		421,474.53		100.	98.7
8	Freaks		50,137.78	36		260,467.92	36		310,607.37		100.	83.9
9	Lovers Courageous			39		333,268.32	39		333,370.71		100.	100.
0	City Sentinel			25	56	217,627.27	25	56	217,923.76		100.	99.9
1	Polly of the Circus			33	9	430,781.90	33	9	430,781.90		100.	100.
2	Cardboard Lover			22		256,487.07	22		256,477.07		100.	100.
3	Grand Hotel			49		695,067.87	49		695,341.20		100.	100.
4	Wet Parade			34		357,960.67	34		357,966.26		100.	100.
5	Are You Listening			29		243,653.31	29		243,654.16		100.	100.
6	Huddle			56		509,512.88	56		509,520.88		100.	100.
8	Strange Interlude			40		640,579.88	40		641,883.19		100.	99.8
9	Truth Game		9,115.05	30		285,619.54	30		294,774.37		100.	96.9
0	When a Fellow Needs a Friend			29	45	325,934.81	29	45	326,112.03		100.	99.9
1	Letty Lynton			33		316,139.48	33		316,192.23		100.	100.
2	Prosperity			38		336,387.63	89		625,616.21		42.7	53.8
4	Night Court		3.42	20		182,921.43	20		183,341.54		100.	99.8
5	As You Desire Me			42		460,723.24	42		460,733.00		100.	100.
6	After All			28		186,124.00	28		186,125.34		100.	100.
8	Redheaded Woman		641.67	30		394,083.47	30		394,736.52		100.	99.8
0	Eskimo					286,182.01	40		931,667.58			30.7
3	Washington Masquerade			38		349,440.93	38		349,662.78		100.	99.9
4	Downstairs			30		470,988.29	30		471,071.82		100.	100.
5	Smiling Thru			61		784,915.24	68		834,859.72		89.	94.
6	Blondie of the Follies			35	93	599,272.02	35	93	602,680.28		100.	99.4
7	Speak Easily			39		415,655.51	39		416,993.43		100.	99.7
									272,510.40		100	97.4

462	Broadway to Hollywood					50,044.51	27		270,524.72			18.5
553	Hell Divers	36	594,141.83	21		220,796.16	58		814,932.99		36.2	27.1
561	Susan Lennox	33	458,194.22	16		114,444.43	49		572,638.65		32.6	20.
569	Sidewalks of New York	33	271,247.62			7,912.35	33		279,159.97		0.	2.8
570	Sin of Madeline Claudet	34	308,323.87	8		54,684.57	42		363,014.17		19.	15.1
574	Emma		54,571.59	35		290,093.08	35		344,664.67		100.	84.2
576	Boarding School	4	108,786.67			*38,381.75*				70,404.92		
577	Get Rich Quick Wallingford	33	326,627.55		15½	54,613.94	33	15½	381,241.99		6.	14.3
578	West of Broadway	25	489,104.10	7		50,019.50	32		539,123.60		22.	9.3
579	Mata Hari		63,560.15	43		488,914.85	43		552,475.00		100.	88.5
580	Flying High	15	231,405.92	25		291,755.89	40		527,936.81		62.5	55.3
581	Possessed		117,749.09	26		220,837.66	26		370,862.08		100.	59.5
582	A Family Affair		*25,579.32*			*8,864.03*				26,715.29		
584	Cuban Love Song	15	293,042.07	28		243,129.87	43		536,221.86		65.1	45.3
586	The Champ	6	188,724.12	26		160,674.66	32		349,537.45		81.	46.
587	Private Lives		95,650.93	40		395,266.86	40		490,917.79		100.	80.5
595	Tarzan		4,652.63	60		648,022.73	60		652,675.36		100.	99.3
596	Arsene Lupin		1,269.45	28		415,989.35	28		421,474.53		100.	98.7
598	Freaks		50,137.78	36		260,467.92	36		310,607.37		100.	83.9
599	Lovers Courageous			39		333,268.32	39		333,370.71		100.	100.
600	City Sentinel			25	56	217,627.27	25	56	217,923.76		100.	99.9
601	Polly of the Circus			33	9	430,781.90	33	9	430,781.90		100.	100.
602	Cardboard Lover			22		256,487.07	22		256,477.07		100.	100.
603	Grand Hotel			49		695,067.87	49		695,341.20		100.	100.
604	Wet Parade			34		357,960.67	34		357,966.26		100.	100.
605	Are You Listening			29		243,653.31	29		243,654.16		100.	100.
606	Huddle			56		509,512.88	56		509,520.88		100.	100.
608	Strange Interlude			40		640,579.88	40		641,883.19		100.	99.8
609	Truth Game		9,115.05	30		285,619.54	30		294,774.37		100.	96.9
610	When a Fellow Needs a Friend			29	45	325,934.81	29	45	326,112.03		100.	99.9
611	Letty Lynton			33		316,139.48	33		316,192.23		100.	100.
612	Prosperity			38		336,387.63	89		625,616.21		42.7	53.8
614	Night Court		3.42	20		182,921.43	20		183,341.54		100.	99.8
615	As You Desire Me			42		460,723.24	42		460,733.00		100.	100.
616	After All			28		186,124.00	28		186,125.34		100.	100.
618	Redheaded Woman		641.67	30		394,083.44	30		394,736.52		100.	99.8
620	Eskimo					286,182.01	40		931,667.58			30.7
623	Washington Masquerade			38		349,440.93	38		349,652.78		100.	99.9
624	Downstairs			30		470,988.29	30		471,071.82		100.	100.
625	Smiling Thru			61		784,915.24	68		834,859.72		89.	94.
626	Blondie of the Follies			35	93	599,272.02	35	93	602,680.28		100.	99.4
627	Speak Easily			39		415,655.51	39		416,993.43		100.	99.7
628	Skyscraper Souls		1,926.94	28	81	362,976.38	28	82	372,510.40		100.	97.4
629	Unashamed			24		163,227.01	24		163,246.33		100.	100.
631	Flesh					65,618.57	42		477,238.11			13.6
632	Father and Son			30		231,274.43	30		232,761.45		100.	99.4
633	Rasputin			31		405,952.35	104		1,019,404.39		30.	39.8

(Figures in italics were red in original.)

Defendants' Exhibit C-25 (continued).

STATEMENT SHOWING PRODUCTION COSTS ACCRUED ON FEATURES DURING FISCAL YEAR 1932 AND PERCENTAGE OF COMPLETED COSTS AND SHOOTING TIME

(Cont.)

Prod. No.	Title	Cost at Aug. 26, 1931 Days	Cost at Aug. 26, 1931 Amount	Increase for Fiscal Year End. 8-24-32 Days	Increase for Fiscal Year End. 8-24-32 Hrs.	Increase for Fiscal Year End. 8-24-32 Amount	Total Days	Total Hrs.	Final Cost Complete	Final Cost Rejected	% Completed in 1932 % Features By Days	% Completed in 1932 % Features By Cost
633	Red Dust		8,347.73	5		155,632.18	44		405,219.79		11.5	38.4
635	Hell Below		25,901.06			139,973.73	70		889,842.86			15.7
636	Kongo			20		105,018.11	27	1	156,998.25		76.3	66.9
637	Fast Life					39,381.93	45		428,891.17			9.2
638	Faithless			15		111,000.18	28		203,420.45		53.5	54.6
639	Payment Deferred			18		98,614.08	32		191,970.39		56.2	51.4
640	Fu Manchu			10		106,278.27	55		327,627.26		18.5	32.4
647	White Sister					29.10	58		619,779.80			
	Total Features in Process During Year	234	3,738,704.78	1,360	299½	14,991,315.56	2,122	301½	23,348,395.64	103,710.13	3702.1	3640.7
	Cost of Foreign Versions					734,585.45						
	Cost of Suspense Productions		78,153.72			308,796.96						
	Cost to Pict. Comp. in Prior Years		31,198.08			59,267.71						
	Cost of SHORTS					110,231.86						
	TOTAL PRODUCTION COSTS FISCAL YEAR 1932					16,204,197.54						

2661 2660 2659

Defendants' Exhibit C-27.

662 FEATURE PICTURES RELEASED DURING FISCAL YEAR 1931-1932

Title	Started	Finished	Total
Squaw Man (544)	2-9-31	3-26-31	$721,986.65
Phantom of Paris (504)	2-14-31	3-12-31	480,515.74
Sidewalks of New York (569)	5-13-31	6-22-31	279,159.97
New Advent. Wallingford (577)	7-13-31	8-21-31	381,241.99
Susan Lennox (561)	5-26-31	7-6-31	572,638.65
Sin of Madelon Claudet (570)	5-29-31	6-25-31	363,014.17
Culgun Love Song (584)	8-10-31	9-24-31	536,221.86
Guardsman (575)	6-24-31	7-23-31	312,654.81
Flying High (580)	8-10-31	9-19-31	527,936.81
Possessed (581)	9-2-31	10-1-31	370,862.08
663 West of Broadway (578)	7-6-31	8-1-31	539,123.60
The Champ (586)	8-19-31	9-22-31	349,537.45
Private Lives (587)	9-8-31	10-23-31	490,917.79
Mata Hari (579)	10-1-31	11-16-31	552,475.00
Hell Divers (553)	6-25-31	8-6-31	814,932.99
Lovers Courageous (599)	11-3-31	12-13-31	333,370.71
Enfma (574)	10-19-31	11-20-31	344,664.67
Passionate Plumber (602)	12-1-31	12-19-31	256,477.07
Beast of the City (600)	11-4-31	12-2-31	217,923.76
Freaks (598)	11-9-31	12-16-31	310,607.37
Polly of the Circus (601)	12-2-31	1-9-32	430,781.90
Arsene Lupin (596)	11-17-31	12-16-31	421,474.53
Are You Listening (605)	1-6-32	1-27-32	243,654.16
Tarzan the Ape Man (595)	10-31-31	12-13-31	652,675.36
But the Flesh Is Weak (609)	1-28-32	2-26-32	294,774.37
664 Wet Parade (604)	1-18-32	2-15-32	357,966.26
Night Court (614)	2-22-32	3-11-32	183,341.54
When a Feller Needs a Friend (610)	2-15-32	3-19-32	326,112.03
Letty Lynton (611)	2-24-32	3-28-32	316,192.23
Huddle (606)	2-11-32	4-8-32	509,520.88
As You Desire Me (615)	3-4-32	4-12-32	460,733.00
New Morals for Old (616)	3-3-32	3-28-32	186,125.54
Red Headed Woman (618)	4-28-32	5-27-32	394,736.52
Unashamed (629)	5-17-32	6-11-32	163,246.33
Washington Masquerade (623)	5-4-32	6-16-32	349,652.78
Skyscraper Souls (628)	5-16-32	6-20-32	372,510.40
Downstairs (624)	5-28-32	6-27-32	471,071.82
Speak Easily (627)	5-9-32	6-17-32	416,993.43
Blondie of the Follies (626)	5-28-32	7-8-32	602,680.28
Divorce in the Family (632)	6-27-32	7-30-32	232,761.45
Grand Hotel (603)	12-30-31	2-19-32	695,344.20

Defendants' Exhibit C-29.

Schedule A-1

STUDIO OVERHEAD

Classification	Dr.	Cr.
Salaries—Executive Department	$1,047,599.43	$
Expenses—Executive Department	16,482.79	
Salaries—Accounting Department	100,421.33	
Expenses—Accounting Department	21,300.88	
Salaries—Production Department	72,346.20	
Expenses—Production Office	2,368.15	
Salaries—Casting Office	41,600.32	
Expenses—Casting Office	35,210.19	
Salaries—Projection Department	2,225.51	
Expenses—Projection Department	31.42	
Salaries and Expenses—Business Office	48,847.61	
Drayage and Auto Hire	1,748.47	
Salaries—Plant Engineering & Planning	50,660.93	
Expense of Personnel Department	220.63	
Salaries, Maintenance	123,602.31	
Maintenance—Repair of Buildings	32,553.44	
Repair and Maintenance of Facilities	151,527.64	
Legal & Other Expenses re Patent Rights	2,860.52	
Legal Salaries and Expense	30,573.43	
Rental of Studio and Facilities	334,464.61	
Insurance—General	33,635.91	
Insurance—Miscellaneous Compensation	54,051.30	
Taxes—City, County and State	72,461.51	
Railway Transportation	2,054.97	
Mailing Expense	11,058.40	
Printing and Stationery	14,745.02	
Stock Library Expense	16,298.66	
Fan Mail Expense	2,514.53	
Losses not covered by Insurance	496.65	
Entertainment	8,440.23	
Donations	6,928.99	
New York Office Expense in Connection with Production	149,520.31	
Stamp Tax	432.72	
Salaries of Directors Unassigned	27,715.49	

Defendants' Exhibit C-29 (continued).

Classification	Dr.	Cr.
Miscellaneous Unclassified Expense	19,357.06	
Rejected Continuity Charges and Songs	63,996.57	
Accumulation on Rejected Pictures	151,686.80	
Film Rentals for Studio Showing	3.05	
Heating and Ventilation	6,357.82	
Button Deposit		18.00
Salvage Yard		9.41
Dues	24,765.60	
Uncollectible Accounts Receivable	3,970.81	
Home Office Unclassified	46,081.93	
Freight & Handling		7,809.33
Telephone Expense	86,677.60	
Telegraph Expense	8,651.48	
Experimental Work—Trick Cameras	24,678.10	
Executive Dining Room Expense	8,485.20	
Flowers for Executive Office	702.61	
Private Dining Room in Commissary	1,501.43	
Income from Use of Flowers		4,011.45
Adjustment of Overhead for year ended 8/27/31		9,910.89
Totals General Overhead	$2,963,125.56	$21,759.08
	21,759.08	
Less absorbed into Pictures	$2,941,366.48	
	2,153,868.00	
Total Unabsorbed General Overhead	$787,498.48	

Defendants' Exhibit C-29 (continued).

Classification			Dr.	Cr.
Brought Forward			$787,498.48	
Department Overhead (Balance)				
Unassigned Salaries—				
Domestic Stock Co.		$813,240.63		
Less: Percentage Charged to Productions		128,855.26		
		$684,385.37		
Less: Profit from Stock Talent Rentals		95,170.98		
		$589,214.39		
Less: Unassigned Salaries.	$304,429.80			
Less: Directors	*12,000.00*			
Less: Foreign	*1,240.88*	291,188.92	298,025.47	
Restaurant			2,470.83	
Overabsorbed Balance—Sound Overhead				143,249.85
Wardrobe Department				3,593.52
Auto & Trucking				14,287.16
Laboratory				861,839.24
Still Room				20,573.48
Construction Department			5,214.73	
Publicity			101.53	
Scenario Dept.				30,532.41
Editorial Dept.			11,841.67	
Property Dept.			7,708.62	
Music Dept.			21,330.20	
Camera Dept.			9,781.52	
Precision Machine Shop			141.03	
Portrait Dept.			63.18	
Mechanical Dept.			9,379.54	
Art Dept.			15,204.64	
Miniature and Trick Dept.			12,280.69	
Newcombe Department			1,307.77	
Print Shop				439.75
Salvage Yard				162.52
Advertising Dept.			2,013.84	

Defendants' Exhibit C-29 (continued).

2674	Classification	Dr.	Cr.
	Props—Rental		1,552.80
	Electrical Equipment Rentals		93.76
	Other Equipment Rentals		600.98
	Profit from Outside Producers		51,438.35
	Rental of Standing Sets		10,245.00
	Foreign Dept. Overhead (Unabsorbed)	17,173.36	
		$1,201,534.10	$1,108,608.82
		1,108,608.82	
		$92,925.28	
	Studio General Overhead on Schedule "A" annexed		$ 92,925.28
	Addition to Reserves for Continuity		500,000.00
2675	Income from Royalties from Music Publishers on Songs used in Production		*11,520.35*
	Salaries Paid by New York:		
	Thalberg	$156,000.00	
	Other Prod. Executives	26,000.000	182,000.00
	Compensation Paid to Louis B. Mayer Pictures		922,141.09
	Unabsorbed Studio Depreciation		179,704.16
	Interest Paid		1,559,559.79
	Total Unabsorbed Overhead		$3,424,809.97

(Figures in italics appeared red in original.)

2676

Defendants' Exhibit C-30.

26770

METHOD OF COMPUTING PERCENTAGE OF OVERHEAD CHARGEABLE TO LETTY LYNTON ON TIME BASIS

Number of Production Days all Pictures during Fiscal Year 1932—

	Days	Hours	Rate	Amount	
(1) Feature Pictures	1327		1559.00	2,068,793.00	
(2) Feature—Cosmopolitan	33		1250.00	41,250.00	
(3) " (Retakes) "		275	125.00	34,375.00	
(4) " " "		24½	100.00	2,450.00	
(5) 2 Shorts—Est. at 2 days each	4		3500.00	7,000.00	26770
	1364	299½		2,153,868.00	

Miscellaneous Items 2 to 5 converted to Days on basis of 8 hour day:

Total Days as above	1364	
299½ hrs. ÷ 8 =	37 plus	
Total Production Days on which overhead was charged	1401	
Letty Lynton overhead days	33	
Letty Lynton's percent to Total		.0235

Schedule No. 1

26770

Defendants' Exhibit C-30 (continued).

METHOD OF COMPUTING PERCENTAGE OF OVERHEAD CHARGEABLE TO LETTY LYNTON

Number of Production Days all Pictures during Fiscal Year 1932—

	Days	Hours	Rate	Amount
(1) Feature Pictures	1327		1559.00	2,068,793.00
(2) Feature—Cosmopolitan	33		1250.00	41,250.00
(3) " (Retakes) "		275	125.00	34,375.00
(4) " " "		24½	100.00	2,450.00
(5) 2 Shorts—Est. at 2 days each	4		3500.00	7,000.00
	1364	2991/2		2,153,868.00

Miscellaneous Items 2 to 5 converted to Days on Basis of amount charged:

Total Overhead charged			2,153,868.00
Less Feature—	1327 days (1)		2,068,793.00
Misc. Items 2 to 5 (Incl.)			85,075.00
Regular Camera Day Overhead Rate		1559.00	
85,075.00 ÷ 1559.00 =	54 plus		
Number of Feature Days as above	1327		
Total Days	1381		
Letty Lynton days	33		
Letty Lynton percent to Total	.0239		

Schedule No. 2.

Defendants' Exhibit C-30 (continued).

METHOD OF COMPUTING PERCENTAGE OF OVERHEAD CHARGEABLE TO LETTY LYNTON ON BASIS OF DIRECT PRODUCTION COSTS OF FEATURE PICTURES

Total Cost of Feature Pictures during fiscal year 1932—		
Per Exhibit C-25 in Studio Hearing		14,991,315.56
Plus items included in Complainant's Memorandum, Page 12, as follows:		
576—Boarding School	38,381.75	
582—A Family Affair	8,864.03	
	47,245.78	
Plus charges to Letty Lynton in other fiscal years	52.75	47,298.53
		15,038,614.09
Less: All Studio Overhead deducted on same basis as set forth in Complainant's Memorandum, pages 7 to 11 inclusive, except total elimination of publicity charges explained below:* (See Schedule No. 1 attached)		3,678,758.93
		11,359,855.16
Letty Lynton costs as set up by Complainant's Memorandum, page 11:		238,649.30
Less: Publicity Charges explained below:* (See Schedule No. 2 attached)		3,179.64
		235,469.66
Letty Lynton's percentage of direct cost to total		.02073

* Complainant's Memorandum objects to Publicity Charges, but leaves in picture Letty Lynton a charge based on .018% of total Publicity Charges for year. We claim basis of .018% is incorrect and to arrive at proper basis eliminate all Publicity charges to arrive at percentage of overhead per Complainant's own basis.

Schedule No. 3

Defendants' Exhibit C-30. (continued).

METHOD OF COMPUTING PERCENTAGE OF OVERHEAD CHARGEABLE TO LETTY LYNTON ON BASIS SET FORTH IN COMPLAINANT'S MEMORANDUM

See Page 12 of Complainant's Memorandum		16,204,197.3
Is set up in C-25 as follows:		
Total Features in Process during year	14,991,315.56	
Cost of Foreign Versions	734,585.45	
Cost of Suspense Productions	308,796.96	
Costs to Pictures Comp. in Prior Year	59,267.71	
Cost of Shorts	110,231.86	
		16,204,197.3
Per Complainant's Memorandum		
Add #576—Boarding School	38,381.75	
582—A Family Affair	8,864.03	47,245.7
		16,251,443.3
Less: Studio Overhead Absorbed into Pictures (C-29)		2,153,868.0
Balance Constituting Labor and Material		14,097,575.3
Letty Lynton—Labor and Material (Ex. 18-D-5)		262,682.6
Complainant's Ratio		.018

As shown above Complainant included in his total costs of all pictures the cost of all foreign versions, but did not include in Letty Lynton the cost of Letty Lynton Foreign Versions. To correctly compute the ratio we should add as follows:

Cost of Letty Lynton Labor & Material (Ex. 18-D-5)		262,682.6
Letty Lynton Foreign Version Costs included in the item of $734,585.45:		
General Version	1,012.76	
German Version	12,600.50	
French Version	13,139.33	
Italian Version	10,744.10	37,493.6
Letty Lynton Cost including Foreign Versions		300,176.3
Correct Ratio		.0213

Schedule No. 4.

Defendants' Exhibit C-31.

2689

METRO-GOLDWYN-MAYER CORPORATION
Studios
CULVER CITY
California.

September 17, 1937.

AIR MAIL

Mr. S. D. Cohen,
Loew's Incorporated,
1540 Broadway,
New York, N. Y.

2690

Dear Sam:

I am very sorry that I have been so long getting this information to you, but assure you it has not been because of neglect.

I hope that the four methods of computing the percentage of overhead charges to LETTY LYNTON which are attached will be of some material help to you. Mr. Cochrane, Walter Hilborn and myself have spent considerable time working these out and checking them and I think we have not overlooked any reasonable method.

Your attention is especially called to No. 4 which should give you some satisfaction because it takes the complainant's own proposed method and proves that he omitted an important factor in his computation. 2691

The four methods attached (and I have made them separate so that you could use any one without exhibiting the others) are as follows:

No. 1—Computing on a time basis, converting to a normal camera day the miscellaneous hourly charges on a basis of an eight hour day, we arrive at a ratio of .0235.

No. 2—This is the same idea of computation on a time basis, except that instead of converting the miscellaneous

Defendants' Exhibit C-31 (continued).

2692 hours on an eight hour day we have divided the charges by the standard camera day charge at $15.59 per day. This develops a ratio of .0239.

No. 3—This method is based on complainant's proposal to eliminate all overheads, both general and departmental, from LETTY LYNTON and also all similar overheads from all feature productions produced during the year. Detailed schedules are attached so that you can see what overheads we have eliminated. This produces a ratio of .02073.

No. 4—This is the complainant's own method of arriving at the ratio of .018, showing that he has included the foreign versions as a part of the total cost of pictures made at the studio during the year, but in arriving at his ratio he did 2693 not include in the cost of LETTY LYNTON the LETTY LYNTON foreign versions. Including these foreign versions in LETTY LYNTON the correct ratio is .0213.

In a separate letter I have corrected my testimony as to the synchronized and shot versions.

I hope that this information will reach you in time to serve your purpose.

Yours truly,

METRO-GOLDWYN-MAYER CORPORATION
By W. K. CRAIG,
Comptroller.

2694

WKC:B
Enc.

Defendants' Exhibit C-32.

2695

CHARGE OF UNASSIGNED TIME AS TO STARS

	Amount	Star	Picture
	$ 38,333.33	Marie Dressler	Emma
	6,416.67	William Haines	Wallingford
	53,000.00	Greta Garbo	Mata Hari
	36,000.00	Joan Crawford	Possessed
	1,250.00	Robert Montgomery	Lovers Courageous
	64,500.00	Buster Keaton	Cardboard Lover (released as Passionate Plumber)
$100,750.00	36,000.00	Joan Crawford	Grand Hotel
	18,750.00	Wallace Beery	
	46,000.00	Greta Garbo	
	12,500.00	Robert Montgomery	Truth Game (released as The Flesh Is Weak)
	3,033.33	Jackie Cooper	When A Fellow Needs A Friend
	33,916.67	Marie Dressler	Prosperity
	22,000.00	Greta Garbo	As You Desire Me
	16,666.74	Robert Montgomery	Blonde of the Follies
	100,000.00	Buster Keaton	Speak Easily
$4,500.00	2,000.00	Joan Crawford	Letty Lynton
	2,500.00	Robert Montgomery	

2696

2697

Defendant, Loew's Inc., Exhibit L-1.

CORPORATIONS OPERATING THEATRES WHICH PLAY "LETTY LYNTON"—COMMON STOCK OF WHICH W WHOLLY OWNED BY LOEW'S INC. IN 1932.

Percentage of Ownership	Company	Theatre
100	Astoria Theatre Corporation	Astoria
2698 100	Astoria Theatre Corporation	Century
100	Notamo Amusement Company	Avenue B
100	Bedford Amusement Corporation	Bedford
100	Loew's Boulevard Corporation	Boulevard
100	Brevoort Holding Co. Inc.	Brevoort
100	Mascot Amusement Company	Circle
100	Lomasch Theatre Corporation	Commodore
100	Coney Island Theatre Inc.	Coney Island
100	The Delancey Amusement Company	Delancey
100	Loew's 86th St. Corporation	86th St.
100	Loew's 86th St. Corporation	Orpheum
100	New Broad Company	83rd St.
100	New Broad Company	State (Newark)
100	Crotona-Elsmere Corporation	Elsmere
100	Fairmont Theatre Corporation	Fairmount
2699 100	Cedric Amusement Corporation	42nd St.
100	Eton Amusement Corporation	46th St.
100	Hillside Theatre Corporation	Hillside
100	Abingdon Amusement Corporation	Kameo
100	Loew's Lexington Inc.	Lexington
100	Hunganovo Producing Company	Lincoln Square
100	Nevins Amusement Corporation	Melba
100	Putnam Theatrical Corporation	Metropolitan
100	International Vaudeville Company	National
100	116th St. Operating Corporation	116th St.
100	167th St. Amusement Corporation	167th St.
100	Palace-Brooklyn Corporation	Palace
100	Marcus Loew Inc.	Seventh Ave.
100	Marcus Loew Realty Corporation	State, (N. Y.)
2700 100	Marcus Loew Realty Corporation	New York and Roof
100	Steinway-38th St. Corporation	Triboro
100	Woodside Operating Corporation	Woodside
100	Main St. Akron Amusement Company	Akron, Loew's
100	Loew's Atlanta Theatre Company	Atlanta, Grand
100	Loew's Dayton Theatre Company	Dayton, Loew's
100	Loew's Harrisburg Corporation	Harrisburg, Regent
100	Loew's Houston Company	Houston, State
100	Loew's Indiana Theatres,	Indianapolis, Palace
100	Loew's Theatre & Realty Corp'n.	Valencia
100	Loew's Theatre & Realty Corp'n.	Kings
100	Loew's Theatre & Realty Corp'n.	Pitkin
100	Loew's Theatre & Realty Corp'n.	Kansas City, Midland
100	Loew's N & K Corporation	Nashville, Vendome
100	Reading Theatre Corporation	Reading, Colonial

Defendant, Loew's Inc., Exhibit L-1 (continued).

CORPORATIONS OPERATING THEATRES WHICH PLAYED "LETTY LYNTON" THE COMMON STOCK OF WHICH WAS PARTLY OWNED BY LOEW'S, INC. in 1932.

Percentage of Ownership	Company	Theatre	
50	Diamond Amusement Corporation	Alpine	
50	Midas Amusement Company	Burland	
45	Walton-Burnside Amusement Co.	Burnside	
53.89	Gates Theatre Corporation	Gates	
66⅔	Dyckwood Amusement Corporation	Inwood	
50	New Rochelle Consolidated Corp'n	New Rochelle (Main St.)	
50	Sutter Amusement Corporation	Premier	
50	Chateau Amusement Corporation	Rio	
50	Evergreen Amusement Corporation	Spooner	
56¼	The Marloew Amusement Corporation	Victoria	270
50	Hemlock Theatre Corporation	Victory	
50	Warwick Amusement Corporation	Warwick	
66⅔	Yonkers Operating Corporation	Yonkers	
50	Loew's Boston Theatres Company	Boston, Orpheum	
86.71	*Loew's Ohio Theatres, Inc.	Cleveland, Allen	
86.71	*Loew's Ohio Theatres, Inc.	Cleveland, Granada	
86.71	*Loew's Ohio Theatres, Inc.	Cleveland, Mall	
86.71	*Loew's Ohio Theatres, Inc.	Cleveland, Park	
50	Evansville Operating Corporation	Evansville, Victory	
25	*Loew's London Theatres Ltd.	London (Can.) Loew's	
50	Toledo Operating Corporation	Toledo, Valentine	
58.75	*Marcus Loew's Theatres, Ltd.	Toronto (Can.) Yonge St.	
71.25	Anchor Theatrical Corporation	Washington, D. C. Palace	
50	Suburban Theatre Corporation	White Plains, State	270
10.7	Willard Amusement Corporation	Willard	
10.7	Willard Amusement Corporation	Mount Vernon	
10.44	Conwall Realty Corporation	Plaza	

*The above holdings are of Common Stock and are junior to Preferred Stock outstanding in the following corporations, in hands of public:

Loew's Ohio Theatres Inc.	$481,300
Loew's London Theatres, Ltd	337,400
Marcus Loew's Theatres, Ltd.	653,900

	Percentage of Ownership	Company	Theatre
	100	Astoria Theatre Corporation	Astoria
2698	100	Astoria Theatre Corporation	Century
	100	Notamo Amusement Company	Avenue B
	100	Bedford Amusement Corporation	Bedford
	100	Loew's Boulevard Corporation	Boulevard
	100	Brevoort Holding Co. Inc.	Brevoort
	100	Mascot Amusement Company	Circle
	100	Lomasch Theatre Corporation	Commodore
	100	Coney Island Theatre Inc.	Coney Island
	100	The Delancey Amusement Company	Delancey
	100	Loew's 86th St. Corporation	86th St.
	100	Loew's 86th St. Corporation	Orpheum
	100	New Broad Company	83rd St.
	100	New Broad Company	State (Newark)
	100	Crotona-Elsmere Corporation	Elsmere
	100	Fairmont Theatre Corporation	Fairmount
2699	100	Cedric Amusement Corporation	42nd St.
	100	Eton Amusement Corporation	46th St.
	100	Hillside Theatre Corporation	Hillside
	100	Abingdon Amusement Corporation	Kameo
	100	Loew's Lexington Inc.	Lexington
	100	Humanovo Producing Company	Lincoln Square
	100	Nevins Amusement Corporation	Melba
	100	Putnam Theatrical Corporation	Metropolitan
	100	International Vandeville Company	National
	100	116th St. Operating Corporation	116th St.
	100	167th St. Amusement Corporation	167th St.
	100	Palace-Brooklyn Corporation	Palace
	100	Marcus Loew Inc.	Seventh Ave.
	100	Marcus Loew Realty Corporation	State (N. Y.)
2700	100	Marcus Loew Realty Corporation	New York and Roof
	100	Steinway-38th St. Corporation	Triboro
	100	Woodside Operating Corporation	Woodside
	100	Main St. Akron Amusement Company	Akron, Loew's
	100	Loew's Atlanta Theatre Company	Atlanta, Grand
	100	Loew's Dayton Theatre Company	Dayton, Loew's
	100	Loew's Harrisburg Corporation	Harrisburg, Regent
	100	Loew's Houston Company	Houston, State
	100	Loew's Indiana Theatres	Indianapolis, Palace
	100	Loew's Theatre & Realty Corp'n.	Valencia
	100	Loew's Theatre & Realty Corp'n.	Kings
	100	Loew's Theatre & Realty Corp'n.	Pitkin
	100	Loew's Theatre & Realty Corp'n.	Kansas City, Midland
	100	Loew's N & K Corporation	Nashville, Vendome
	100	Reading Theatre Corporation	Reading, Colonial
	100	Clinton-Court Corporation	Rochester, Loew's
	100	Loew's St. Louis Realty & Amusement Corp.	St. Louis, State
	100	Parkway Wilmington Corporation	Wilmington, Loew's

NOTE: NO STOCK OTHER THAN COMMON WAS OUTSTANDING.

Defendant, Loew's Inc., Exhibit L-1 (continued).

704 THEATRES WHICH PLAYED "LETTY LYNTON" WHICH WERE NOT AND ARE NOT NOW OWNED OR LEASED BY DEFENDANT LOEW'S INCORPORATED, OR ANY OTHER DEFENDANT, OR BY ANY AFFILIATE OR SUBSIDIARY OF LOEW'S INCORPORATED, OR OF ANY OF THE OTHER DEFENDANTS HEREIN, BUT WERE MERELY MANAGED BY MARCUS LOEW BOOKING AGENCY UNDER WRITTEN MANAGEMENT AGREEMENTS WITH THE OWNERS OF SAID THEATRES.

THEATRES

Broadway
Freeman
703 Mt. Vernon
Plaza
Prospect
Sheridan
Willard
Fox, Atlanta.

706

Defendant, Loew's Inc., Exhibit L-1 (continued).

CORPORATIONS OPERATING THEATRES WHICH PLAYED "LETTY LYNTON" IN WHICH SAID CORPORATION, LOEW'S INC. HAVE AN INDIRECT STOCK INTEREST, IN WHOLE OR IN PART THROUGH ONE OR MORE INTERMEDIATE CORPORATIONS.

Theatre	Operating Corporation	Intermediate Corporation Owning Stock of Operating Corporation		Owner of Stock of Intermediate Corporation		Owner of Stock of Second Intermediate Corporation	
Bay Ridge	Ridge Bay Amusement Corporation	Diamond Amusement Corporation	100%	Loew's Incorporated	50%		
Canal	Ludlow Operating Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
Embassy, No. Bergen	North Bergen Amusement Corporation	Loew's Theatre & Realty Corp.	50%	Loew's Incorporated	100%		
Grand	Hamford Realty Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
Jersey	Jersey Boulevard Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
175th St.	Highbridge Realty Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
Oriental	Hawthorne Amusement Corporation	Loew's Theatre & Realty Corp.	66⅔%	Loew's Incorporated	100%		
72nd St.	Wilthan Realty Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
Paradise	Concourse Realty Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
State, Providence	Providence Theatrical Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
State, Syracuse	Salina-Jefferson Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
Parkway, Baltimore	Century-Parkway Corporation	Penn-Federal Enterprises, Inc.	100%	Loew's Incorporated	50%		
Broad, Columbus	Loew-United Artists Columbus, Corp.	Penn-Federal Enterprises, Inc.	100%	Loew's Incorporated	50%		
State, Louisville	Louisville Operating Co. Inc.	Penn-Federal Enterprises, Inc.	100%	Loew's Incorporated	50%		
Valencia, Baltimore	Baltimore Consolidated Corporation	Century-Parkway Corporation	60%	Penn-Federal Enterprises, Inc.	100%	Loew's Incorporated	50%
Stanley, Baltimore	Baltimore Consolidated Corporation	Century-Parkway Corporation	60%	Penn-Federal Enterprises, Inc.	100%	Loew's Incorporated	50%
State, Boston	State Theatre Company	Loew's Boston Theatres Company	98%	Loew's Incorporated	50%		
State, Norfolk	Norfolk Consolidated Corporation	Loew's Virginia Enterprises, Inc.	33⅓%	Loew's Incorporated	100%		
Loew's, Richmond	Richmond Consolidated Corporation	Richmond-Grade Corporation	33⅓%	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%
Loew's, Canton, Ohio	Canton-Market Theatre Corporation	Loew's Theatre & Realty Corp.	100%	Loew's Incorporated	100%		
Penn, Pittsburgh	Penn-Federal Corporation	Penn-Federal Enterprises, Inc.	88.24%	Loew's Incorporated	50%		

* The above holdings are of Common Stock and are junior to Preferred Stock outstanding in the following corporations, in hands of public:

Penn-Federal Corporation	$930,000.
State Theatre Company	230,600.

Defendant, Loew's Inc., Exhibit L-2.

Payroll (Check No. 11372)	No. of Empl.		Trade Bills	Check No.		Films and Acts	Check No.			
Bus. Manager	1	125.00	Newspapers	11373	379.98	FILMS				25.00
Asst. Bus. Manager	2	80.00	Other Advertising	"	8.92	Metro-"Letty Lynton"	11373	2000.00		80.00
			Lobby Stills Photos							
Treasurer			Display Cut Outs	"	46.85	" Hearst Metrotonews #266 (4 days)	"	40.00		
Asst. Treasurer			Posters—Lith.—Cards	"	157.15	" " " 267 (3 days)	"	30.00		72.00
Cashiers	4	72.00	Trailers	"	24.47	Columbia-Snapshots #8 (5 days)	"	30.00		74.00
Doormen	3	74.00	Loew's W'kly & Add.	"	112.50				Weather	25.00
Special Officers	1	25.00	" " Postage	11372	35.05	5/8			Clear—Warm	90.90
Ushers	26	400.96	Sign Shop	11373	30.00	Metro. Nickel Nurser (Add. Chg. 1 Day)	"	25.00	Cloudy "	12.00
Matron	1	12.00	Bill Posting	"	234.00				Clear "	18.00
Pages	4	48.00	Sub. Adv. Est.	"	625.00	Adv. Tr. Sd. Tr. "Letty Lynton"	"	2.75	" "	32.00
Watchman	1	32.00	Maintenance—Repairs	"	21.00			2127.75	" "	15.00
Painter	1	45.00	Booth Supplies	Aug.	6.87				" "	
Superintendent			Cleaners Supplies						" Mild	5.00
Cleaners	11	155.00	Office Supplies	"	4.70				" "	7.00
Porters	4	87.00	Elec. Supplies						" "	20.00
Engineer	2	120.00	Cooling Plant Supplies						" "	
Fireman			" " Gas						" "	4.00
Elevator Operator	1	14.00	" " Water						" "	3.00
Stage Manager	1	73.00	" Elec. Power						" "	10.00
Electrician	2	140.00	Carbons						" "	2.60
Asst. Electrician	1	62.00	Coal—Steam							
			Bal. Bill Apr. 112.91							
			Est. 200.00			ACTS				
Property Man	2	132.00	Electric Light & Power	"	312.91	Dave Gould's Boys & Girls	11365	807.50		2.00
Carpenter			Fire Alarm Service			Dick Henderson (6 days)	11366	366.42	Perfume Comm	
Clearers			Lamps	"	12.35	Chris Charlton & Co.	11367	380.00	Cups	
Flymen			Music Scores	"	20.00	Brems-Fitz & Murphy Bros.	11368	712.50		7.00
Operators	5	357.00	Organ Maintenance	"	26.80	Gracella & Theodore Co.	11369	997.50		
Stage Doorman			Piano Rental			M. L. B. A. Act Comm	11370	171.79	Expense	0.00
Reel Boys	1	20.00	Telephone & Telegraph						Pay Roll	
			Tickets						Trade Bills	
Orchestra	17	1451.00	Ice, Cups and Filter Service						Films & Acts	1.00
			Booking Office	"	500.00					
Bill Poster	3	125.00	Detective Service						Check No. 11374	5.00
Publicity Man			Express	"	2.00					
			Film Delivery	"	6.90				These Lines to be	
Overtime			Production Exp.						By Mana	
			Traveling Exp.							
Musicians	15	60.00	Relief Mgr.						R	0.00
Operators	2	26.40	V. M. P. A. Dues						1931	8.40
Electrician	1	2.50	"Sound" Service Fee	"	40.00	2654.04				2.50
			Auto Hire	"	20.00	2127.75			12713.64	
						4781.79			13180.64	
			Miscel. Expense	11372	27.49	62.54				
						4719.25			467.00	
Total		$3738.86	Total		$2654.04	Total		$5563.46		

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Defendant, Loew's Inc., Exhibit L-2.

Trade Bills	Check No.	
Newspapers	11373	379.98
Other Advertising	"	8.92
Lobby Stills Photos		
Display Cut Outs	"	46.85
Posters—Lith.—Cards	"	157.15
Trailers	"	24.47
Loew's W'kly & Add.	"	112.50
" " Postage	11372	35.05
Sign Shop	11373	30.00
Bill Posting	"	234.00
Sub. Adv. Est.	"	625.00
Maintenance—Repairs	"	28.00
Booth Supplies	Aug.	6.87
Cleaners Supplies		
Office Supplies	"	4.70
Elec. Supplies		
Cooling Plant Supplies		
" " Gas		
" " Water		
" Elec. Power		
Carbons		
Coal—Steam		
Bal. Bill Apr. 112.91		
Est. 200.00		
Electric Light & Power	"	312.91
Fire Alarm Service		
Lamps	"	12.35
Music Scores	"	20.00
Organ Maintenance	"	26.80
Piano Rental		
Telephone & Telegraph		
Tickets		
Ice, Cups and Filter Service		
Booking Office	"	500.00
Detective Service		
Express	"	2.00
Film Delivery	"	6.00
Production Exp.		
Traveling Exp.		
Relief Mgr.		
V. M. P. A. Dues		
"Sound" Service Fee	"	40.00
Auto Hire	"	20.00
Miscel. Expense	11372	27.49
Total		$2654.04

Films and Acts	Check No.		
FILMS			
Metro-"Letty Lynton"	11373	2000.00	
" Hearst Metrotonews #266 (4 days)	"	40.00	
" " " 267 (3 days)	"	30.00	
Columbia-Snapshots #8 (5 days)	"	30.00	
			2654.04
			2127.75
			4781.79
			62.54
			4719.25
Metro. Nickel Nurser (Add. Chg. 1 Day)	"	25.00	
Adv. Tr. Sd. Tr. "Letty Lynton"	"	2.75	
		2127.75	
ACTS			
Dave Gould's Boys & Girls	11365	807.50	
Dick Henderson (6 days)	11366	366.42	
Chris Charlton & Co.	11367	380.00	
Brems-Fitz & Murphy Bros.	11368	712.50	
Gracella & Theodore Co.	11369	997.50	
M. L. B. A. Act Comm	11370	171.79	
Total		$5563.46	

Theatre METROPOLITAN

City BROOKLYN

Week Ending MAY 20, 1932

RECEIPTS

Weather		Date			Total For the Day
Clear—Warm	Sat.	Mat.	5/14	1304.30	
Cloudy "	"	Eve.		2563.85	3868.15
Clear "	Sun.	Mat.	5/15	1367.65	
" "	"	Eve.		3091.15	4458.80
" "	Mon.	Mat.	5/16	895.60	
" "	"	Eve.		776.00	1671.60
" Mild	Tues	Mat.	5/17	742.05	
" "	"	Eve.		958.15	1700.20
" "	Wed.	Mat.	5/18	812.25	
" "	"	Eve.		1387.15	2199.40
" "	Thur.	Mat.	5/19	686.70	
" "	"	Eve.		1015.70	1682.40
" "	Fri.	Mat.	5/20	459.90	
" "	"	Eve.		846.05	1305.95
					$16856.50

MISC. RECEIPTS

Perfume Comm.	5/18	4.32
Cups	5/19	25.00
TOTAL INCOME		$16885.82

Expense

Pay Roll	$3738.86	
Trade Bills	$2654.04	
Films & Acts	$5563.46	11956.36
Check No. 11374 Balance—		$4929.46
OVERHEAD		3430
These Lines to be Left Blank By Manager — PROFIT LOSS		1499.46

REMARKS & OPPOSITION

1931

12713.64

13180.64

467.00

(Signature illegible.)
Bus. Manager

(Stamp—Posted General Ledger.)
(Stamp—Audited—J. A.)

Defendant, Loew's Inc., Exhibit L-3.

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PUTNAM THEATRICAL CORPORATION
METROPOLITAN THEATRE
FISCAL YEAR ENDED AUGUST 31, 1932
ANALYSIS OF OVERHEAD EXPENSE

Insurance Premiums		$ 5,495.81
Real Estate Taxes		37,984.75
Interest on Mortgage		39,937.17
Interest on Net Investment		31,786.00
Depreciation of Building and Equipment		42,563.00
Sundry Expense		839.80
		$158,606.53
Less		
Rent Income	$11,473.42	
Sundry "	8.42	11,481.84
Total for Year		$147,124.69
Per Week for 52 Weeks		$ 2,829.32

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Defendant, Loew's Inc., Exhibit L-4.

Payroll (Check Nos. 1099, 1103)	No. of Empl.		Trade Bills	Check No.		Films and Acts		Check No.		
Bus. Manager	1	60.—	Newspapers	1102	111.76	FILMS				
Asst. Bus. Manager	1	45.—	Other Advertising	"	94.—	5/14-15-16				
Treasurer			Lobby Stills Photos							
Asst. Treasurer			Display Cut Outs	"	23.31	Letty Lynton	MGM	1102	900.—	
Cashiers	2	36.—	Posters—Lith.—Cards	"	54.63	War Mamas	MGM	"	52.50	Weather
Doormen	1	22.—	Trailers	"	37.50	Down Memory Land	Col.	"	18.—	Warm
Special Officers			Loew's W'kly & Add.	1102	88.—	News #	MGM	"	30.—	"
Ushers	18	218.—	" " Postage	1103	109.54	5/17-18				"
Matron	1	12.—	Sign Shop	1102	30.—	Trail of Vivienne Ware	Fox	"	535.27	Hot
Pages	2	10.—	Bill Posting			" " " Score	"	"	10.—	"
Watchman	1	25.—	Maintenance—Repairs	"	104.92	Bow & Arrow	Uni.	"	10.—	Warm
Telephone	1	15.—	Booth Supplies	"	2.70	News #83	Par	"	12.50	Fair
Superintendent			Cleaners Supplies	"	10.60	" #84	"	"	12.50	Warm
Cleaners	6	72.—	Office Supplies			5/19-20				"
Porters	5	92.—	Elec. Supplies	"	13.03	Sky Bride	Par.	"	330.—	Fair
Engineer			Cooling Plant Supplies			News #267	MGM	"	20.—	"
Fireman			" " Gas			5/19-11 All Sealed Up	Par	"	35.—	"
Carriageman	1	12.85	" " Water			5/12-13 Ireland, Melody Isle	MGM	"	12.—	"
Stage Manager			" Elec. Power			5/12-13 Hollywood #13	Edu	"	12.—	
Electrician	1	65.—	Carbons	"	55.64	5/7-9 Empire of Son	Pathe	"	18.—	
Rel. Electrician	1	11.50	Coal—Steam	"					2007.77	Refund Salary
Property Man			Electric Light & Power	"	161.01					Perfume Sales
Carpenter			Fire Alarm Service			ACTS				Kotex Sales
Clearers			Lamps							
Flymen			Music Scores							Expense
Operators	6	357.—	Organ Maintenance							Pay Roll
Stage Doorman			Piano Rental							Trade Bills
Reel Boys			Telephone & Telegraph							Films & Acts
Messenger	1	7.—	Tickets							
Orchestra			Ice, Cups and Filter Service							Check No. 1104
Bill Poster	1	40.—	Booking Office	"	375.—					
Publicity Man			Detective Service							These Lines to
Overtime			Express	"	1.—					By Ma
Electrician	1	5.—	Film Delivery	"	8.50					
			Production Exp.							
			Traveling Exp.							
			Relief Mgr.							
			V. M. P. A. Dues							
			"Sound" Service Fee	"	40.—					
			Miscel. Expense	1103	40.86					
			Credits—Weil & Son		.98					
Total		$1105.35		Total	$1361.02		Total		$2007.77	

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Defendant, Loew's Inc., Exhibit L-4.

Trade Bills	Check No.		Films and Acts	
Newspapers	1102	111.76	FILMS	
Other Advertising	"	94.—	5/14-15-16	
Lobby Stills Photos				
Display Cut Outs	"	23.31	Letty Lynton	M
Posters—Lith.—Cards	"	54.63	War Mamas	M
Trailers	"	37.50	Down Memory Land	
Loew's Wkly & Add.	1102	88.—	News #	M
" " Postage	1103	109.54	5/17-18	
Sign Shop	1102	30.—	Trail of Vivienne Ware	
Bill Posting			" " " Score	
Maintenance—Repairs	"	104.92	Bow & Arrow	
Booth Supplies	"	2.70	News #83	
Cleaners Supplies	"	10.60	" #84	
Office Supplies			5/19-20	
Elec. Supplies	"	13.03	Sky Bride	
Cooling Plant Supplies			News #267	M
" " Gas			5/19-11 All Sealed Up	
" " Water			5/12-13 Ireland, Melody Isle	M
" Elec. Power			5/12-13 Hollywood #13	
Carbons	"	55.64	5/7-9 Empire of Son	Pa
Coal—Steam	"			
Electric Light & Power	"	161.01		
Fire Alarm Service				
Lamps			ACTS	
Music Scores				
Organ Maintenance				
Piano Rental				
Telephone & Telegraph				
Tickets				
Ice, Cups and Filter Service				
Booking Office	"	375.—		
Detective Service				
Express	"	1.—		
Film Delivery	"	8.50		
Production Exp.				
Traveling Exp.				
Relief Mgr.				
V. M. P. A. Dues				
"Sound" Service Fee	"	40.—		
Miscel. Expense	1103	40.86		
Credits—Weil & Son		.98		
Total		$1361.02		

Check No. _____

Theatre LEXINGTON
City • N. Y. City
Week Ending May 20 1932

GM	1102	900.—						
GM	"	52.50	Weather			Date		Total For the Day
Col.	"	18.—	Warm	Sat.	Mat.	5/14	846.25	
GM	"	30.—	"	"	Eve.		1701.90	2548.15
			"	Sun.	Mat.	5/15	691.80	
			"	"	Eve.		1850.60	2542.40
Fox	"	535.27	Hot	Mon.	Mat.	5/16	364.80	
"	"	10.—	"	"	Eve.		1138.40	1503.20
Uni.	"	10.—	Warm	Tues.	Mat.	5/17	341.45	
Par	"	12.50	Fair	"	Eve.		1065.50	1406.95
"	"	12.50	Warm	Wed.	Mat.	5/18	271.55	
			"	"	Eve.		997.85	1269.40
Par.	"	330.—	Fair	Thur.	Mat.	5/19	244.20	
GM	"	20.—	"	"	Eve.		818.10	1062.30
Par	"	35.—	"	Fri.	Mat.	5/20	208.10	
GM	"	12.—	"	"	Eve.		727.15	935.25
Edu	"	12.—						
the	"	18.—						
								$11267.65
		2007.77						

MISC. RECEIPTS

Refund Salary	5/16	3.—
Perfume Sales Comm	5/18	7.48
Kotex Sales	5/20	5.—

TOTAL INCOME $11283.13

Expense

Pay Roll	$1105.35	
Trade Bills	$1361.02	
Films & Acts	$2007.77	4474.14
Check No. 1104 Balance		$6808.99
Overhead		3330.
Profit Loss		3478.99

These Lines to be Left Blank By Manager

REMARKS & OPPOSITION

Total $2007.77

FREDERICK OWENS
Bus. Manager

(Stamp—Posted General Ledger.)
(Stamp—Audited No. 5—L.)

Defendant, Loew's Inc., Exhibit L-5.

2719

LOEW'S LEXINGTON, INC.
LEXINGTON THEATRE
FISCAL YEAR ENDED AUGUST 31, 1932
ANALYSIS OF OVERHEAD EXPENSE

Insurance Premiums	$ 1,136.62
Real Estate Taxes	42,050.00
Interest on Mortgage	35,814.79
Interest on Net Investment	15,876.00
Depreciation of Building and Equipment	41,857.00
	$136,734.41
Less:	
Sundry Income	6.30
Total for Year	$136,728.11
Per Week for 52 Weeks	$ 2,629.39

2720

2721

Defendant, Loew's Inc., Exhibit L-6.

PROFIT OR LOSS OF THEATRES OPERATED BY CORPORATIONS WHOLLY OWNED BY LOEW'S INCORPORAT
DURING PERIODS IN WHICH "LETTY LYNTON" (TOGETHER WITH OTHER ATTRACTIONS) WAS EXHIBITE

Play Date (1932)	Name of Theatre	Operated By	Payroll and Trade Bills for Entire Week	Overhead for Entire Week	Box Office Receipts of period in which Letty Lynton (together with other attractions) was Exhibited	Percentage of Weeks Receipts received during period in which Letty Lynton (together with other attractions) was Exhibited	Payroll and Trade Bills Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Overhead Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Cost of Feature Letty Lynton	Cost of Oth Attractions during perio in which Let Lynton was Exhibited
5/30-31	Astoria	Astoria Theatre Corp.	$ 2,010.15	$ 1,781.71	$ 1,998.80	28.2	$ 566.86	$ 502.44	$ 250.00	$ 58.00
6/5-6	Century	Astoria Theatre Corp.	1,240.16	499.56	834.55	42.5	527.07	212.31	150.00	25.50
5/27-29	Avenue B	Natoma Amusement Company	1,563.58	663.79	1,539.60	57.4	897.49	381.02	325.00	115.2
5/28-30	Bedford	Berford Amusement Corp.	1,654.15	1,558.66	2,906.25	73.7	1,219.11	1,148.73	450.00	123.00
5/28-31	Boulevard	Loew's Boulevard Corp.	2,286.32	673.59	4,716.10	80.1	1,831.34	539.55	800.00	902.28
6/4-6	Brevoort	Brevoort Holding Co., Inc.	1,403.76	642.04	1,152.25	44.7	627.48	286.99	300.00	100.50
5/21-22	Circle	Mascot Amusement Co.	1,500.63	622.87	1,018.60	38.2	573.24	237.87	200.00	67.00
5/20-22	Commodore	Lomasch Theatre Corp.	1,686.55	2,511.71	3,246.05	72.5	1,222.75	1,820.99	525.00	113.00
5/28-29	Coney Island	Coney Island Theatre Inc.	2,071.74	2,756.37	5,424.80	77.4	1,603.53	2,133.43	750.00	125.75
5/20-22	Delancey	The Delancey Amusement Co.	1,767.00	818.99	2,970.50	72.1	1,274.01	590.49	525.00	105.00
5/26-27	86th St.	Loew's 86th St. Corp.	1,543.46	531.53	1,202.45	28.9	446.06	153.61	350.00	50.00
5/21-24	Orpheum	Loew's 86th St. Corp.	3,792.61	1,550.94	6,188.80	76.6	2,905.14	1,188.02	700.00	1,368.57
5/14-17	83rd St.	New Broad Company	2,878.56	2,732.53	9,913.35	79.1	2,276.94	2,161.43	1,200.00	126.75
5/7-13	Newark	New Broad Company	4,557.81	3,457.23	17,423.95	100.	4,557.81	3,457.23	3,000.00	2,617.00
6/4-6	Elsmere	Crotona-Elsmere Corp.	1,428.35	971.03	897.85	43	614.19	417.54	225.00	78.25
5/28-31	Fairmount	Fairmont Theatre Corp.	1,950.89	1,641.98	5,510.75	84.8	1,654.35	1,392.40	900.00	161.75
5/21-22	42nd St.	Cedric Amusement Corp.	1,446.54	788.48	1,579.55	35.	506.29	275.97	350.00	72.00
5/28-31	46th St.	Eton Amusement Corp.	1,871.91	2,155.44	4,627.90	81.	1,467.65	1,745.91	800.00	159.00
5/28-30	Hillside	Hillside Theatre Corp.	1,473.74	1,823.13	2,779.35	68.9	1,015.41	1,256.14	450.00	95.75
5/28-30	Kameo	Abingdon Amusement Corp.	2,083.45	1,264.81	4,247.15	70.5	1,468.83	891.69	675.00	84.75
5/14-16	Lexington	Loew's Lexington Inc.	2,450.89	2,629.39	6,593.75	58.5	1,433.77	1,538.19	900.00	100.50
5/21-23	Lincoln Sq.	Humanovo Producing Co.	1,560.12	731.03	2,182.60	59.7	931.39	436.42	450.00	92.75
5/28-29	Melba	Nevins Amusement Corp.	1,614.75	2,418.60	2,678.25	50.	807.38	1,209.30	400.00	48.00
5/14-20	Metropolitan	Putnam Theatrical Corp.	6,363.58	2,829.32	16,856.50	100.	6,363.58	2,829.32	2,000.00	3,563.40
5/28-31	National	International Vaudeville Co.	1,831.04	780.99	3,431.70	71.9	1,316.52	561.53	700.00	146.75
5/21-24	116th St.	116th St. Operating Corp.	1,570.73	836.41	2,237.80	73.	1,146.63	610.58	400.00	135.00
5/28-30	167th St.	167th St. Amusement Corp.	1,894.44	1,632.11	5,226.70	72.7	1,377.26	1,186.54	750.00	125.75
5/29-31	Palace	Palace-Brooklyn Corp.	1,408.64	992.72	1,686.25	56.3	793.06	558.90	225.00	80.75
5/21-23	Seventh Ave.	Marcus Loew Inc.	1,472.85	905.31	2,049.20	60.1	885.18	544.09	375.00	123.00
5/14-20	State, N. Y.	Marcus Loew Realty Corp.	7,946.27	4,000.66	23,169.90	100.	7,946.27	4,000.66	3,000.00	5,120.00
5/23	New York	Marcus Loew Realty Corp.	2,488.96	2,203.02	755.30	15.2	378.32	334.86	150.00	32.50
5/21-24	Triboro	Steinway-38th St. Corp.	3,754.48	2,841.21	6,315.60	80.2	3,011.09	2,278.65	700.00	1,075.03
5/27-29	Woodside	Woodside Operating Corp.	1,600.50	1,188.73	2,495.35	49.5	792.25	588.42	500.00	84.75
5/13-16	Akron	Main St. Akron Amusement Co.	1,914.47	2,400.82	3,770.15	76.4	1,462.66	1,834.23	754.03	105.12

MICRO CARD 22
TRADE MARK ®
39
14416
MATTHEW BENDER & COMPANY
MB
65
microcard

Defendant, Loew's Inc., Exhibit L-6.

OPERATED BY CORPORATIONS WHOLLY OWNED BY LOEW'S INCORPORATED
LETTY LYNTON" (TOGETHER WITH OTHER ATTRACTIONS) WAS EXHIBITED

for Week	Box Office Receipts of period in which Letty Lynton (together with other attractions) was Exhibited	Percentage of Weeks Receipts received during period in which Letty Lynton (together with other attractions) was Exhibited	Payroll and Trade Bills Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Overhead Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Cost of Feature Letty Lynton	Cost of Other Attractions during period in which Letty Lynton was Exhibited	Profit or *Loss* Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Loew's Inc. Percentage of Interest	Amount of Loew's Inc. Profit or *Loss* during period in which Letty Lynton (together with other attractions) was Exhibited	⅔ Share of Profit or *Loss* Allocated to Letty Lynton
1.71	$ 1,998.80	28.2	$ 566.86	$ 502.44	$ 250.00	$ 58.00	$ 621.50	100	$ 621.50	$ 414.35
.56	834.55	42.5	527.07	212.31	150.00	25.50	*80.33*	100	*80.33*	*53.56*
.79	1,539.60	57.4	897.49	381.02	325.00	115.25	*179.16*	100	*179.16*	*119.45*
.66	2,906.25	73.7	1,219.11	1,148.73	450.00	123.00	*34.59*	100	*34.59*	*23.06*
.59	4,716.10	80.1	1,831.31	539.55	800.00	902.28	642.93	100	642.93	428.64
.04	1,152.25	44.7	627.18	286.99	300.00	160.50	*162.72*	100	*162.72*	*108.49*
.87	1,018.60	38.2	573.24	237.91	200.00	67.00	*59.58*	100	*59.58*	*39.72*
.71	3,246.05	72.5	1,222.75	1,820.99	525.00	113.00	*435.69*	100	*435.69*	*290.47*
.37	5,424.80	77.4	1,008.93	2,133.43	750.00	125.75	812.09	100	812.09	541.42
.99	2,970.50	72.1	1,274.01	590.49	525.00	105.00	476.00	100	476.00	317.35
.53	1,202.45	28.9	446.06	153.61	350.00	50.00	202.78	100	202.78	135.19
.94	6,188.80	76.6	2,905.14	1,188.02	700.00	1,368.57	27.07	100	27.07	18.05
.53	9,913.35	79.1	2,276.94	2,161.43	1,200.00	126.75	4,148.23	100	4,148.23	2,765.62
.23	17,423.95	100.	4,557.81	3,457.23	3,000.00	2,617.09	3,791.91	100	3,791.91	2,528.07
.03	897.85	43.	614.19	417.54	225.00	78.25	*437.13*	100	*437.13*	*291.43*
.98	5,510.75	84.8	1,654.35	1,392.40	900.00	161.75	1,402.25	100	1,402.25	934.88
.48	1,579.55	35.	506.29	275.97	350.00	72.00	375.29	50	187.65	125.11
.44	4,627.90	81.	1,467.65	1,745.91	800.00	159.00	455.34	83⅓	379.45	252.98
.43	2,379.35	68.9	1,015.44	1,256.14	450.00	95.75	*37.95*	66⅔	*25.30*	*16.87*
.84	4,247.15	70.5	1,468.83	894.69	675.00	84.75	1,126.88	100	1,126.88	751.29
.39	6,593.75	58.5	1,433.77	1,538.19	900.00	100.50	2,621.29	100	2,621.29	1,747.61
.03	2,182.60	59.7	931.39	436.42	450.00	92.75	272.04	100	272.04	181.37
.60	2,678.25	50.	807.38	1,209.30	400.00	48.00	213.57	100	213.57	142.39
.32	16,856.50	100.	6,363.58	2,829.32	2,000.00	3,563.46	2,100.14	100	2,100.14	1,400.10
.99	3,431.70	71.9	1,316.52	561.53	700.00	146.75	706.90	75	530.18	353.47
.41	2,237.80	73.	1,146.63	610.58	400.00	135.00	*54.41*	160	*54.41*	*36.28*
.11	5,226.70	72.7	1,377.26	1,186.54	750.00	125.75	1,787.15	100	1,787.15	1,191.49
.72	1,686.25	56.3	793.06	558.90	225.00	80.75	28.54	100	28.54	19.03
.31	2,049.20	60.1	885.18	544.09	375.00	123.00	121.93	100	121.93	81.29
0.66	23,169.00	100.	7,946.27	4,000.66	3,000.00	5,120.00	3,102.07	83⅓	2,585.05	1,723.45
3.02	735.30	15.2	378.32	334.86	150.00	32.50	*140.38*	33⅓	*46.79*	*31.19*
1.21	6,315.60	80.2	3,011.09	2,278.65	700.00	1,075.03	*749.17*	100	*749.17*	*499.47*
8.73	2 495.35	49	792.25	588.42	500.00	84.75	529.93	100	529.93	353.30

| | | |

Defendant, Loew's Inc., Exhibit L-7.

OVERHEAD EXPENSE OF THEATRES OPERATED BY CORPORATIONS WHOLLY OWNED BY LOEW'S INCORPORATED

FOR THE FISCAL YEAR ENDED AUGUST 31, 1932

Theatre	Operated by	Rent	Insurance Premiums	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income	Other Income
Astoria	Astoria Theatre Corp.	-0-	$ 3,230.49	$ 14,045.25	$ 11,687.50	$ 26,108.00	$ 47,037.00	$ 379.74	$ 7,399.96	$ 2,439.
Century	do.	-0-	1,769.20	3,836.25	5,570.64	3,300.00	12,150.00	51.00	-0-	700.
Avenue B	Natoma Amusement Co.	-0-	1,983.00	7,492.00	8,250.00	10,855.00	11,102.00	140.08	4,305.00	999.
Bedford	Berfoid Amusement Corp.	-0-	2,277.82	10,383.25	13,387.50	20,642.00	34,280.00	89.56	-0-	9.
Boulevard	Loew's Boulevard Corp.	$ 30,166.66	2,169.63	500.00	-0-	-0-	5,487.00	-0-	-0-	3,296.
Brevoort	Brevoort Holding Co., Inc.	-0-	2,398.43	6,679.02	9,762.50	4,736.00	11,976.00	139.30	2,300.00	5.
Circle	Mascot Amusement Co.	26,666.67	3,453.27	14,752.06	-0-	1,023.00	2,788.00	147.65	16,426.01	15.
Commodore	Lamasch Theatre Corp.	-0-	3,452.59	16,665.76	22,912.50	49,704.00	39,882.00	426.42	1,420.41	1,014.
Coney Island	Coney Island Theatre Inc.	30,000.00	3,328.88	19,376.43	40,194.01	53,265.00	38,359.00	11,387.96	50,279.98	2,300.
Delancey	Delancey Amusement Co.	-0-	2,100.14	16,808.00	14,575.00	10,108.00	10,225.00	606.44	10,035.00	1,860.
86th St.	Loew's 86th St. Corp.	-0-	2,070.03	11,918.00	18,882.50	(10,902.00)	12,472.00	398.85	6,000.00	1,200.
Orpheum	do.	-0-	2,631.02	19,808.02	11,270.83	17,352.00	36,764.00	4.71	3,458.33	3,723.
83rd St.	New Broad Company	-0-	3,768.89	32,266.12	73,457.54	3,129.00	61,398.00	-0-	31,798.50	129.
Newark	do.	83,000.00	2,909.40	54,284.85	48,936.00	3,928.00	69,470.00	1,602.61	81,233.26	3,121.
Elsmere	Crotona-Elsmere Corp.	-0-	1,754.40	6,117.54	20,504.50	8,014.00	19,066.00	136.20	4,195.00	904.
Fairmount	Fairmont Theatre Corp.	-0-	3,125.82	17,947.50	-0-	43,060.00	32,403.00	1,279.08	12,108.98	23.
42nd St.	Cedric Amusement Corp.	12,000.00	1,643.71	23,115.02	-0-	1,628.00	3,339.00	125.65	-0-	850.
46th St.	Eton Amusement Corp.	-0-	3,609.93	14,089.42	2,284.24	57,199.00	39,982.00	-0-	4,200.00	881.
Hillside	Hillside Theatre Corp.	-0-	2,840.79	19,001.64	19,736.10	14,513.00	39,040.13	3,906.15	4,220.00	15.
Kameo	Abington Amusement Corp.	-0-	3,063.63	8,976.00	13,080.00	19,096.00	21,424.00	130.00	-0-	1.
Lexington	Loew's Lexington Inc.	-0-	1,136.62	42,050.00	35,814.79	15,876.00	41,857.00	-0-	-0-	6.
Lincoln Sq.	Humanovo Producing Co.	30,000.00	1,457.71	200.02	-0-	2,605.00	5,461.00	34.30	-0-	1,744.
Melba	Nevins Amusement Co.	-0-	2,950.25	16,725.00	32,279.25	25,481.00	48,146.00	1,289.90	1,075.00	29.
Metropolitan	Putnam Theatrical Corp.	-0-	5,495.81	37,984.75	39,937.17	31,786.00	42,563.00	839.80	11,473.42	8.
National	International Vaudeville Co.	30,000.00	1,999.24	200.02	-0-	3,980.00	5,871.00	61.38	900.00	600.
116th St.	116th St. Operating Corp.	28,262.67	2,170.79	5,736.02	2,751.35	1,321.00	4,879.00	-0-	-0-	1,527.
167th St.	167th St. Amusement Corp.	40,000.00	2,955.96	12,166.50	-0-	14,939.00	16,011.00	25.82	-0-	1,228.
Palace	Palace Brooklyn Corp.	-0-	1,864.96	6,150.00	13,020.00	11,420.00	19,910.00	43.75	-0-	787.
Seventh Ave.	Marcus Loew Inc.	20,000.00	1,937.40	7,291.04	-0-	7,142.00	11,183.00	133.09	-0-	610.
State, N. Y.	Firm Amusement Corp.	175,000.00	3,685.38	500.00	-0-	6,720.00	17,198.25	4,930.77	-0-	-0-
New York	do.	105,714.28	3,387.20	400.00	-0-	2,203.00	174.07	7,675.54	1,672.26	3,325.
Triboro	Steinway 38th St. Corp.	-0-	4,314.50	17,587.50	437.80	89,474.00	46,473.00	1,691.78	10,850.19	1,385.
Woodside	Woodside Operating Corp.	34,821.81	2,405.98	9,225.50	9,246.67	5,246.00	3,398.00	1,314.71	3,833.32	11.
Akron	Main St. Akron Amusement Co.	6,767.53	1,512.98	13,065.44	-0-	67,464.00	38,629.00	112.38	2,690.00	18.
Atlanta, Grand	Loew's Atlanta Theatre Co.	88,079.67	7,673.14	18,421.02	-0-	2,747.00	6,513.00	23,943.16	65,920.92	829.

Defendant, Loew's Inc., Exhibit L-7.

NSE OF THEATRES OPERATED BY CORPORATIONS WHOLLY OWNED BY LOEW'S INCORPORATED

FOR THE FISCAL YEAR ENDED AUGUST 31, 1932

Rent	Insurance Premiums	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income	Other Income	Total for Year	Per Week 1/52
-0-	$ 3,230.49	$ 14,045.25	$ 11,687.50	$ 26,108.00	$ 47,037.00	$ 379.74	$ 7,399.96	$ 2,439.23	$ 92,648.79	$ 1,781.71
-0-	1,769.20	3,830.25	5,570.64	3,300.00	12,150.00	51.00	-0-	700.00	25,977.09	499.56
-0-	1,983.00	7,492.00	8,250.00	10,855.00	11,102.00	140.08	4,305.00	999.96	34,517.12	663.79
-0-	2,277.82	10,383.25	13,387.50	20,642.00	34,280.00	89.56	-0-	9.87	81,050.26	1,558.66
30,166.66	2,169.63	500.00	-0-	-0-	5,487.00	-0-	-0-	3,296.72	35,026.57	673.59
-0-	2,398.43	6,679.02	9,762.50	4,736.00	11,976.00	139.30	2,300.00	5.19	33,386.06	642.04
26,666.67	3,453.27	14,752.06	-0-	1,023.00	2,788.00	147.65	16,426.01	15.53	32,389.11	622.87
-0-	3,452.59	16,665.76	22,912.50	49,704.00	39,882.00	426.42	1,420.41	1,014.64	130,608.82	2,511.71
30,000.00	3,328.88	19,376.43	40,194.01	53,265.00	38,359.00	11,387.96	50,279.98	2,300.22	143,331.08	2,756.37
-0-	2,100.11	16,808.00	14,575.00	10,108.00	10,225.00	606.44	10,035.00	1,800.00	42,587.55	818.99
-0-	2,070.03	11,918.00	18,882.50	(10,902.00)	12,472.00	398.85	6,000.00	1,200.05	27,639.33	531.53
-0-	2,631.02	19,808.02	11,270.83	17,352.00	36,764.00	4.71	3,458.33	3,723.36	80,648.89	1,550.94
-0-	3,768.89	32,266.12	73,457.54	3,129.00	61,398.00	-0-	31,798.50	129.24	142,091.81	2,732.53
83,000.00	2,909.40	54,284.85	48,936.00	3,928.00	69,470.00	1,602.61	81,233.26	3,121.44	179,776.16	3,457.23
-0-	1,754.40	6,117.54	20,504.50	8,014.00	19,066.00	136.20	4,195.00	904.32	50,493.32	971.03
-0-	3,125.82	17,947.50	-0-	43,060.00	32,403.00	1,279.08	12,408.98	23.56	85,382.86	1,641.98
12,000.00	1,643.71	23,115.02	-0-	1,628.00	3,339.00	125.65	-0-	850.27	41,001.11	788.48
-0-	3,609.93	14,089.42	2,284.24	57,199.00	39,982.00	-0-	4,200.00	881.92	112,082.67	2,155.44
-0-	2,840.79	19,001.64	19,736.10	14,513.00	39,040.13	3,906.15	4,220.00	15.28	94,802.53	1,823.13
-0-	3,065.63	8,976.00	13,080.00	19,996.00	24,424.00	130.00	-0-	1.26	65,770.37	1,264.81
-0-	1,136.62	42,050.00	35,814.79	15,876.00	41,857.00	-0-	-0-	6.30	136,728.11	2,629.39
30,000.00	1,457.71	200.02	-0-	2,605.00	5,461.00	34.30	-0-	1,744.34	38,013.69	731.03
-0-	2,950.25	16,725.00	32,279.25	25,481.00	48,146.00	1,289.90	1,075.00	29.06	125,767.34	2,418.60
-0-	5,495.81	37,984.75	39,937.17	31,786.00	42,563.00	839.80	11,473.42	8.42	147,124.69	2,829.32
30,000.00	1,999.24	200.02	-0-	3,980.00	5,871.00	61.38	900.00	600.00	40,611.64	780.99
28,262.67	2,170.79	5,736.02	2,751.35	1,321.00	4,879.00	-0-	-0-	1,527.54	43,493.29	836.41
40,000.00	2,955.96	12,166.50	-0-	14,939.00	16,011.00	25.82	-0-	1,228.47	84,869.81	1,632.11
-0-	1,864.96	6,150.00	13,020.00	11,420.00	19,910.00	43.75	-0-	787.50	51,621.21	992.72
20,000.00	1,937.40	7,291.04	-0-	7,142.00	11,183.00	133.09	-0-	610.45	47,076.08	905.31
175,000.00	3,685.38	500.00	-0-	6,720.00	17,198.25	4,930.77	-0-	-0-	208,034.40	4,000.66
105,714.28	3,387.20	400.00	-0-	2,203.00	174.07	7,675.54	1,672.26	3,325.00	114,556.83	2,203.02
-0-	4,314.50	17,587.50	437.80	89,474.00	46,473.00	1,691.78	10,850.19	1,385.71	147,742.68	2,841.21
34,821.81	2,405.98	9,225.50	9,246.67	5,246.00	3,398.00	1,314.71	3,833.32	11.16	61,814.19	1,188.73
6,767.53	1,512.98	13,065.44	-0-	67,464.00	38,629.00	112.38	2,690.00	18.68	124,842.65	2,400.82
88,079.67	7,673.14	18,421.02	-0-	2,747.00	6,513.00	23,943.16	65,920.92	829.72	80,626.35	1,966.50*
					17,402.00	1,815.00	8,770.00	604.85	69,676.23	1,339.93

Circle	Mascot Amusement Co.	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	[illegible]	
Commodore	Lomasch Theatre Corp.	-0-	3,452.59	16,665.76	22,912.50	49,704.00	39,882.00	426.42	1,420.41	1
Coney Island	Coney Island Theatre Inc.	30,000.00	3,328.88	19,376.43	40,194.01	53,265.00	38,359.00	11,387.96	50,279.98	2
Delancey	Delancey Amusement Co.	-0-	2,100.11	16,808.00	14,575.00	10,108.00	10,225.00	606.44	10,035.00	1
86th St.	Loew's 86th St. Corp.	-0-	2,070.03	11,918.00	18,882.50	(10,902.00)	12,472.00	398.85	6,000.00	1
Orpheum	do.	-0-	2,631.02	19,808.02	11,270.83	17,352.00	36,764.00	4.71	3,458.33	3
83rd St.	New Broad Company	-0-	3,768.89	32,266.12	73,457.54	3,129.00	61,398.00	-0-	31,798.50	
Newark	do.	83,000.00	2,909.40	54,284.85	48,936.00	3,928.00	69,470.00	1,602.61	81,233.26	3
Elsmere	Crotona-Elsmere Corp.	-0-	1,754.40	6,117.54	20,504.50	8,014.00	19,066.00	136.20	4,195.00	
Fairmount	Fairmont Theatre Corp.	-0-	3,125.82	17,947.50	-0-	43,060.00	32,403.00	1,279.08	12,408.98	
42nd St.	Cedra Amusement Corp.	12,000.00	1,643.71	23,115.02	-0-	1,628.00	3,339.00	125.65	-0-	
46th St.	Eton Amusement Corp.	-0-	3,609.93	14,089.42	2,284.24	57,199.00	39,982.00	-0-	4,200.00	
Hillside	Hillside Theatre Corp.	-0-	2,840.79	19,001.64	19,736.10	14,513.00	39,040.13	3,906.15	4,220.00	
Kameo	Abington Amusement Corp.	-0-	3,065.63	8,976.00	13,080.00	19,096.00	21,424.00	130.00	-0-	
Lexington	Loew's Lexington Inc.	-0-	1,136.62	42,050.00	35,814.79	15,876.00	41,857.00	-0-	-0-	
Lincoln Sq.	Humanova Producing Co.	30,000.00	1,457.71	200.02	-0-	2,605.00	5,461.00	34.30	-0-	1
Melba	Nevins Amusement Co.	-0-	2,950.25	16,725.00	32,279.25	25,481.00	48,146.00	1,289.90	1,075.00	
Metropolitan	Putnam Theatrical Corp.	-0-	5,495.81	37,984.75	39,937.17	31,786.00	42,563.00	839.80	11,473.42	
National	International Vaudeville Co.	30,000.00	1,999.24	200.02	-0-	3,980.00	5,871.00	61.38	900.00	
116th St.	116th St. Operating Corp.	28,262.67	2,170.79	5,736.02	2,751.35	1,321.00	4,879.00	-0-	-0-	1
167th St.	167th St. Amusement Corp.	40,000.00	2,955.96	12,166.50	-0-	14,939.00	16,011.00	25.82	-0-	1
Palace	Palace Brooklyn Corp.	-0-	1,864.96	6,150.00	13,020.00	11,420.00	19,910.00	43.75	-0-	
Seventh Ave.	Marcus Loew Inc.	20,000.00	1,937.40	7,291.04	-0-	7,142.00	11,183.00	133.09	-0-	
State, N. Y.	Firm Amusement Corp.	175,000.00	3,685.38	500.00	-0-	6,720.00	17,198.25	4,930.77	-0-	
New York	do.	105,714.28	3,387.20	400.00	-0-	2,203.00	174.07	7,675.54	1,672.26	3
Triboro	Steinway-38th St. Corp.	-0-	4,314.50	17,587.50	437.80	89,474.00	46,473.00	1,691.78	10,850.19	1
Woodside	Woodside Operating Corp.	34,821.81	2,405.98	9,225.50	9,246.67	5,246.00	3,398.00	1,314.71	3,833.32	
Akron	Main St. Akron Amusement Co.	6,767.53	1,512.98	13,065.44	-0-	67,464.00	38,629.00	112.38	2,690.00	
Atlanta, Grand	Loew's Atlanta Theatre Co.	88,079.67	7,673.14	18,421.02	-0-	2,747.00	6,513.00	23,943.16	65,920.92	
Dayton	Loew's Dayton Theatre Co.	25,002.15	1,319.47	14,489.98	7,700.00	11,921.00	17,402.80	1,215.68	8,770.00	
Harrisburg	Loew's Harrisburg Corp.	10,833.30	2,222.17	5,999.18	-0-	12,772.00	30,444.00	87.06	3,340.78	
Houston	Loew's Houston Co.	87,000.00	1,181.34	1,006.22	-0-	10,528.00	6,483.00	90.26	-0-	
Indianapolis	Loew's Indiana Theatres	83,305.01	1,900.80	-0-	-0-	-0-	5,057.00	1.08	-0-	
Valencia	Loew's Theatre & Realty Corp.	200,193.72	5,460.42	40,944.45	394.40	27,008.00	30,826.00	1,084.45	-0-	
Kings	do.	225,761.64	5,047.03	39,875.00	70.54	43,381.00	37,463.00	988.50	20,625.00	
Pitkin	do.	199,812.00	3,923.24	42,486.25	268.80	52,257.00	33,613.00	445.70	21,994.20	
Kansas City, Midland	do.	427,706.99	1,938.75	111.07	398.49	4,411.00	6,647.00	34,677.43	126,128.88	2
Nashville, Vendome	Loew's N and K Corp.	300.00	1,730.01	3,841.84	2,850.00	16,610.00	16,700.00	-0-	-0-	
Reading	Reading Theatre Corp.	12,883.35	1,890.83	7,457.11	8,050.06	17,610.00	33,243.00	318.84	9,900.00	
Rochester	Clinton-Court Corp.	152,500.00	1,545.43	-0-	-0-	7,110.00	3,419.00	22,834.08	-0-	27
St. Louis	Loew's St. Louis Rlty. & Am. Corp.	59,200.00	2,403.47	44,585.02	23,600.00	-0-	73,641.00	6,649.56	37,274.97	3
Wilmington	Parkway-Wilmington Corp.	-0-	753.26	1,631.07	32.91	3,350.00	2,619.12	254.90	-0-	
Total		$2,224,977.45	$129,847.18	$708,192.13	$511,343.53	$831,720.00	$1,154,468.37	$131,695.32	$566,129.37	$70

* 41 Weeks
** 35 Weeks

-0-	3,452.59	16,665.76	22,912.50	49,704.00	39,882.00	426.42	1,420.41	1,014.04	130,608.82	2,611.71
30,000.00	3,328.88	19,376.43	40,194.01	53,265.00	38,359.00	11,387.96	50,279.98	2,300.22	143,331.08	2,756.37
-0-	2,100.11	16,808.00	14,575.00	10,108.00	10,225.00	606.44	10,035.00	1,800.00	42,587.55	818.99
-0-	2,070.03	11,918.00	18,882.50	10,902.00	12,472.00	398.85	6,000.00	1,200.05	27,639.33	531.53
-0-	2,631.02	19,808.02	11,270.83	17,352.00	36,764.00	4.71	3,458.33	3,623.36	80,648.89	1,550.94
-0-	3,768.89	32,266.12	73,457.54	3,129.00	61,398.00	-0-	31,798.50	129.24	142,091.81	2,732.53
83,000.00	2,909.40	54,284.85	48,036.00	3,928.00	69,470.00	1,602.61	81,233.26	3,121.44	179,776.16	3,457.23
-0-	1,754.40	6,117.54	20,504.50	8,014.00	19,066.00	136.20	4,195.00	904.32	50,493.32	971.03
-0-	3,125.82	17,947.50	-0-	43,060.00	32,403.60	1,279.08	12,408.98	23.56	85,382.86	1,641.98
12,000.00	1,643.71	23,115.02	-0-	1,628.00	3,339.00	125.65	-0-	850.27	41,091.11	788.48
-0-	3,609.93	14,089.42	2,284.24	57,199.00	39,982.00	-0-	4,200.00	881.92	112,082.67	2,155.44
-0-	2,840.79	19,001.64	19,736.10	14,513.00	39,040.13	3,906.15	4,220.00	15.28	94,802.53	1,823.13
-0-	3,065.63	8,976.00	13,080.00	19,096.00	21,424.00	130.00	-0-	1.26	65,770.37	1,264.81
-0-	1,136.62	42,050.00	35,814.79	15,876.00	41,857.00	-0-	-0-	6.30	136,728.11	2,629.39
30,000.00	1,457.71	200.02	-0-	2,605.00	5,461.00	34.30	-0-	1,744.34	38,013.69	731.03
-0-	2,950.25	16,725.00	32,279.25	25,481.00	48,146.00	1,289.90	1,078.00	29.00	125,767.34	2,418.60
-0-	5,495.81	37,984.75	39,937.17	31,786.00	42,563.00	839.80	11,473.42	8.42	147,124.69	2,829.32
30,000.00	1,999.24	200.02	-0-	3,980.00	5,871.00	61.38	900.00	600.00	40,611.64	780.99
28,262.67	2,170.79	5,736.02	2,751.35	1,321.00	4,879.00	-0-	-0-	1,527.54	43,493.29	836.41
40,000.00	2,955.96	12,166.50	-0-	14,939.00	16,011.00	25.82	-0-	1,228.47	84,869.81	1,632.11
-0-	1,864.96	6,150.00	13,020.00	11,420.00	19,910.00	43.75	-0-	787.50	51,621.21	992.72
20,000.00	1,937.40	7,291.04	-0-	7,142.00	11,183.00	133.09	-0-	610.45	47,076.08	905.31
175,000.00	3,685.38	500.00	-0-	6,720.00	17,198.25	4,936.47	-0-	-0-	208,034.40	4,000.66
105,714.28	3,387.20	400.00	-0-	2,203.00	174.07	7,675.54	1,672.26	3,325.00	114,556.83	2,203.02
-0-	4,314.50	17,587.50	437.80	89,474.00	46,473.00	1,691.78	10,850.19	1,385.71	147,742.68	2,841.21
34,821.81	2,405.98	9,225.50	9,246.67	3,246.00	3,398.00	1,314.71	3,833.32	11.16	61,814.19	1,188.73
6,767.53	1,512.98	13,065.44	-0-	67,464.00	38,629.00	112.38	2,690.00	18.68	124,842.65	2,400.82
88,079.67	7,673.14	18,421.02	-0-	2,747.00	6,513.00	23,943.16	65,920.92	829.72	80,626.35	1,966.50*
25,002.15	1,319.47	14,489.98	7,700.00	11,921.00	17,402.80	1,215.68	8,770.00	604.85	69,676.23	1,339.93
10,833.30	2,222.17	5,999.18	-0-	12,772.00	30,444.00	87.06	3,340.78	15.66	59,001.27	1,134.64
87,000.00	1,181.34	1,006.22	-0-	10,528.00	6,483.00	90.26	-0-	27.41	106,261.41	2,043.49
83,305.01	1,900.80	-0-	-0-	-0-	5,057.00	1.08	-0-	15.78	90,248.11	1,735.54
200,193.72	5,460.42	40,944.45	394.40	27,008.00	30,826.00	1,084.45	-0-	-0-	305,911.44	5,882.91*
225,761.64	5,047.03	39,875.00	70.54	43,381.60	37,463.00	988.50	20,625.00	-0-	331,961.71	6,383.88
199,812.00	3,923.24	42,486.25	268.80	52,257.00	33,613.00	445.70	21,994.20	883.15	309,928.64	5,960.16
427,706.99	1,938.75	111.07	398.49	4,111.00	6,647.00	34,667.43	126,128.88	2,740.44	346,721.41	6,667.72
300.00	1,730.01	3,841.84	2,850.00	16,610.00	16,700.00	-0-	-0-	177.32	41,854.53	804.89
12,883.35	1,890.83	7,457.11	8,050.00	17,610.00	33,243.00	318.84	9,900.00	24.07	71,529.06	1,375.56
152,500.00	1,545.43	-0-	-0-	7,110.00	3,419.00	22,834.08	-0-	27,181.28	160,227.23	3,081.29
59,200.00	2,403.47	44,585.02	23,600.00	-0-	73,641.00	6,649.56	37,274.97	3,559.44	169,244.64	3,254.70
-0-	753.26	1,631.07	32.91	3,350.00	2,619.12	254.90	-0-	10.99	8,630.27	246.58**
$2,224,977.45	$129,847.88	$708,192.13	$511,343.53	$831,720.00	$1,154,468.37	$131,695.32	$566,129.37	$70,784.20	$5,055,330.41	$97,414.50

Defendant, Loew's Inc., Exhibit L-8.

PROFIT OR LOSS OF THEATRES OPERATED BY CORPORATIONS PARTLY OWNED BY LOEW'S INCORP
DURING PERIODS IN WHICH "LETTY LYNTON" (TOGETHER WITH OTHER ATTRACTIONS) WAS EXH

Play Date (1932)	Name of Theatre	Operated By	Payroll and Trade Bills for Entire Week	Overhead for Entire Week	Box Office Receipts of period in which Letty Lynton (together with other attractions) was Exhibited	Percentage of Weeks Receipts received during period in which Letty Lynton (together with other attractions) was Exhibited	Payroll and Trade Bills Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Overhead Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Cost of Feature Letty Lynton	Cost Attr during in wh Lynt Exh
6/4-6	Alpine	Diamond Amusement Corp.	$ 1,830.37	$ 712.28	$ 2,102.20	51.6	$ 944.47	$ 367.54	$ 450.00	$
5/28-30	Burland	Midas Amusement Co.	1,846.41	847.26	3,628.25	79.5	1,467.90	673.57	600.00	
5/28-30	Burnside	Walton-Burnside Amusement Co.	1,730.89	1,099.29	3,800.25	69.7	1,206.43	766.21	600.00	
5/28-31	Gates	Gates Theatre Corp.	3,771.13	1,689.71	6,461.25	80.3	3,028.22	1,356.84	800.00	1,
6/4-6	Inwood	Dyckwood Amusement Corp.	1,514.04	762.42	1,638.50	48.7	737.34	371.30	375.00	
6/4/6	New Rochelle	New Rochelle Consolidated Corp.	2,161.90	1,486.97	3,976.35	60.5	1,307.95	899.62	675.00	
5/27-29	Premier	Sutter Amusement Corp.	1,919.43	1,691.63	3,267.90	75.8	1,454.93	1,282.26	550.00	
5/21-23	Rio	Chateau Amusement Corp.	1,616.47	1,259.98	2,874.05	61.4	992.51	773.63	300.00	
6/2-3	Spooner	Evergreen Amusement Corp.	1,461.63	962.19	1,155.35	24.9	363.95	239.59	250.00	
6/1-3	Victoria	Marloew Amusement Corp.	1,672.57	1,476.72	2,006.95	33.	551.95	487.32	300.00	
6/11-13	Victory	Hemlock Theatre Corp.	1,280.79	595.50	1,127.45	42.2	540.49	251.30	200.00	
6/4-6	Warwick	Warwick Amusement Corp.	1,275.37	310.84	1,007.30	47.5	605.80	147.65	150.00	
6/4-7	Yonkers	Yonkers Operating Corp.	3,321.73	1,017.32	3,950.65	69.5	2,308.60	707.04	700.00	1,
5/13-19	Boston, Orpheum	Loew's Boston Theatres Co.	4,791.48	3,664.49	15,847.70	100.	4,791.48	3,664.49	1,250.00	3,
5/13-19	Cleveland, Allen	Loew's Ohio Theatres Inc.	2,768.57	3,543.08	13,307.65	100.	2,768.57	3,543.08	2,103.82	
6/12-15	" Granada	Loew's Ohio Theatres Inc.	1450.46	1,824.46	2,303.90	75.4	1,093.65	1,375.64	275.00	
6/26-29	" Mall	Loew's Ohio Theatres Inc.	1,118.74	873.80	925.05	61.6	689.14	538.26	125.00	
6/11-17	" Park	Loew's Ohio Theatres Inc.	1,503.16	1,988.18	5,005.85	100.	1,503.16	1,988.18	500.00	
5/20-23	Evansville, Victory	Evansville Operating Corp.	1,044.65	2,157.94	2,944.00	81.7	853.48	1,763.04	300.00	
6/10-11-13/16	London, Loew's	Loew's London Theatres Ltd.	1,041.99	1,229.97	2,670.66	100.	1,041.99	1,229.97	750.00	
5/13-19	Toledo, Valentine	Toledo Operating Corp.	1,410.31	514.97	5,002.85	100.	1,410.31	514.97	1,250.71	
6/3-4-6/8-9	Toronto, Yonge St.	Marcus-Loew's Theatres Ltd.	2,189.71	2,653.18	6,157.88	100.	2,189.91	2,653.18	1,750.00	
5/13-19	Washington, Palace	Anchor Theatrical Corp.	4,841.01	2,015.53	17,623.40	100.	4,841.01	2,015.53	5,811.70	
6/4-7	White Plains, State	Suburban Theatre Corp.	1,347.80	904.73	3,541.65	71.7	966.37	648.69	1,232.59	
			$48,910.61	$35,282.44	$112,327.04		$37,659.61	$28,258.90	$21,298.82	$9,

Words and figures in italics appeared red in original.

Defendant, Loew's Inc., Exhibit L-8.

EATRES OPERATED BY CORPORATIONS PARTLY OWNED BY LOEW'S INCORPORATED
VHICH "LETTY LYNTON" (TOGETHER WITH OTHER ATTRACTIONS) WAS EXHIBITED

Overhead for Entire Week	Box Office Receipts of period in which Letty Lynton (together with other attractions) was Exhibited	Percentage of Weeks Receipts received during period in which Letty Lynton (together with other attractions) was Exhibited	Payroll and Trade Bills Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Overhead Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Cost of Feature Letty Lynton	Cost of Other Attractions during period in which Letty Lynton was Exhibited	Profit or *Loss* Applicable to period in which Letty Lynton (together with other attractions) was Exhibited	Loew's Inc. Percentage of Interest	Amount of Loew's Inc. Profit or *Loss* during period in which Letty Lynton (together with other attractions) was Exhibited	⅔ Share of Profit or *Loss* Allocated to Letty Lynton
$ 712.28	$ 2,102.20	51.6	$ 944.47	$ 367.54	$ 450.00	$ 110.75	$ 229.44	50	$ 114.72	$ 76.48
847.26	3,628.25	79.5	1,467.90	673.57	600.00	125.75	761.03	50	380.52	253.69
1,099.29	3,800.25	69.7	1,206.43	766.21	600.00	110.75	1,116.86	95	1,061.02	707.38
1,689.71	6,461.25	80.3	3,028.22	1,356.84	800.00	1,060.75	215.44	53.89	116.10	77.40
762.42	1,638.50	48.7	737.34	371.30	375.00	78.25	76.61	66.67	51.08	34.06
1,486.97	3,976.35	60.5	1,307.95	899.62	675.00	112.25	981.53	42.00	412.24	274.84
1,691.63	3,267.90	75.8	1,454.93	1,282.26	550.00	125.75	*145.04*	50	*72.52*	*48.35*
1,259.98	2,874.05	61.4	992.51	773.63	300.00	97.25	710.66	50	355.33	236.90
962.19	1,155.35	24.9	363.95	239.59	250.00	58.00	243.81	50	121.91	81.28
1,476.72	2,006.95	33.	551.95	487.32	300.00	330.00	337.68	56.25	189.95	126.64
595.50	1,127.45	42.2	540.49	251.30	200.00	89.50	46.16	75	34.62	23.08
310.84	1,007.30	47.5	605.80	147.65	150.00	83.25	20.60	50	10.30	6.87
1,017.32	3,950.65	69.5	2,308.60	707.04	700.00	1,281.86	*1,046.85*	66.67	*697.93*	*465.31*
3,664.49	15,847.70	100.	4,791.48	3,664.49	1,250.00	3,197.58	2,944.15	50.	1,472.08	981.44
3,543.08	13,307.65	100.	2,768.57	3,543.08	2,103.82	352.62	4,539.56	86.71	3,936.25	2,624.30
1,824.46	2,303.90	75.4	1,093.65	1,375.64	275.00	55.12	*495.51*	86.71	*429.66*	*286.45*
873.80	925.05	61.6	689.14	538.26	125.00	39.12	*466.47*	86.71	*404.48*	*269.67*
1,988.18	5,005.85	100.	1,503.16	1,988.18	500.00	85.16	929.35	86.71	805.84	537.25
2,157.94	2,944.00	81.7	853.48	1,763.04	300.00	110.00	*82.52*	50.	*41.26*	*27.51*
1,229.97	2,670.66	100.	1,041.99	1,229.97	750.00	240.00	*591.30*	25.	*147.83*	*98.56*
514.97	5,002.85	100.	1,410.31	514.97	1,250.71	292.62	1,534.24	50.	767.12	511.44
2,653.18	6,157.88	100.	2,189.91	2,653.18	1,750.00	550.00	*985.21*	58.75	*578.81*	*385.89*
2,015.53	17,623.40	100.	4,841.01	2,015.53	5,811.70	429.60	4,525.56	71.25	3,224.46	2,149.75
904.73	3,541.65	71.7	966.37	648.69	1,232.59	86.08	607.92	37.50	227.97	151.99
$35,282.44	$112,327.04		$37,659.61	$28,258.90	$21,298.82	$9,102.01	$16,007.70		$10,909.02	$7,273.05

Defendant, Loew's Inc., Exhibit L-8+.

PROFIT OF COMPANIES WHICH ARE LANDLORDS OF THEATRES LISTED AS MANAGED BY MARCUS LOEW BOOKING AGENCY.

Name of Theatre	Corporation	Profit of Corp'n. Re: "Letty Lynton" Showing	Loew's Incorporated Percent Stockholdings	Loew's Incorporated Share Landlord Profit	⅔ Share Profit Allocated to "Letty Lynton"
Willard	Willard Amusement Corporation	729.99	10.7	78.14	52.08
Mt. Vernon	Willard " "	499.02	10.7	53.40	35.60
Plaza	Conwall Realty Corporation	867.00	10.44	90.51	60.34
		$2,096.01		$222.02	$148.02

2733 2732 2731

Defendant, Loew's Inc., Exhibit L-9.

OVERHEAD EXPENSE OF THEATRES OPERATED BY CORPORATIONS PARTLY OWNED BY LOEW'S INCORPORATED FOR THE FISCAL YEAR ENDED AUGUST 31, 1932

Theatre	Operated by	Rent	Insurance Premiums	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income	
Alpine	Diamond Amusement Corp.		$ 2,726.17	$ 8,128.75	$ 5,940.00	$ 9,903.00	$ 14,405.00	$ 5,543.97	$ 7,665.00	$
Burland	Midas Amusement Co.	$ 27,156.26	2,459.17	250.02	-0-	3,060.00	9,434.00	3,367.18	-0-	
Burnside	Walton-Burnside Amuse. Co.	37,500.00	2,211.71	200.02	-0-	2,453.00	11,347.00	5,903.81	-0-	
Gates	Gates Theatre Corp.	-0-	3,952.08	16,261.78	16,420.00	18,578.00	38,937.00	2,769.21	7,640.00	
Inwood	Dyckwood Amusement Corp.	-0-	2,453.35	8,301.00	12,900.20	7,849.00	19,471.00	209.30	10,224.96	
New Rochelle	New Rochelle Consolidated Corp.	74,960.00	1,439.58	-0-	-0-	-0-	-0-	922.69	-0-	
Premier	Sutter Amusement Corp.	68,250.00	1,973.05	1,462.37	-0-	2,167.00	5,883.00	792.24	11,196.64	
Rio	Chateau Amusement Corp.	50,000.00	2,265.18	200.00	-0-	3,229.00	7,068.18	4,181.68	-0-	
Spooner	Evergreen Amusement Corp.	-0-	2,426.49	13,350.02	28,070.25	9,418.00	30,272.00	5,560.88	37,754.07	
Victoria	Marlowe Amusement Corp.	59,375.04	2,897.60	13,837.00	50.00	4,276.00	8,489.68	947.55	8,600.00	
Victory	Hemlock Theatre Corp.	-0-	2,073.99	5,787.27	7,200.00	6,808.00	10,351.26	590.79	720.46	
Warwick	Warwick Amusement Corp.	-0-	1,706.35	3,306.00	1,925.00	1,889.00	6,411.00	1,280.53	-0-	
Yonkers	Yonkers Operating Corp.	45,000.00	1,514.62	250.00	-0-	3,994.00	2,236.28	1,268.05	-0-	
Boston, Orpheum	Loew's Boston Theatres Co.	-0-	4,454.99	52,196.87	34,973.32	36,617.66	89,416.29	488.71	25,200.00	
Cleveland, Allen	Loew's Ohio Theatres Inc.	76,495.00	2,523.33	16,791.87	24,954.38	21,421.00	42,292.30	4,218.01	-0-	
" Granada	Loew's Ohio Theatres Inc.	17,000.00	1,977.51	14,280.74	15,768.00	31,087.00	35,502.99	1,978.36	19,955.52	
" Mall	Loew's Ohio Theatres Inc.	24,999.97	947.36	2,991.95	2,356.20	5,626.00	7,736.20	779.90	-0-	
" Park	Loew's Ohio Theatres Inc.	17,150.00	1,653.37	13,112.99	11,781.00	29,970.00	28,950.04	768.01	-0-	
Evansville, Victory	Evansville Operating Corp.	87,145.04	1,935.32	19,767.85	-0-	914.00	2,455.60	359.76	-0-	
London, Loew's	Loew's London Theatres Ltd.	-0-	1,614.51	11,664.35	-0-	23,618.00	14,169.72	12,957.11	65.00	
Toledo, Valentine	Toledo Operating Corp.	25,000.00	504.15	66.49	-0-	-0-	825.00	526.35	-0-	
Toronto, Yonge St.	Marcus Loew's Theatres Ltd.	12,000.00	3,538.32	31,176.93	9,003.57	26,723.00	26,884.25	28,639.17	-0-	
Washington, Palace	Anchor Theatrical Corp.	6,500.00	2,160.00	16,497.80	13,750.00	24,702.00	41,526.93	382.28	-0-	
White Plains, State	Suburban Theatre Corp.	-0-	1,517.93	11,997.93	13,980.00	5,770.95	17,047.84	2,524.82	5,793.37	
		$628,531.31	$52,926.13	$261,880.00	$199,071.92	$280,072.95	$471,112.56	$86,960.36	$134,815.02	$31

* 40 Weeks

912

Defendant, Loew's Inc., Exhibit L-9.

:RHEAD EXPENSE OF THEATRES OPERATED BY CORPORATIONS PARTLY OWNED BY LOEW'S INCORPORATED FOR THE FISCAL YEAR ENDED AUGUST 31, 1932

ted by	Rent	Insurance Premiums	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income	Other Income	Total for Year	Per Week 1/52
ment Corp.		$ 2,726.17	$ 8,128.75	$ 5,940.00	$ 9,903.00	$ 14,405.00	$ 5,543.97	$ 7,665.00	$ 1,943.49	$ 37,038.40	$ 712.28
t Co.	$ 27,156.26	2,459.17	250.02	-0-	3,060.00	9,434.00	3,367.18	-0-	1,669.03	44,057.60	847.26
Amuse. Co.	37,500.00	2,211.71	200.02	-0-	2,453.00	11,347.00	5,903.81	-0-	2,452.45	57,167.09	1,099.29
orp.	-0-	3,952.08	16,261.78	16,420.00	18,578.00	38,937.00	2,769.21	7,640.00	1,413.09	87,864.98	1,689.71
ement Corp.	-0-	2,453.35	8,301.00	12,900.20	7,849.00	19,471.00	209.30	10,224.96	1,313.10	39,645.79	762.42
nsolidated Corp.	74,960.00	1,439.58	-0-	-0-	-0-	-0-	922.69	-0-	-0-	77,322.27	1,486.97
nt Corp.	68,250.00	1,973.05	1,462.37	-0-	2,167.00	5,883.00	792.24	11,196.64	1,665.79	67,665.23	1,691.63
ent Corp.	50,000.00	2,265.18	200.00	-0-	3,229.00	7,068.18	4,181.68	-0-	1,425.08	65,518.96	1,259.98
ment Corp.	-0-	2,426.49	13,350.02	28,070.25	9,418.00	30,272.00	5,560.88	37,754.07	1,309.64	50,033.93	962.19
ent Corp.	59,375.04	2,897.60	13,837.00	50.00	4,276.00	8,489.68	947.55	8,600.00	4,483.67	76,789.20	1,476.72
Corp.	-0-	2,073.99	5,787.27	7,200.00	6,808.00	10,351.26	590.79	720.46	1,125.00	30,965.85	595.50
ent Corp.	-0-	1,706.35	3,306.00	1,925.00	1,889.00	6,411.00	1,280.53	-0-	354.27	16,163.61	310.84
g Corp.	45,000.00	1,514.62	250.00	-0-	3,994.00	2,236.28	1,268.05	-0-	1,362.24	52,900.71	1,017.32
heatres Co.	-0-	4,454.99	52,196.87	34,973.32	36,617.00	89,416.29	488.71	25,200.00	2,393.76	190,553.42	3,664.49
atres Inc.	76,495.00	2,523.33	16,791.87	24,954.38	21,421.00	42,292.30	4,218.01	-0-	4,455.70	184,240.19	3,543.08
atres Inc.	17,000.00	1,977.51	14,280.74	15,768.00	31,087.00	35,502.99	1,978.36	19,955.52	2,767.30	94,87[illegible]	1,824.46
atres Inc.	24,999.97	947.36	2,991.95	2,356.20	5,626.00	7,736.20	779.90	-0-	-0-	45,[illegible]	873.80
atres Inc.	17,150.00	1,653.37	13,112.99	11,781.00	29,970.00	28,950.04	768.01	-0-	-0-	103,385.41	1,988.18
ing Corp.	87,145.04	1,935.32	19,767.85	-0-	914.00	2,455.60	359.76	-0-	364.60	112,212.97	2,157.94
heatres Ltd.	-0-	1,614.51	11,664.35	-0-	23,618.00	14,169.72	12,957.11	65.00	-0-	63,958.69	1,229.97
Corp.	25,000.00	504.15	66.49	-0-	-0-	825.00	526.35	-0-	143.60	26,778.39	514.97
heatres Ltd.	12,000.00	3,538.32	31,176.93	9,003.57	26,723.00	26,884.25	28,639.17	-0-	-0-	137,965.24	2,653.18
Corp.	6,500.00	2,160.00	16,497.80	13,750.00	24,702.00	41,526.93	382.28	-0-	711.52	104,807.49	2,015.53
Corp.	-0-	1,517.93	11,997.93	13,980.00	5,770.95	17,047.84	2,524.82	5,793.37	-0-	47,046.10	904.73
	$628,531.31	$52,926.13	$261,880.00	$199,071.92	$280,072.95	$471,112.56	$86,960.36	$134,815.02	$31,353.33	$1,814,386.88	$35,282.44

PROFIT OR LOSS OF THEATRES OPERATED BY CORPORA
THROUGH ONE OR MORE INTERMEDIATE CORPORATION

Date (1932)	Name of Theatre	Operated By	Payroll and Trade Bills Entire We
28-31	Bayridge	Ridgebay Amusement Corporation	$ 2,491.0
27-29	Canal	Ludlow Operating Corporation	1,466.0
28-30	Embassy—No. Bergen	North Bergen Amusement Corp.	1,383.0
28-30	Grand	Hamford Realty Corporation	2,346.1
6-12	Jersey City	Jersey Boulevard Corporation	6,245.2
14-17	175th St.	Highbridge Realty Corporation	3,031.0
28-31	Oriental	Hawthorne Amusement Corporation	2,158.2
14-16	72nd St.	Wilthan Realty Corporation	2,809.3
13-19	Paradise	Concourse Realty Corporation	7,445.3
29-5/5	State—Providence	Providence Theatrical Corporation	2,558.3
6-12	State—Syracuse	Salina-Jefferson Corporation	2,833.3
27-6/2	Parkway—Baltimore	Century-Parkway Corporation	1,019.7
6-12	Columbus-Broad	Loew-U. A. Columbus Corporation	1,766.1
29-5/5	State—Louisville	Louisville Operating Company, Inc.	1,871.2
27-6/2	Valencia—Baltimore	Baltimore Consolidated Corp.	1,201.-
13-19	Stanley—Baltimore	Baltimore Consolidated Corp.	2,430.3
29-5/5	State—Boston	State Theatre Company	2,692.7
6-7-5/9-12	State—Norfolk	Norfolk Consolidated Corporation	1,481.9
6-7	Loew's—Richmond	Richmond Consolidated Corporation	1,447.3
13-16	Loew's—Canton	Loew's Theatre & Realty Corporation	1,660.1
20-26	Penn—Pittsburgh	Penn-Federal Corporation	5,576.0
	TOTALS		$55,916.3

Words and figures in italics appeared red in original.

Defendant, Loew's Inc., Exhibit L-10.

ATIONS IN WHICH SAID CORPORATION, LOEW'S INC. HAVE IN DIRE
S DURING PERIODS IN WHICH LETTY LYNTON (TOGETHER WITH

ad for ek	Overhead for Entire Week	Box Office receipts of period in which Letty Lynton (together with other attractions) was exhibited	Percentage of weeks receipts received during period in which Letty Lynton (together with other attractions) was exhibited	Payroll and Trade bills applicable to period in which Letty Lynton (together with other attractions) was exhibited	Overhead applicable to period in which Letty Lynton (together with other attractions) was exhibited	C fe Letty
00	$ 1,457.85	$ 5,554.25	83.3	$ 2,075.00	$ 1,214.39	$
01	1,640.64	2,039.15	58.3	854.68	956.49	
03	856.76	3,446.95	72.8	1,006.85	623.72	
12	2,246.04	5,678.20	71.5	1,677.48	1,605.92	
25	4,622.87	21,318.90	100.	6,245.25	4,629.87	1
62	4,802.93	8,334.45	78.4	2,376.79	3,765.50	1
26	1,987.72	5,732.00	74.8	1,614.38	1,486.81	1
56	3,547.66	4,818.30	56.8	1,595.83	1,998.03	
35	5,143.80	17,999.60	100	7,445.35	5,143.80	2
32	4,806.47	12,407.20	100	2,558.32	4,806.47	4
55	4,999.53	12,171.15	100	2,833.55	4,999.53	1
77	537.27	4,482.15	100	1,019.77	537.27	
11	3,519.04	9,133.10	100	1,766.11	3,519.04	2
22	2,839.96	8,381.70	100	1,871.22	2,839.96	2
47	2,135.09	2,583.30	100	1,201.47	2,135.09	
86	2,970.73	14,054.95	100	2,430.86	2,970.73	3
74	4,040.66	13,564.50	100	2,692.74	4,040.66	3
00	1,713.62	5,938.25	100	1,481.90	1,713.62	1
59	1,387.16	8,742.65	100	1,447.59	1,387.16	2
16	1,854.03	2,539.45	79.8	1,324.81	1,479.52	
67	8,370.36	16,412.05	100	5,576.67	8,370.36	
56	$65,457.19	$185,332.25		$51,096.62	$60,223.94	$31

ONS IN WHICH SAID CORPORATION, LOEW'S INC. HAVE IN DIR
DURING PERIODS IN WHICH LETTY LYNTON (TOGETHER WIT

Overhead for Entire Week	Box office receipts of period in which Letty Lynton (together with other attractions) was exhibited	Percentage of weeks receipts received during period in which Letty Lynton (together with other attractions) was exhibited	Payroll and Trade bills applicable to period in which Letty Lynton (together with other attractions) was exhibited	Overhead applicable to period in which Letty Lynton (together with other attractions) was exhibited	Lett
$ 1,457.85	$ 5,554.25	83.3	$ 2,075.00	$ 1,214.39	$
1,640.64	2,039.15	58.3	854.68	956.49	
856.76	3,446.95	72.8	1,006.85	623.72	
2,246.04	5,678.20	71.5	1,677.48	1,605.92	
4,622.87	21,318.90	100	6,245.25	4,629.87	
4,802.93	8,334.45	75.1	2,376.79	3,765.50	
1,987.72	5,732.00	74.8	1,614.38	1,486.81	
3,517.66	4,818.30	56.8	1,595.83	1,998.03	
5,143.80	17,999.60	100	7,445.35	5,143.80	
4,806.47	12,407.20	100	2,558.32	4,806.47	
4,999.53	12,171.15	100	2,833.55	4,999.53	
537.27	4,482.15	100	1,019.77	537.27	
3,519.04	9,133.10	100	1,766.11	3,519.04	
2,839.96	8,381.70	100	1,871.22	2,839.96	
2,135.09	2,583.30	100	1,201.47	2,135.09	
2,970.73	14,054.95	100	2,430.86	2,970.73	
4,040.66	13,564.50	100	2,692.74	4,040.66	
1,713.62	5,938.25	100	1,481.90	1,713.62	
1,387.16	8,742.65	100	1,447.59	1,387.16	
1,854.03	2,539.45	79.8	1,324.81	1,479.52	
8,370.36	16,412.05	100	5,576.67	8,370.36	
$65,457.19	$185,332.25		$51,096.62	$60,223.94	$3

ECT STOCK INTEREST WHOLE OR IN PART
H OTHER ATTRACTIONS) WAS EXHIBITED

ost. of eature y Lynton	Cost of other attractions during period in which Letty Lynton was exhibited	Profit or *Loss* applicable to period in which Letty Lynton (together with other attractions) was exhibited	Loew's Inc. Percentage of Interest	Amount of Loew's Inc. Profit or *Loss* during period in which Letty Lynton (together with other attractions) was exhibited	⅔ share profit or allocated Letty Ly
800.00	$ 1,038.61	$ 426.25	50	$ 313.13	$ 142
375.00	86.50	*233.52*	100	*233.52*	*155*
689.39	120.75	1,096.24	50	503.12	335
600.00	110.75	1,684.05	100	1,684.05	1,122
1,500.00	2,874.65	6,069.13	100	6,069.13	4,046
1,200.00	136.75	855.41	100	855.41	570
1,000.00	146.75	1,484.06	66.67	989.42	659
750.00	148.50	325.94	100	325.94	217
2,000.00	4,478.47	*1,068.02*	100	*1,068.02*	*712*
2,500.00	221.25	2,321.16	100	2,321.16	1,547
1,400.00	3,728.56	*790.49*	100	*709.49*	*527*
868.75	110.10	1,946.26	50	973.13	648
2,629.08	267.62	951.25	50	475.63	317
2,241.62	219.16	1,209.74	50	604.87	403
387.49	105.10	*1,245.85*	30	*373.76*	*249*
5,483.08	317.60	2,852.68	0	855.80	570
3,500.00	321.33	3,009.77	50	1,504.89	1,003
1,484.57	210.50	1,047.66	33.33	349.19	232
2,371.37	267.60	3,268.93	33.33	1,089.53	726
—	120.12	*385.00*	100	*385.00*	*258*
—	3,768.12	*1,303.10*	44.12	*574.93*	*383*
1,780.35	$18,798.79	$23,432.55		$15,388.68	$10,259

Defendant, Loew's Inc., Exhibit L-11.

OVERHEAD EXPENSE OF THEATRES OPERATED BY CORPORATIONS IN WHICH SAID CORPORATION LOEW'S INC
INDIRECT STOCK INTEREST WHOLE OR IN PART THROUGH ONE OR MORE INTERMEDIATE CORPORATIO

Theatre	Operated by	Rent	Insurance	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income
Bay Ridge	Ridge Bay Amusement Corp.	-0-	$ 2,647.68	$ 7,307.39	$ 21,242.13	$ 13,541.00	$ 34,687.00	$ 282.60	$ 3,665.00
Canal	Ludlow Operating Corporation	-0-	2,826.34	17,280.00	173.66	41,176.00	25,086.81	213.79	-0-
Embassy—No. Bergen	North Bergen Amusement Corp.	$ 27,000.00	1,951.47	11,886.77	204.10	1,298.00	2,596.87	713.47	-0-
Grand	Hamford Realty Corporation	-0-	4,320.23	33,075.04	44,960.26	26,304.00	47,951.65	809.95	40,626.63
Jersey City	Jersey Boulevard Corporation	-0-	3,689.72	37,956.66	18,476.79	118,276.00	69,925.00		7,570.88
175th Street	Highbridge Realty Corporation	-0-	4,372.25	39,020.02	1,103.12	150,008.00	70,225.00	434.78	15,224.99
Oriental	Hawthorne Amusement Corp.	-0-	3,647.97	16,637.75	36,004.57	25,825.00	38,305.81	456.02	17,225.00
72nd Street	Wiltham Realty Corporation	7,812.50	1,341.28	9,213.19	38,617.41	25,522.50	19,469.80	81.72	2,925.00
Paradise	Concourse Realty Corporation	-0-	5,386.59	43,885.10	15,223.54	175,609.00	72,648.00	3,362.63	48,637.1
State—Providence	Providence Theatrical Corp.	50,000.00	2,792.90	38,757.35	111.25	108,716.00	71,785.30	4,626.19	21,656.52
State—Syracuse	Salina-Jefferson Corporation	-0-	4,916.66	71,943.86	58.13	195,149.00	95,993.10	54,021.54	143,376.02
Parkway—Balti.	Century-Parkway Corporation	200.00	1,150.73	3,354.86	11,027.29	-0-	12,168.31	37.10	-0-
Broad—Columbus	Loew-U. A. Columbus Corp.	62,026.07	3,353.23	13,871.41	-0-	39,597.00	66,639.00	15,241.70	17,058.46
State—Louisville	Louisville Operating Co. Inc.	91,289.92	2,479.15	23,207.61	-0-	13,344.00	17,458.00	349.21	-0-
Valencia—Balti.	Baltimore-Canal Corporation	108,160.00	876.72	48.40	-0-	281.00	1,659.00	-0-	-0-
Stanley—Balti.	Baltimore-Canal Corporation	150,000.00	1,198.22	68.96	-0-	1,123.00	3,546.00	2.00	-0-
State—Boston	State Theatre Company	-0-	6,221.44	52,133.40	75,145.58	22,104.00	106,021.16	31,185.89	58,069.9
State—Norfolk	Norfolk Consolidated Corp.	93,886.40	2,222.89	13,431.97	-0-	-0-	3,378.93	-0-	23,812.09
Loew's—Richmond	Richmond Consolidated Corp.	71,383.68	1,657.65	14,194.32	-0-	-0-	3,869.46	1,249.87	20,222.8
Loew's—Canton	Loew's Thea. & Realty Corp.	25,500.00	1,781.84	9,049.48	-0-	30,681.00	32,204.32	1,441.84	4,187.50
Penn—Pittsburgh	Penn-Federal Corporation	111,500.00	4,260.62	121,908.90	54,809.83	115,318.00	100,433.00	2,895.46	69,322.47
TOTALS		$798,758.57	$63,095.58	$578,232.44	$317,157.66	$1,103,872.50	$896,051.52	$117,405.76	$493,580.13

* 28 Weeks

Defendant, Loew's Inc., Exhibit L-11.

PENSE OF THEATRES OPERATED BY CORPORATIONS IN WHICH SAID CORPORATION LOEW'S INC. HAVE STOCK INTEREST WHOLE OR IN PART THROUGH ONE OR MORE INTERMEDIATE CORPORATIONS

Rent	Insurance	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income	Other Income	Total for Year	Per Week 1/52
-0-	$ 2,647.68	$ 7,307.39	$ 21,242.13	$ 13,541.00	$ 34,687.00	$ 282.60	$ 3,665.00	$ 234.10	$ 75,808.70	$ 1,457.85
-0-	2,826.34	17,280.00	173.66	41,176.00	25,086.81	213.79	-0-	1,443.34	85,313.26	1,640.64
$ 27,000.00	1,951.47	11,886.77	204.10	1,298.00	2,596.87	713.47	-0-	1,099.22	44,551.46	856.76
-0-	4,320.23	33,075.04	44,960.26	26,304.00	47,951.65	809.95	40,626.65	-0-	116,794.48	2,246.04
-0-	3,689.72	37,956.66	18,476.79	118,276.00	69,925.00		7,570.88	-0-	240,753.29	4,629.87
-0-	4,372.25	39,020.02	1,103.12	150,008.00	70,225.00	434.78	15,224.99	186.13	249,792.05	4,802.93
-0-	3,647.97	16,637.75	36,004.57	25,825.00	38,305.81	456.02	17,225.00	290.53	103,361.59	1,987.72
7,812.50	1,341.28	9,213.19	38,617.41	25,522.50	19,469.80	81.72	2,925.00	638.90	98,494.50	3,517.66
-0-	5,386.59	43,885.10	15,223.54	175,609.00	72,648.00	3,362.63	48,637.11	-0-	267,477.75	5,143.80
50,000.00	2,792.90	38,757.35	111.25	108,716.00	71,785.30	4,626.19	21,656.52	5,195.75	249,936.72	4,806.47
-0-	4,916.66	71,943.86	58.13	195,149.00	95,993.10	54,021.54	143,376.02	18,730.55	259,975.72	4,999.53
200.00	1,150.73	3,354.86	11,027.29	-0-	12,168.31	37.10	-0-	-0-	27,938.29	537.27
62,026.07	3,353.23	13,871.41	-0-	39,597.00	66,639.00	15,241.70	17,058.16	680.02	182,990.23	3,519.04
91,289.92	2,479.15	23,207.61	-0-	13,344.00	17,458.00	349.21	-0-	449.77	147,678.12	2,839.96
108,160.00	876.72	48.40	-0-	281.00	1,659.00	-0-	-0-	-0-	111,025.12	2,135.09
150,000.00	1,198.22	68.96	-0-	1,123.00	3,546.00	2.00	-0-	1,460.00	154,478.18	2,970.73
-0-	6,221.44	52,133.40	75,145.58	22,104.00	106,021.16	31,185.89	58,069.94	24,627.25	210,114.28	4,040.66
93,886.40	2,222.89	13,431.97	-0-	-0-	3,378.93	-0-	23,812.08	-0-	89,108.11	1,713.62
71,383.68	1,657.65	14,194.32	-0-	-0-	3,869.46	1,249.87	20,222.83	-0-	72,132.15	1,387.16
25,500.00	1,781.84	9,049.48	-0-	30,681.00	32,204.32	1,441.84	4,187.50	61.35	96,409.63	1,854.03
111,500.00	4,260.62	121,908.90	54,809.83	115,318.00	100,433.00	2,895.46	69,322.47	6,545.03	435,258.31	8,370.36
$798,758.57	$63,095.58	$478,232.44	$317,157.66	$1,103,872.50	$896,051.52	$117,405.76	$493,580.15	$61,641.94	$3,319,351.94	$65,457.19

Defendant, Loew's Inc., Exhibit L-12.

PROFIT OR LOSS OF THEATRES DURING PERIOD IN WHICH "LETTY LYNTON" (TOGETHER WITH OTHER AT
THESE THEATRES WERE NOT AND ARE NOT NOW OWNED OR LEASED BY THE DEFENDANT LOEW'S INC. OR A
ANY AFFILIATE OR SUBSIDIARY OF LOEW'S INC. OR OF ANY OF THE OTHER DEFENDANTS HEREIN, BUT
THE MARCUS LOEW BOOKING AGENCY UNDER WRITTEN MANAGEMENT AGREEMENTS WITH THE OWNERS OF

Play Date (1932)	Name of Theatre	Managed By	Payroll and Trade Bills for Entire Week	Overhead for Entire Week	Box Office Receipts of Period in which Letty Lynton (together with other attractions) was exhibited	Percentage of weeks receipts received during period in which Letty Lynton (together with other attractions) was exhibited	Payroll and Trade bills applicable to period in which Letty Lynton (together with other attractions) was exhibited	Overhead applicable to period in which Letty Lynton (together with other attractions) was exhibited	Cost of Feature Letty Lynton
3/28-30	Broadway	Marcus Loew Booking Agency	$ 1,563.45	$ 594.33	$ 3,344.15	57.2	$ 894.29	$ 339.96	$ 600.00
6/11-13	Freeman	Marcus Loew Booking Agency	1,178.03	631.26	1,722.10	52.3	616.11	330.15	300.00
6/4-7	Mt. Vernon	Marcus Loew Booking Agency	1,712.31	1,077.62	3,661.15	70.5	1,207.18	759.72	800.00
5/28-31	Plaza	Marcus Loew Booking Agency	1,607.06	1,080.62	4,087.05	68.	1,092.80	734.82	800.00
5/28-30	Prospect	Marcus Loew Booking Agency	1,705.82	1,229.68	3,966.30	75.4	1,286.19	927.18	675.00
5/21-23	Sheriden	Marcus Loew Booking Agency	1,706.67	1,521.84	4,923.45	66.8	1,140.06	1,016.59	750.00
5/28-30	Willard	Marcus Loew Booking Agency	1,684.98	852.06	3,722.35	72.	1,213.19	613.48	675.00
4/30-5/2-6	Fox—Atlanta	Marcus Loew Booking Agency	3,997.63	2,200.57	10,092.25	100.	3,997.63	2,200.57	523.06
			$15,155.95	$9,187.98	$35,518.80		$11,447.45	$6,922.47	$5,123.06

Words in italics appeared red in original.

Defendant, Loew's Inc., Exhibit L-12.

ATRES DURING PERIOD IN WHICH "LETTY LYNTON" (TOGETHER WITH OTHER ATTRACTIONS) WAS EXHIBITED. NOT AND ARE NOT NOW OWNED OR LEASED BY THE DEFENDANT LOEW'S INC. OR ANY OTHER DEFENDANT OR BY IDIARY OF LOEW'S INC. OR OF ANY OF THE OTHER DEFENDANTS HEREIN, BUT WERE MERELY MANAGED BY ING AGENCY UNDER WRITTEN MANAGEMENT AGREEMENTS WITH THE OWNERS OF SAID THEATRES

	Payroll and Trade Bills for Entire Week	Overhead for Entire Week	Box Office Receipts of Period in which Letty Lynton (together with other attractions) was exhibited	Percentage of weeks receipts received during period in which Letty Lynton (together with other attractions) was exhibited	Payroll and Trade bills applicable to period in which Letty Lynton (together with other attractions) was exhibited	Overhead applicable to period in which Letty Lynton (together with other attractions) was exhibited	Cost of Feature Letty Lynton	Cost of other attractions during period in which Letty Lynton was exhibited	Profit or *Loss* applicable to period in which Letty Lynton (together with other attractions) was exhibited	Compensation of Marcus Loew Booking Agency based upon the following percentage of profit	Amount of Profit or *Loss* during period in which Letty Lynton (together with other attractions) was exhibited	⅔ share Profit or *Loss* allocated Letty Lynton
cy	$ 1,563.45	$ 594.33	$ 3,344.15	57.2	$ 894.29	$ 339.96	$ 600.00	$ 95.75	$1,414.15	50	$ 707.08	$ 471.41
cy	1,178.03	631.26	1,722.10	52.3	616.11	330.15	300.00	82.00	303.84	50	196.92	131.29
cy	1,712.31	1,077.62	3,661.15	70.5	1,207.18	759.72	800.00	145.75	748.50	33.33	249.48	166.33
cy	1,607.06	1,080.62	4,087.05	68.	1,092.80	734.82	800.00	159.00	1,300.43	33.33	433.43	288.97
cy	1,705.82	1,229.68	3,966.30	75.4	1,286.19	927.18	675.00	125.75	952.48	33.33	317.36	211.58
cy	1,706.67	1,521.84	4,923.45	66.8	1,140.06	1,016.59	750.00	110.75	1,906.03	50.	953.03	635.39
cy	1,684.98	852.06	3,722.35	72.	1,213.19	613.48	675.00	125.75	1,094.93	33.33	364.94	243.31
cy	3,997.63	2,200.57	10,092.25	100.	3,997.63	2,200.57	523.06	3,300.40	70.59	50	35.30	23.53
	$15,155.95	$9,187.98	$35,518.80		$11,447.45	$6,922.47	$5,123.06	$4,145.15	$7,880.67		$3,257.54	$2,171.81

Defendant, Loew's Inc., Exhibit L-13.

OVERHEAD EXPENSE OF THEATRES, WHICH WERE NOT AND ARE NOT NOW OWNED OR LEASED BY THE DEFENDANT, LOEW'S INC. OR AN AFFILIATE OR SUBSIDIARY OF LOEW'S INC. OR OF ANY OF THE OTHER DEFENDANTS HEREIN, BUT WERE MERELY MANAGED BY MA UNDER WRITTEN MANAGEMENT AGREEMENTS WITH THE OWNERS OF SAID THEATRES FOR THE FISCAL YEAR ENDING

Theatre	Managed By	Rent	Insurance	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income
Broadway	Marcus Loew Booking Agency	$ 30,000.00	$ 1,929.03	$ 200.00				$ 276.20	
Freeman	Marcus Loew Booking Agency	32,500.00	131.52	200.00				73.50	
Mt. Vernon	Marcus Loew Booking Agency	52,800.00	1,173.20					3,415.26	
Plaza	Marcus Loew Booking Agency	53,000.00	1,871.94	200.00				2,161.57	
Prospect	Marcus Loew Booking Agency	63,600.00	1,971.74	200.00				1,253.41	1,349.99
Sheriden	Marcus Loew Booking Agency	65,000.00	2,752.23	13,906.25				674.66	2,475.00
Willard	Marcus Loew Booking Agency	42,200.00	2,085.36	200.00				1,102.75	
Fox—Atlanta	Marcus Loew Booking Agency	92,855.00	762.63	1,002.96				4.00	
		$431,955.00	$12,677.65	$15,909.21				$8,961.35	$3,824.99

* 43 Weeks

916

Defendant, Loew's Inc., Exhibit L-13.

ES, WHICH WERE NOT AND ARE NOT NOW OWNED OR LEASED BY THE DEFENDANT, LOEW'S INC. OR ANY OTHER DEFENDANT OR BY ANY LOEW'S INC. OR OF ANY OF THE OTHER DEFENDANTS HEREIN, BUT WERE MERELY MANAGED BY MARCUS LOEW BOOKING AGENCY N MANAGEMENT AGREEMENTS WITH THE OWNERS OF SAID THEATRES FOR THE FISCAL YEAR ENDING AUGUST 31ST, 1932

d By	Rent	Insurance	Real Estate Taxes and Licenses	Accrued Interest Payable	Investment Interest	Depreciation and Amortization	Sundry Expense	Rent Income	Other Income	Total for Year	Per Week 1/52
king Agency	$ 30,000.00	$ 1,929.03	$ 200.00				$ 276.20		$1,500.03	$ 30,905.20	$ 594.33
king Agency	32,500.00	131.52	200.00				73.50		79.17	32,825.85	631.26
king Agency	52,800.00	1,173.20					3,415.26		1,351.83	56,036.63	1,077.62
king Agency	53,000.00	1,871.94	200.00				2,161.57		1,041.27	56,192.24	1,080.62
king Agency	63,600.00	1,971.74	200.00				1,253.41	1,349.99	1,731.50	63,943.66	1,229.68
king Agency	65,000.00	2,752.23	13,906.25				674.66	2,475.00	722.37	79,135.77	1,521.84
king Agency	42,200.00	2,085.36	200.00				1,102.75		1,280.96	44,307.15	852.06
king Agency	92,855.00	762.63	1,002.96				4.00			94,624.59	2,200.57*
	$431,955.00	$12,677.65	$15,909.21				$8,961.35	$3,824.99	$7,707.13	$457,971.09	$9,187.98

Payroll (Check No. 11748)	No. of Empl.		Trade Bills	Check No. 11747		Films and Acts	
Bus. Manager		110.	Newspapers		13.07	FILMS	
Asst. Bus. Manager		35.	Other Advertising		6.25	May 28-31	
			Lobby Stills Photos				
Treasurer			Display Cut Outs		8.42		
Asst. Treasurer			Posters—Lith.—Cards		44.01	Letty Lynton—M. G. M.	
Cashiers		18.	Trailers		15.42	Joan Crawford	
Doormen		25.	Loew's W'kly & Add.		50.63		
Special Officers		25.	" " Postage	11748	25.01	Down Memory Lane—Col.	
Ushers	5	56.—	Sign Shop		30.	Metrotone News #270	
Matron	2	13.71	Bill Posting				
Pages						June 1-3	
Watchman		23.	Maintenance—Repairs		95.44		
			Booth Supplies			Sky Bride—Para	
Superintendent			Cleaners Supplies		22.39	Richard Arlen	
Cleaners	3	33.	Office Supplies			War Mamas—M. G. M.	
Porters	2	45.	Elec. Supplies			Should 18th Amendment—Col.	
Engineer			Cooling Plant Supplies			Be Repealed—Col.	
Fireman			" " Gas			Metrotone News #271	
			" " Water			Sound Tr. Letty Lynton	
Stage Manager			" Elec. Power				
Electrician		70.	Carbons			ACTS	
Asst. Electrician		62.	Coal—Steam			May 28-31	
Property Man		70.	Electric Light & Power		150.		
Carpenter		73.	Fire Alarm Service		6.29	Taketa Bros. & Sis.	
Clearers			Lamps			Renard & Ryan	
Flymen			Music Scores		15.	Geo. Fawcett & Co.	
Operators	5	357.	Organ Maintenance			Mel Klee	
Stage Doorman		18.	Piano Rental		36.	Jean Schwartz—Joie Ray	
Reel Boys		3.	Telephone & Telegraph			M. L. B. A. Comm.	
			Tickets				
Orchestra		553.	Ice, Cups and Filter Service			June 1-3	
			Booking Office		100.		
Bill Poster		40.	Detective Service			5 Arleys	
Publicity Man			Express		7.75	Smith, Rogers & Eddy	
			Film Delivery		7.50	Belle Blanche	
Overtime			Production Exp.			Flynn & Mack	
			Traveling Exp.			Babe Egan & Red Heads	
			Relief Mgr.			M. L. B. A. Comm.	
Late Show		17.76	V. M. P. A. Dues				
			"Sound" Service Fee		20.		657.58
							1418.75
							2076.33
			Miscel. Expense	11748	4.40		29.41
							2046.92
Total		$1647.47		Total	$657.58		

Check No. 11747		Th…
		C…
		W…
	800.	Weather
		Clear—Warm
		" "
	18.	Cldy—Cool
	30.	" "
		Clear—Warm
		" "
		" "
	450.	" "
		" Very "
	60.	" " "
	18.	Cldy "
		" "
	40.	
	2.75	Clear—Warm
		" "
	1418.75	
		Late Show
11736	122.14	Salary Refund—V…
37	38.	Napkin Dep.
38	244.28	
39	217.14	
40	190.	Expense
46	42.72	Pay Roll
		Trade Bills
	854.28	Films & Acts
		Check No. 11749
41	142.50	
42	47.50	These Lines to be
43	71.25	By Mana…
44	71.25	
45	244.28	
46	30.36	R…
	607.14	
		Last Year—I…
		Ex…
	1461.42	
		Deficit
Total	$2880.17	

Check No. 11747		Trade Bills
	13.07	Newspapers
	6.25	Other Advertising
		Lobby Stills Photos
		Display Cut Outs
	8.42	
	44.01	Posters—Lith.—Cards
	15.42	Trailers
	50.63	Loew's W'kly & Add.
11748	25.01	" " Postage
		Sign Shop
	71	Bill Posting
	95.44	Maintenance—Repairs
		Booth Supplies
	22.39	Cleaners Supplies
		Office Supplies
		Elec. Supplies
		Cooling Plant Supplies
		" " Gas
		" " Water
		" Elec. Power
		Carbons
		Coal—Steam
	150.	Electric Light & Power
	6.29	Fire Alarm Service
		Lamps
	15.	Music Scores
		Organ Maintenance
	36.	Piano Rental
		Telephone & Telegraph
		Tickets
		Ice, Cups and Filter Service
	100.	Booking Office
		Detective Service
	7.75	Express
	7.50	Film Delivery
		Production Exp.
		Traveling Exp.
		Relief Mgr.
	76	V. M. P. A. Dues
		"Sound" Service Fee
	20.	
11748	4.40	Miscel. Expense
Total	$657.58	

Check No. 11747		Films and Acts
		FILMS
		May 28-31
		Letty Lynton—M. G. M.
		Joan Crawford
		Down Memory Lane—Col.
		Metrotone News #270
		June 1-3
		Sky Bride—Para
		Richard Arlen
		War Mamas—M. G. M.
		Should 18th Amendment—Col.
		Be Repealed—Col.
		Metrotone News #271
		Sound Tr. Letty Lynton
		ACTS
		May 28-31
	6.29	Taketa Bros. & Sis.
		Renard & Ryan
	15.	Geo. Fawcett & Co.
		Mel Klee
	36.	Jean Schwartz—Joie Ray
		M. L. B. A. Comm.
		June 1-3
		5 Arleys
	7.75	Smith, Rogers & Eddy
	7.50	Belle Blanche
		Flynn & Mack
		Babe Egan & Red Heads
		M. L. B. A. Comm.
	20.	657.58
		1418.75
		2076.33
		29.41
		2046.92

Check No. 11747

Theatre BOULEVARD

City New York

Week Ending June 3, 1932

RECEIPTS

	Weather	Date			Total For the Day
800.	Clear—Warm	Sat.	Mat.	5/28	149.60
	" "	"	Eve.	"	817.10	1266.70
18.	Cldy—Cool	Sun.	Mat.	29	573.20
30.	" "	"	Eve.	"	1129.10	1702.30
	Clear—Warm	Mon.	Mat.	30	276.60	194.90
	" "	"	Eve.	"	681.90	958.50
450.	" "	Tues.	Mat.	31	329.20	4122.40
	" "	"	Eve.	"	264.50	593.70
60.	" Very "	Wed.	Mat.	6/1	177.10	
	" " "	"	Eve.	"	236.50	413.60
18.	Cldy "	Thur.	Mat.	2	198.50	
	" "	"	Eve.	"	197.10	395.60
40.	Clear—Warm	Fri.	Mat.	3	167.60	
2.75	" "	"	Eve.	"	193.40	361.
1418.75						$5691.40
	Late Show					194.90
	MISC. RECEIPTS					5846.30
11736 122.14	Salary Refund—W. E. 5/27			5/31	14.73
37 38.	Napkin Dep.			6/1	4.—
38 244.28					
39 217.14	TOTAL INCOME				$5905.03
40 190.	Expense				
46 42.72	Pay Roll			$1647.47	
854.28	Trade Bills			$ 657.58	
	Films & Acts			$2880.17	5185.22
	Check No. 11749 Balance				719.81
41 142.50				Overhead	840.
42 47.50	These Lines to be Left Blank By Manager			Profit Loss	120.19
43 71.25					
44 71.25	REMARKS & OPPOSITION				
45 244.28				673.59	
46 30.36				46.22	
607.14					
	Last Year—Recpts				4767.03
1461.42	Exp.				5263.41
	Deficit				496.38
Total $2880.17					

A. BERNSTEIN
Bus. Manager

Payroll (Check No. 4739)	No. of Empl.	Trade Bills	Check No. 4738	
Bus. Manager	1 70.	Newspapers		6.51
Asst. Bus. Manager	1 35.	Other Advertising		
		Lobby Stills Photos		3.56
Treasurer		Display Cut Outs		24.70
Asst. Treasurer		Posters—Lith.—Cards		77.45
Cashiers	4 72.	Trailers		8.75
Doormen	1 25.	Loew's W'kly & Add.		50.13
Special Officers		" " Postage	4739	24.22
Ushers	9 126.	Sign Shop		108.
Matron	1 14.	Bill Posting		4.16
Pages				
Watchman		Maintenance—Repairs		85.52
		Booth Supplies		27.39
Superintendent	1 30.	Cleaners Supplies		23.04
Cleaners	5 54.80	Office Supplies		
Porters	4 72.	Elec. Supplies		5.76
Engineer	1 60.	Cooling Plant Supplies		
Fireman	1 30.	" " Gas		122.50
		" " Water		
Stage Manager	1 73.	" Elec. Power		30.96
Electrician		Carbons		
Asst. Electrician	1 69.	Coal—Steam		
Property Man	1 70.	Electric Light & Power		262.50
Carpenter	1 70.	Fire Alarm Service		
Cleaners		Lamps		
Flymen		Music Scores & Records		23.
Operators	7 357.	Organ Maintenance		
Stage Doorman	1 14.	Piano Rental		
Reel Boys		Telephone & Telegraph		
		Tickets		
Orchestra	11 1149.	Ice, Cups and Filter Service		
		Booking Office		350.
Bill Poster	1 40.	Detective Service		19.95
Publicity Man		Express		1.
Midnite	3 38.10	Film Delivery		7.50
Overtime		Production Exp.		
		Traveling Exp.		
Stage	4 28.50	Relief Mgr.		
		V. M. P. A. Dues		
		"Sound" Service Fee		40.
		Miscel. Expense	4739	50.15
		Sign Shop Credit		12.
		Carbons Credit		13.54
Total $2497.40			Total	$1331.21

Films and Acts			Check No. 4738	
FILMS				
May 21-22-23-24			Metro	700.
			Metro	40.
Letty Lynton				
News #268				
May 25-26-27				
Sky Bride			Para	450.
News #269			Metro	30.
				1220.
ACTS			Weather	
May 21-22-23-24			Warm	
			"	
3 St. John Brothers			Cool	
Bert Walton & Co.			"	
Benny Davis & Gang			Clear	
M. L. B. A. Commission			Clear & Cool	
			Cool	
May 25-26-27			"	
			Warm	
The Duponts			"	
Kerr & Ensign			"	
Reis & Dunn			Warm	
Seed & Austin			Showers	
Dave Gould's Boys & Girls				
M. L. B. A. Commission			1931	
				9810
				7577.95
				2232.05
			4729	122.14
			4730	190.
			4731	950.
			4737	66.43
			4732	101.78
			4733	101.78
			4734	118.75
			4735	203.58
			4736	325.72
			4737	44.82
Film				
Acts May 21-22-23-24				1220.
Acts May 25-26-27				1328.57
				896.43
			Total	$3445.00

Theatre ORPHE
City New Yor
Week Ending

RECEIPT

Midnit

MISC. RE

Refund 30 x

Deduction err

To

Expense
Pay Roll
Trade Bills
Films & Acts

Check No. 4740 Balance—Defic

These Lines to be Left Blank
By Manager

REMARKS & OP

Trade Bills	No. 4738	Films and Acts	No. 4738	
Newspapers	6.51	FILMS		
Other Advertising				
Lobby Stills Photos	3.56	May 21-22-23-24	Metro	700.
Display Cut Outs	24.70		Metro	40.
Posters—Lith.—Cards	77.45	Letty Lynton		
Trailers	8.75	News #268		
Loew's W'kly & Add.	50.13			
" " Postage	4739 24.22	May 25-26-27		
Sign Shop	108.			
Bill Posting	4.16	Sky Bride	Para	450.
		News #269	Metro	30.
Maintenance—Repairs	85.52			1220.
Booth Supplies	27.39		Weather	
Cleaners Supplies	23.04		Warm	
Office Supplies			"	
Elec. Supplies	5.76		Cool	
Cooling Plant Supplies			"	
" " Gas	122.50		Clear	
" " Water			Clear & Cool	
" Elec. Power	30.96		Cool	
Carbons			"	
Coal—Steam			Warm	
Electric Light & Power	262.50	ACTS	"	
Fire Alarm Service			"	
Lamps			Warm	
Music Scores & Records	23.	May 21-22-23-24	Showers	
Organ Maintenance				
Piano Rental		3 St. John Brothers		1931
Telephone & Telegraph		Bert Walton & Co.		9810
Tickets		Benny Davis & Gang		7577.95
Ice, Cups and Filter Service		M. L. B. A. Commission		2232.05
Booking Office	350.		4729	122.14
Detective Service	19.95	May 25-26-27	4730	190.
Express	1.		4731	950.
Film Delivery	7.50	The Duponts	4737	66.43
		Kerr & Ensign		
Production Exp.		Reis & Dunn		
Traveling Exp.		Seed & Austin		
Relief Mgr.		Dave Gould's Boys & Girls		
V. M. P. A. Dues		M. L. B. A. Commission		
"Sound" Service Fee	40.		4732	101.78
			4733	101.78
Miscel. Expense	4739 50.15	Film	4734	118.75
Sign Shop Credit	12.	Acts May 21-22-23-24	4735	203.58
Carbons Credit	13.54	Acts May 25-26-27	4736	325.72
			4737	44.82
Total	$1331.21			1220.
				1328.57
				896.43
			Total	$3445.00

Theatre ORPHEUM, A. F.

City New York

Week Ending May 27, 1932

RECEIPTS

	Weather	Date			Total For the Day
Metro 700.	Warm	Sat.	Mat.	5/21	468.60
Metro 40.	"	"	Eve.	"	908.80	1377.40
	Cool	Sun.	Mat.	5/22	868.95
	"	"	Eve.	"	1574.15	2443.10
Para 450.	Clear	Mon.	Mat.	5/23	474.65
Metro 30.	Clear & Cool	"	Eve.	"	616.60	1091.25
1220.	Cool	Tues.	Mat.	5/24	309.20
	"	"	Eve.	"	592.35	81 [illegible]
	Warm	Wed.	Mat.	5/25	297.50
	"	"	Eve.	"	444.25	741.75
	"	Thur.	Mat.	5/26	241.55
	"	"	Eve.	"	369.85	611.40
	Warm	Fri.	Mat.	5/27	218.80
	Showers	"	Eve.	"	315.15	533.95
	1931					$7610.10
	9810	Midnite 5/21/32				165.50
	7577.95	MISC. RECEIPTS				8075.90
	2232.05					
		Cups 5/23 25.				
		Refund 30 x 40 frame 5/27 11.				
		Deduction error [illegible] 5/20				811.59
						20
		TOTAL INCOME				$8111.70
		Expense				
		Pay Roll			$2497.40	
		Trade Bills			$1331.21	
		Films & Acts			$3445.	7273.61
		Check No. 4740 Balance—Deficit				$ 838.09
		These Lines to be Left Blank By Manager			Overhead	1740.
					Profit Loss	901.91
		REMARKS & OPPOSITION				

W. ACKERMAN
Bus. Manager

Complainants' Exhibit B-13.

Payroll (Check Nos. 7859, 7860)	No. of Empl.		Trade Bills	Check No. 7858	
Bus. Manager	1	95.00	Newspapers		594.92
Asst. Bus. Manager	1	45.00	Other Advertising		
			Lobby Stills Photos		
Treasurer			Display Cut Outs		64.52
Asst. Treasurer			Posters—Lith.—Cards		7.82
Cashiers	2	35.00	Trailers		1.66
Doormen	1	26.00	Loew's W'kly & Add.		47.50
Special Officers	1	20.00	" " Postage	7860	49.36
Ushers	8	100.00	Sign Shop		
Matron	1	13.00	Bill Posting		75.00
Pages					
Watchman	1	21.00	Maintenance—Repairs		96.00
			Booth Supplies		68.00
Superintendent	1	24.00	Cleaners Supplies		
Cleaners	1	51.00	Office Supplies		7.53
Porters	3	60.00	Elec. Supplies		2.89
Engineer	1	55.00	Cooling Plant Supplies		23.15
Fireman	1	50.00	" " Gas		
			" " Water		
Stage Manager	1	79.00	" Elec. Power		
Electrician	1	73.00	Carbons		
Asst. Electrician	1	73.00	Coal—Steam		188.84
Property Man	1	79.00	Electric Light & Power		178.37
Carpenter			Fire Alarm Service		
Cleaners	2	146.00	Lamps		
Flymen			Music Scores		15.00
Operators	4	399.00	Organ Maintenance		
Stage Doorman	1	20.00	Piano Rental		
Reel Boys			Telephone & Telegraph		42.86
			Tickets		
Orchestra	13	917.00	Filter Service		13.00
			Booking Office		450.00
Bill Postgr	1	36.00	Detective Service		
Publicity Man			Express		
			Film Delivery		10.00
Overtime			Production Exp.		
			Traveling Exp.		
			Relief Mgr.		
			V. M. P. A. Dues		
			"Sound" Service Fee		40.00
			Exp. Proj. Dept.		1.00
			Mats—Cuts		9.58
			Miscel. Expense	7860	17.04
			Charity May 8th	7861	141.00
Total		$2417.00		Total	$2145.04

Check No. 7858		Films and Acts
		FILMS
		Metro-Goldwyn-Mayer
	3000.00	Letty Lynton
	40.00	News 264
	30.00	News 265
	42.00	London—City of Tradition
	35.00	Nanny
		National Screen
	20.00	Trailer—Letty Lynton
		Metro-Goldwyn-Mayer
	10.50	Tennis—Technique 10/31
	10.50	Forehand, Backhand 11/7
	10.50	Volley & Smash 11/14
	10.50	Land of Maharajah 10/24
		ACTS
7852	166.25	Stanley Bros. & Attre
7853	190.00	Feeley, Melvin Sister
7854	308.75	Walter Walters & Co.
7855	475.00	Bill Telaak & Co.
7856	1187.50	Joe Laurie Jr. & Co.
7857	122.50	M. L. B. A. Coms.
Total	$5575.00	

Weather

Clear Cool
Clear Cool
Clear Cool
Clear Cool
Clear Cool
Clear Cold
Clear Cold
Clear Cold
Clear Cold
Clear Cold
Clear Cold
Clear Cool
Clear Cool

Expense
Pay Roll
Trade Bills
Films & Acts

Check No.

These Lines to be
By Mana

1931
18958.82
11477.75
7481.07

919

Complainants' Exhibit B-13.

Trade Bills	Check No. 7858	
wspapers		594.92
er Advertising		
obby Stills Photos		
Display Cut Outs		64.52
sters—Lith.—Cards		7.82
ilers		1.66
w's W'kly & Add.		47.50
" " Postage	7860	49.36
n Shop		
l Posting		75.00
intenance—Repairs		96.00
th Supplies		68.00
aners Supplies		
ce Supplies		7.53
c. Supplies		2.89
ling Plant Supplies		23.15
" " Gas		
" " Water		
" Elec. Power		
bons		
l—Steam		188.84
ctric Light & Power		178.37
e Alarm Service		
mps		
sic Scores		15.00
an Maintenance		
no Rental		
ephone & Telegraph		42.86
kets		
er Service		13.00
king Office		450.00
ective Service		
press		
n Delivery		10.00
duction Exp.		
veling Exp.		
ief Mgr.		
M. P. A. Dues		
und" Service Fee		40.00
. Proj. Dept.		1.00
ts—Cuts		9.58
cel. Expense	7860	17.04
rity May 8th	7861	141.00
Total		$2145.04

Check No. 7858		Films and Acts
		FILMS
		Metro-Goldwyn-Mayer
	3000.00	Letty Lynton
	40.00	News 264
	30.00	News 265
	42.00	London—City of Tradition
	35.00	Nanny
		National Screen
	20.00	Trailer—Letty Lynton
		Metro-Goldwyn-Mayer
	10.50	Tennis—Technique 10/31
	10.50	Forehand, Backhand 11/7
	10.50	Volley & Smash 11/14
	10.50	Land of Maharajah 10/24
		ACTS
7852	166.25	Stanley Bros. & Attre
7853	190.00	Feeley, Melvin Sister
7854	308.75	Walter Walters & Co.
7855	475.00	Bill Telaak & Co.
7856	1187.50	Joe Laurie Jr. & Co.
7857	122.50	M. L. B. A. Coms.

Theatre LOEW'S STATE
City Newark, N. J.
Week Ending Fri. May 13th, 1932

RECEIPTS

Weather	Date			Total For the Day
Clear Cool	Sat. Mat.	7	1141.25	
Clear Cool	" Eve.	"	2245.80	3387.05
Clear Cool	Sun. Mat.	8	1611.90	
Clear Cool	" Eve.	"	2607.90	4219.80
Clear Cool	Mon. Mat.	9	999.80	
Clear Cold	" Eve.	"	994.70	1994.50
Clear Cold	Tues. Mat.	10	761.70	
Clear Cold	" Eve.	"	1328.30	2090.00
Clear Cold	Wed. Mat.	11	799.90	
Clear Cold	" Eve.	"	1568.70	2368.60
Clear Cold	Thur. Mat.	12	768.00	
Clear Cold	" Eve.	"	1097.70	1865.70
Clear Cool	Fri. Mat.	13	528.10	
Clear Cool	" Eve.	"	970.20	1498.30
				$17423.95

MISC. RECEIPTS

Bank Int. Apr. 4.23

TOTAL INCOME $17428.18

Expense

Pay Roll	$2417.00	
Trade Bills	$2145.04	
Films & Acts	$5575.00	10137.04
Check No.	Balance—Deficit	$ 7291.14
These Lines to be Left Blank By Manager	Overhead 3950.	
	Profit Loss	3341.14

REMARKS & OPPOSITION

1931
18958.82
11477.75
7481.07

WM. S. PHILLIPS
Bus. Manager

Complainants' Exhibit B-27.

Payroll (Check No. 1638)	No. of Empl.		Trade Bills	Check No.	
Bus. Manager	1	90.	Newspapers	1639	1273.—
Asst. Bus. Manager	8	85.—	Other Advertising		
Treasurer Auditor	1	5.—	Lobby Stills Photos		
Asst. Treasurer			Display Cut Outs		217.40
Cashiers	3	62.—	Posters—Lith.—Cards		118.17
Doormen	2	53.—	Trailers		18.61
Special Officers	2	53.—	Loew's W'kly & Add.		104.25
Ushers Male	19	228.52	" " Postage		42.54
Matron	4	48.—	Sign Shop		40.—
Pages	10	129.26	Bill Posting		186.—
Watchman	1	22.—	Carpe Repairs		46.55
Ushers Girl	5	70.—	Mainfenance—Repairs		200.—
Superintendent	1	35.—	Booth Supplies		1.45
Cleaners	10	178.92	Cleaners Supplies		53.28
Porters	3	69.50	Office Supplies		2.88
Engineer	1	60.—	Elec. Supplies		71.67
Fireman			Cooling Plant Supplies		
Stage Manager	1	73.—	" " Gas		122.50
Electrician	1	70.—	" " Water		52.70
Asst. Electrician	2	132.—	" Elec. Power	1640	80.—
Property Man	1	70.—	Carbons	1639	71.31
Carpenter			Coal—Steam		
Clearers			Electric Light & Power	1640	560.—
Flymen	1	65.—	Fire Alarm Service	1639	
Operators	5	357.—	Banners		59.50
Stage Doorman	1	20.—	Music Scores		20.—
Reel Boys			Organ Maintenance		
Orchestra	16	1275.—	Hdwe.		5.03
Bill Poster	1	10.—	Telephone & Telegraph		
Publicity Man			Uniforms		57.86
Overtime			Cups		48.94
Musicians	16	219.—	Booking Office		200.—
Stg. Crew	5	165.60	Detective Service		
Operator	5	209.—	Express		5.25
			Cleaners		23.10
			Production Exp. Scenery		250.—
			Traveling Exp.		
			Relief Mgr.		
			V. M. P. A. Dues		
			"Sound" Service Fee		40.—
			" Dept. Chge		2.99
			Credit MT. BBL.		.49
			Miscel. Expense	1638	111.10

Films and Acts	
FILMS	
"Letty Lynton" Metro	
Metro News 266	
267	
ACTS	
Audresseur	
Miss Patricola	
Kramer-Boyle	
Jay Seiler-Frances Wills	
George Sidney	
Smith-Dale	
Goodwin-Raymond	
M. L. B. A. Comm.	

Check No. 1639			Theatre City Week
1639	3000.—		
	40.—	Weather	
	30.—	Warm	Sat "
	3070.—	"	"
		"	Sun "
		"	"
		"	Mon "
		"	"
		"	Tues "
		"	"
		Fair	Wed "
		"	"
		"	Thur "
		"	"
		"	Fri "
		"	"
1630	95.00		
1	475.00	Kotex	
2	475.00	Perfume Com.	
3	522.50		
4	1425.00		
5	1662.50		
6	142.50		
7	252.50		
	5050.00	Expense	
		Pay Roll	
		Trade Bills	
		Films & Acts	
		Check No. 1641 Bala	
		These Lines to be Le By Manager	
		REMA	
Total	$8120.—		

920

Complainants' Exhibit B-27.

Trade Bills	Check No.	
wspapers	1639	1273.—
er Advertising		
obby Stills Photos		
isplay Cut Outs		217.40
sters—Lith.—Cards		118.17
ilers		18.61
w's W'kly & Add.		104.25
" " Postage		42.54
n Shop		40.—
Posting		186.—
pe Repairs		46.55
intenance—Repairs		200.—
th Supplies		1.45
aners Supplies		53.28
ce Supplies		2.88
c. Supplies		71.67
ling Plant Supplies		
" " Gas		122.50
" " Water		52.70
" Elec. Power	1640	80.—
bons	1639	71.31
l—Steam		
ctric Light & Power	1640	560.—
Alarm Service	1639	
ners		59.50
sic Scores		20.—
an Maintenance		
we.		5.03
ephone & Telegraph		
iforms		57.86
s		48.94
king Office		200.—
ective Service		
press		5.25
aners		23.10
duction Exp. Scenery		250.—
veling Exp.		
ief Mgr.		
M. P. A. Dues		
und" Service Fee		40.—
" Dept. Chge		2.99
dit MT. BBL.		.49
scel. Expense	1638	111.10

Films and Acts	
FILMS	
"Letty Lynton" Metro	
Metro News 266	
267	
ACTS	
Audresseur	
Miss Patricola	
Kramer-Boylé	
Jay Seiler-Frances Wills	
George Sidney	
Smith-Dale	
Goodwin-Raymond	
M. L. B. A. Comm.	

Check No. 1639			Theatre STATE City New York Week Ending May 20, 1932			
			RECEIPTS			
1639	3000.—					
	40.—	Weather		Date		Total For the Day
	30.—	Warm	Sat.	Mat. 5/14	2429.85	
	3070.—	"	"	Eve.	3961.80	6391.65
		"	Sun.	Mat. 5/15	1061.75	
		"	"	Eve.	2932.50	3994.25
		"	Mon.	Mat. 5/16	1286.15	
		"	"	Eve.	1264.05	2550.20
		"	Tues.	Mat. 5/17	1076.90	
		"	"	Eve.	1597.35	2674.25
		Fair	Wed.	Mat. 5/18	1124.20	
		"	"	Eve.	2022.45	3146.65
		"	Thur.	Mat. 5/19	810.50	
		"	"	Eve.	1632.45	2442.95
		"	Fri.	Mat. 5/20	636.80	
		"	"	Eve.	1332.25	1969.05
						23169.00
1630	95.00		MISC. RECEIPTS			
1	475.00	Kotex			5/18	10.—
2	475.00	Perfume Com.			5/18	14.12
3	522.50					
4	1425.00					
5	1662.50					
6	142.50					
7	252.50		TOTAL INCOME			$23193.12
	5050.00	Expense				
		Pay Roll			$3884.80	
		Trade Bills			$4085.59	
		Films & Acts			$8120.	16090.39
		Check No. 1641 Balance—Deficit				$ 7102.73
		These Lines to be Left Blank By Manager	Overhead			5170.
			Profit-Loss			1932.73
Total	$8120.—		REMARKS & OPPOSITION			

GEORGE H. MINER
Bus. Manager

Complainants' Exhibit B-29.

Payroll (Check No. 2077)	No. of Empl.	
Bus. Manager		95.
Asst. Bus. Manager		40.
Treasurer		
Asst. Treasurer		
Cashiers	2	36.
Doormen	1	23.
Special Officers		
Ushers	16	218.
Matron	2	19.
Pages		
Watchman		
Superintendent	1	30.
Cleaners	4	48.
Porters	5	90.
Engineer	1	60.
Fireman		
Stage Manager	1	73.
Electrician	2	140.
Asst. Electrician	1	62.
Property Man	1	70.
Carpenter		
Clearers		
Flymen		
Operators	5	357.
Stage Doorman	1	15.
Reel Boys		
House Painter		8.
Orchestra	9	703.
Bill Poster	2	85.
Publicity Man		
Overtime		
E. Ralph Electrican Late show 5/21-23-25		7.50
G. Messmer 4th Show 5/22-29	19	38.
S. Friedman Operator 3 hrs. 5/12/32		7.89
Total		$2225.39

Trade Bills	Check No. 698	
Newspapers	2078	$81.12
Other Advertising		
Lobby Stills Photos		
Display Cut Outs	"	26.80
Posters—Lith.—Cards	"	105.71
Trailers	"	14.60
Loew's W'kly & Add.	"	68.38
" " Postage	2068	37.09
Sign Shop	2078	30.
Bill Posting	"	111.95
Maintenance—Repairs	"	12.
Booth Supplies	"	18.30
Cleaners Supplies	"	5.40
Office Supplies		
Elec. Supplies		
Cooling Plant Supplies		
" " Gas		
" " Water	"	35.
" Elec. Power	"	10.
Carbons		
Coal—Steam		
Electric Light Est.	"	385.
Fire Alarm Service		
Lamps	"	119.95
Music Scores	"	21.90
Organ Maintenance		
Piano Rental		
Telephone & Telegraph		
Tickets	"	24.
Ice, Cups and Filter Service		
Booking Office	"	350.
Detective Service	"	19.95
Express	"	1.50
Film Delivery	"	7.50
Production Exp.		
Traveling Exp.		
Relief Mgr.		
V. M. P. A. Dues		
"Sound" Service Fee	"	40.
Miscel. Expense	2077	54.54
Total		$1580.69

Films and Acts FILMS	Check No.		
May 21-22-23-24			
Letty Lynton	Metro	20.	700.
Down Memory Lane	Col	"	18.
News #268	Metro	"	40.
Letty Lynton Trailer	Adv	"	2.75
May 25-26-27			
Sky Bride	Para	"	450.
War Mamas	Metro	"	60.
News #269	Metro	"	30.
			1300.75

ACTS		
May 21-22-23-24		
Audrey Wyckoff	2063	176.42
Al. Shayne & Co.	2064	122.14
Pepito & Co.	2065	271.42
Birnes & Kaye	2066	149.29
5 Jewels	2067	244.28
M. L. B. A. Commissions	2076	50.73
May 25-26-27		1014.26
Frank Peckless & Co.	2071	40.72
Meryl & Lane	2072	47.50
Walter Walters & Co.	2073	132.33
Sammy Cohen & Co.	2074	305.36
Stohe & Geblows Revue	2075	162.86
M. L. B. A. Commission	2076	36.24
		1739.29
Total		$3040.04

Theatre City Ast Week End R	
Weather	
Clear	Sat. Ma
Rain	" Ev
Clear	Sun. Ma
"	" Ev
"	Mon. Ma
"	" Ev
"	Tues. Ma
"	" Ev
"	Wed. Ma
" & Hot	" Ev
" "	Thur. Ma
" "	" Ev
" "	Fri. Ma
Rain	" Ev

MISC.	
5/25 On Account Benefi Chapter	
5/27—9 Slate—old Lamp	
Expense	
Pay Roll	
Trade Bills	
Films & Acts	
Check No. 2079 Balance	
These Lines to be Left Bl By Manager	
REMARKS	
W/E 5/29/32	
Rec. 10523.01	
Ex. 8800.59	
Bal. 1722.42	

921

Complainants' Exhibit B-29.

rade Bills ers ivertising Stills Photos y Cut Outs Lith.—Cards V'kly & Add. " Postage p ing nce—Repairs upplies Supplies pplies pplies Plant Supplies " Gas " Water Elec. Power eam Light Est. rm Service cores laintenance ental e & Telegraph s and Filter Service Office e Service elivery ion Exp. g Exp. fgr. . A. Dues Service Fee Expense	Check No. 698	
	2078	81.12
	"	26.80
	"	105.71
	"	14.60
	"	68.38
	2068	37.09
	2078	30.
	"	111.95
	"	12.
	"	18.30
	"	5.40
	"	35.
	"	10.
	"	385.
	"	119.95
	"	21.90
	"	24.
	"	350.
	"	19.95
	"	1.50
	"	7.50
	"	40.
	2077	54.54
Total		$1580.69

Films and Acts FILMS	Check No.		
May 21-22-23-24			
Letty Lynton	Metro	2078	700.
Down Memory Lane	Col	"	18.
News #268	Metro	"	40.
Letty Lynton Trailer	Adv	"	2.75
May 25-26-27			
Sky Bride	Para	"	450.
War Mamas	Metro	"	60.
News #269	Metro	"	30.
			1300.75

ACTS		
May 21-22-23-24		
Audrey Wyckoff	2063	176.42
Al. Shayne & Co.	2064	122.14
Pepito & Co.	2065	271.42
Birnes & Kaye	2066	149.29
5 Jewels	2067	244.28
M. L. B. A. Commissions	2076	50.73
May 25-26-27		1014.26
Frank Peckless & Co.	2071	40.72
Meryl & Lane	2072	47.50
Walter Walters & Co.	2073	132.33
Sammy Cohen & Co.	2074	305.36
Stohe & Geblows Revue	2075	162.86
M. L. B. A. Commission	2076	36.24
		1739.29
Total		$3040.04

Theatre TRIBORO
City Astoria, L. I.
Week Ending May 27, 1932

RECEIPTS

Weather	Date			Total For the Day
Clear	Sat. Mat.	5/21	339.50	
Rain	" Eve.	"	1218.00	1557.50
Clear	Sun. Mat.	5/22	1119.15	
"	" Eve.	"	1982.80	3101.95
"	Mon. Mat.	5/23	304.40	
"	" Eve.	"	612.90	917.30
"	Tues. Mat.	5/24	192.65	
"	" Eve.	"	546.20	738.85
"	Wed. Mat.	5/25	152.85	
" & Hot	" Eve.	"	486.90	639.75
" "	Thur. Mat.	5/26	146.60	
" "	" Eve.	"	290.20	436.80
" "	Fri. Mat.	5/27	103.05	
Rain	" Eve.	"	383.70	486.75
				$7878.90

MISC. RECEIPTS

5/25 On Account Benefit Bath Sheba			49.60
Chapter		5/27	2.00
5/27—9 Slate—old Lamps			
TOTAL INCOME			$7930.50
Expense			
Pay Roll	$2225.39		
Trade Bills	$1580.69		
Films & Acts	$3040.04		6846.12
Check No. 2079 Balance			$1084.38
These Lines to be Left Blank By Manager	Overhead		3590.
	Profit Loss		2505.62

REMARKS & OPPOSITION

W/E 5/29/32	Devil to Pay
Rec. 10523.01	
Ex. 8800.59	
Bal. 1722.42	Stepping Out

WM. NITICHKE
Bus. Manager

Complainants' Exhibit B-37.

Payroll (Check Nos. 3632, 3633)	No. of Empl.		Trade Bills	Check No.		Films and Acts	Check No.			Theat City Week
Bus. Manager	1	70.00	Newspapers Est.	3631	550.00					
Asst. Bus. Manager	1	45.00	Other Advertising	"	15.00	FILMS				
			Lobby Stills Photos							
Treasurer	1	40.00	Display Cut Outs	"	75.57	Joan Crawford & Robert Montgomery In			Weather	
Asst. Treasurer			Posters—Lith.—Cards	"	161.45	"Letty Lynton"	3631	2000.00	Unsetl.	Fri
Cashiers	3	41.00	Trailers	"	6.57				Fair	"
Doormen	2	40.00	Loew's W'kly & Add.	"	26.75				Warm	Sat
Special Officers			" " Postage	3633	36.89	Metro-News #266	"	70.00	"	"
Ushers	15	213.00	Sign Shop	3631	100.00				"	Sun
Matron	1	14.00	Bill Posting	"	18.50	Natl. Screen Seve. "Letty Lynton" Met.	"	17.50	"	"
Pages			Sub. & Bus. Est.	"	150.00				"	Mon
Watchman			Maintenance—Repairs	"	200.00				"	"
Checkroom Att.	2	24.00	Booth Supplies	"	31.18	Natl. Screen Seve. "Wet Parade" Met.	"	17.50	"	Tues
Superintendent			Cleaners Supplies	"	39.70				"	"
Cleaners	6	72.00	Office Supplies					2105.00	"	Wed
Porters	6	131.00	Elec. Supplies	"	1.91				"	"
Engineer	2	120.00	Cooling Plant Supplies						"	Thur
Fireman			" " Gas						"	"
			" " Water E.	"	3.65					
Stage Manager	4	83.00	" Elec. Power E.	"	30.00	"Broadway Revue"				
Electrician	3	249.00	Carbons			ACTS				Midnite show Sat
Asst. Electrician	2	166.00	Coal—Steam			Harry Rose	3622	534.37		M
Property Man	2	157.00	Electric Light & Power	"	469.99	Buster Shaver With Olive & George				
Carpenter			Fire Alarm Service			Brasno	3623	617.50	Musician Part Salary	
Clearers	1	74.00	Lamps	"	103.90	Norman Frescott	3625	427.50		
Flymen	2	148.00	Music Scores			Russ Martin Capt. of 12 C. Hale Girls				
Operators	9	688.50	Organ Maintenance			& Boys	3626	550.00	Expense	
Stage Doorman	1	18.00	Piano Rental			6 Extra Girls @ $20.	3627	120.00	Pay Roll	
Reel Boys			Telephone & Telegraph	"	66.97	J. Finn. Carp.	3628	100.00	Trade Bills	
Painter	1	8.00	Tickets			Prod. Expense	3629	1000.00	Films & Acts	
Orchestra	15	1370.00	Ice, Cups and Filter Service			Acts. Comm.	3630	83.13		
Organist	1	89.00	Booking Office	"	900.00				Check No. 3634 Balan	
Bill Poster	2	80.00	Detective Service			Production	3631	85.50		
Publicity Man			Express	"	2.00				These Lines to be Left	
			Film Delivery	"	6.00	Stg. Putting on show	3633	104.50	By Manager	
Overtime			Production Exp.	"	3.53	" Taking out "	"	35.75		
Midnite show 5/14		45.83	Traveling Exp.	"	7.35	" Band Regular	"	225.00	REMAR	
Stg. Ex. 8 Hrs.		60.50	V. M. P. A. Dues						1	
Booth Late show 5/16		11.49	"Sound" Service Fee	"	40.00				1	
" Dismantling										
Lamp House		6.38								
Stg. Install lines P. A.		2.75	Miscel. Expense	3633	66.62					
Total		$4067.45	Total		$3113.53	Total		$5988.25		

Complainants' Exhibit B-37.

Trade Bills	Check No.	
Newspapers Est.	3631	550.00
Other Advertising	"	15.00
Lobby Stills Photos		
Display Cut Outs	"	75.57
Posters—Lith.—Cards	"	161.45
Trailers	"	6.37
Loew's W'kly & Add.	"	26.75
" " Postage	3633	36.89
Sign Shop	3631	100.00
Bill Posting	"	18.50
Pub. & Bus. Est.	"	150.00
Maintenance—Repairs	"	200.00
Rough Supplies	"	31.18
Cleaners Supplies	"	39.70
Office Supplies		
Elec. Supplies	"	1.91
Heating Plant Supplies		
" " Gas		
" " Water E.	"	3.65
" Elec. Power E.	"	30.00
Carbons		
Coal—Steam		
Electric Light & Power	"	469.99
Fire Alarm Service		
Lamps	"	103.90
Music Scores		
Organ Maintenance		
Piano Rental		
Telephone & Telegraph	"	66.97
Tickets		
Ice, Cups and Filter Service		
Booking Office	"	900.00
Detective Service		
Express	"	2.00
Film Delivery	"	6.00
Production Exp.	"	3.53
Traveling Exp.	"	7.35
M. P. A. Dues		
"Sound" Service Fee	"	40.00
Miscel. Expense	3633	66.62
Total		$3113.53

Films and Acts	Check No.		
FILMS			
Joan Crawford & Robert Montgomery In "Letty Lynton"	3631	2000.00	Unsetl.
			Fair
			Warm
Metro-News #266	"	70.00	"
			"
Natl. Screen Seve. "Letty Lynton" Met.	"	17.50	"
			"
			"
Natl. Screen Seve. "Wet Parade" Met.	"	17.50	"
			"
		2105.00	"
			"
			"
			"
ACTS			
Harry Rose	3622	534.37	
Buster Shaver With Olive & George Brasno	3623	617.50	
Norman Frescott	3625	427.50	
Russ Martin Capt. of 12 C. Hale Girls & Boys	3626	550.00	
6 Extra Girls @ $20.	3627	120.00	
J. Finn. Carp.	3628	100.00	
Prod. Expense	3629	1000.00	
Acts. Comm.	3630	83.13	
Production	3631	85.50	
Stg. Putting on show	3633	104.50	
" Taking out "	"	35.75	
" Band Regular	"	225.00	
Total		$5988.25	

Theatre VALENCIA
City Jamaica, N. Y.
Week Ending May 19, 1932.

RECEIPTS

Date				Total For the Day
Fri.	Mat.	5/13	899.50	
"	Eve.	13	1666.05	2565.55
Sat.	Mat.	14	808.45	
"	Eve.	"	2783.55	3592.00
Sun.	Mat.	15	902.55	
"	Eve.	"	2625.00	3527.55
Mon.	Mat.	16	750.80	
"	Eve.	"	1401.05	2151.85
Tues.	Mat.	17	659.25	
"	Eve.	"	1183.95	1843.20
Wed.	Mat.	18	822.40	
"	Eve.	"	1659.15	2481.55
Thur.	Mat.	19	687.70	
"	Eve.	"	1210.35	1898.05
				$18059.75
Midnite show Sat. 5/14				318.25

MISC. RECEIPTS
W/E

Musician Part Salary 5/15	5/17	2.00
TOTAL INCOME		$18380.00

Expense		
Pay Roll	$4067.45	
Trade Bills	$3113.53	
Films & Acts	$5988.25	13169.23
Check No. 3634 Balance		$ 5210.77
These Lines to be Left Blank By Manager — Overhead		7650.
These Lines to be Left Blank By Manager — Profit Loss		2439.23

REMARKS & OPPOSITION
17395.07
16500.59
894.48

A. D. ROBERTSON
Bus. Manager

Complainants' Exhibit B-39.

Payroll (Check No. 871)	No. of Empl.	
Bus. Manager		70.
Asst. Bus. Manager		30.
Treasurer		
Asst. Treasurer		
Cashiers	2	36.
Doormen	1	22.
Special Officers		
Ushers	10	117.
Matron	1	12.
Pages Mezz. Mt.	1	14.
Watchman	1	21.
Superintendent	1	30.
Cleaners	4	48.
Porters	3	54.
Engineer	2	120.
Fireman		
Painter	1	8.
Stage Manager	1	73.
Electrician	2	140.
Asst. Electrician	1	62.
Property Man	1	70.
Carpenter		
Clearers		
Flymen		
Operators	5	357.
Stage Doorman	1	15.
Reel Boys		
Orchestra		900.—
Bill Poster	2	85.
Publicity Man		
Overtime		
Operators		12.76
Orchestra		18.
Orchestra		36.—
Stage Hands		46.75
Midnight Show		20.26
Total		$2417.77

Trade Bills	Check No. 870	
Newspapers		70.91
Other Advertising		
Lobby Stills Photos		26.25
Display Cut Outs		50.42
Posters—Lith.—Cards		90.88
Trailers		12.20
Loew's W'kly & Add.		120.38
" " Postage		178.60
Sign Shop		30.
Bill Posting		40.
Maintenance—Repairs		137.27
Booth Supplies		166.35
Cleaners Supplies		18.31
Office Supplies		
Elec. Supplies		
Cooling Plant Supplies		
" " Gas		208.25
" " Water		
" Elec. Power		150.
Carbons		71.31
Coal—Steam		
Electric Light & Power		295.
Fire Alarm Service		
Lamps		
Music Scores		15.
Organ Maintenance		
Piano Rental		
Telephone & Telegraph		
Tickets		19.45
Ice, Cups and Filter Service		
Booking Office		400.
Detective Service		19.95
Express		1.06
Film Delivery		7.50
Production Exp.		
Traveling Exp.		4.50
V. M. P. A. Dues		
"Sound" Service Fee		40.—
Miscel. Expense Ck #871		48.41
Total		$2222.00

Films and Acts			
FILMS			
May 21-22-23-24			
Metro	Letty Lynton		700.—
Metro	News #268		40.
Metro	War Mamas		40.
Adv.	Letty Lynton Tr.		2.75
May 25-26-27			
Para.	Sky Brides		450.—
Metro	News #269		30.
Pathe	Extra Extra		30.
Col.	18th Amendt. Repeal		12.
April 9-15			
War	Man Who Played God Tr.		5.—
			1309.75
ACTS			
May 21-22-23-24			
Donals Sisters			81.42
3 Keena Sisters			95.
Carl Emmy's Pets			285.
Eddie Pardo & Co			325.72
Southern Gaities Co			298.58
M. L. B. A. Comm.			57.14
			1142.86
May 25-26-27			
John & Mary Mason			—
Mel Klee			162.86
N. T. G. & Revue			712.50
M. L. B. A. Comm.			46.07
			2064.29

Check No. 870		
	Theatre P	
	City Broo	
	Week Endi	
	Re	
700.—		
40.	Weather	
40.	Fair	Sat. Mat
2.75	Rain	" Eve
	Fair	Sun. Mat
450.—	"	" Eve
30.	"	Mon. Mat
30.	"	" Eve
12.	"	Tues. Mat
"	"	" Eve
5.—	"	Wed. Mat
"	"	" Eve
1309.75	Warm	Thurs. Mat
"	"	" Eve
	Fair	Fri. Mat
	Rain	" Eve
	1931	
	Gross 10449.65	
81.42	Exp. 8907.19	M
95.		
285.	Co. Ex. 1542.46	
325.72		Misc.
298.58		
57.14		
1142.86		
	Expense	
—	Pay Roll	
162.86	Trade Bills	
712.50	Films & Acts	
46.07		
	Check No. 872 Balance	
2064.29		
	These Lines to be Left Bl	
	By Manager	
	Remarks	
Total	$3374.04	

923

Complainants' Exhibit B-39.

Trade Bills	Check No. 870	
Newspaper		70.91
Other Advertising		
Lobby Stills Photos		26.25
Display Cut Outs		50.42
Posters—Lith.—Cards		90.88
Trailers		12.20
Loew's W'kly & Add.		120.38
" " Postage		178.60
Sign Shop		30.
Bill Posting		40.
Maintenance—Repairs		137.27
Booth Supplies		166.35
Cleaners Supplies		18.31
Office Supplies		
Elec. Supplies		
Cooling Plant Supplies		
" " Gas		208.25
" " Water		
" Elec. Power		150.
Carbons		71.31
Coal—Steam		
Electric Light & Power		295.
Fire Alarm Service		
Lamps		
Music Scores		15.
Organ Maintenance		
Piano Rental		
Telephone & Telegraph		
Tickets		19.45
Ice, Cups and Filter Service		
Booking Office		400.
Detective Service		19.95
Express		1.06
Film Delivery		7.50
Production Exp.		
Traveling Exp.		4.50
V. M. P. A. Dues		
"Sound" Service Fee		40.—
Miscel. Expense Ck #871		48.41
Total		$2222.00

Films and Acts			
FILMS			
May 21-22-23-24			
Metro	Letty Lynton		700.—
Metro	News #268		40.
Metro	War Mamas		40.
Adv.	Letty Lynton Tr.		2.75
May 25-26-27			
Para.	Sky Brides		450.—
Metro	News #269		30.
Pathe	Extra Extra		30.
Col.	18th Amendt. Repeal		12.
April 9-15			
War	Man Who Played God Tr.		5.—
			1309.75
ACTS			
May 21-22-23-24			
Donals Sisters			81.42
3 Keena Sisters			95.
Carl Emmy's Pets			285.
Eddie Pardo & Co			325.72
Southern Gaities Co			298.58
M. L. B. A. Comm.			57.14
			1142.86
May 25-26-27			
John & Mary Mason			—
Mel Klee			162.86
N. T. G. & Revue			712.50
M. L. B. A. Comm.			46.07
			2064.29

Theatre PITKIN
City Brooklyn, N. Y.
Week Ending May 27 1932

RECEIPTS

Check No. 870					Total For the Day
700.—					
40.	Weather		Date		
40.	Fair	Sat. Mat.	5/21	765.40	
2.75	Rain	" Eve.		1689.10	2454.50
	Fair	Sun. Mat.	5/22	691.45	
450.—	"	" Eve.		1676.	2367.45
30.	"	Mon. Mat.	5/23	343.65	
30.	"	" Eve.		351.35	695.
12.	"	Tues. Mat.	5/24	248.55	
"	"	" Eve.		348.65	597.20
5.—	"	Wed. Mat.	5/25	432.70	
"	"	" Eve.		484.95	917.65
1309.75	Warm	Thurs. Mat.	5/26	435.45	
"	"	" Eve.		436.	871.45
	Fair	Fri. Mat.	5/27	293.75	
	Rain	" Eve.		574.10	867.85
	1931				$8771.10
	Gross 10449.65				
81.42	Exp. 8907.19	Mid. Show 5/21			1027.80
95.					
285.	Co. Ex. 1542.46				
325.72		MISC. RECEIPTS			
298.58					
57.14		TOTAL INCOME			$9798.90
1142.86					
	Expense				
—	Pay Roll			$2417.77	
162.86	Trade Bills			$2222.00	
712.50	Films & Acts			$3374.04	8013.81
46.07					
2064.29	Check No. 872 Balance				$1785.09
	These Lines to be Left Blank By Manager		Overhead		7600.
			Loss		5814.91
	REMARKS & OPPOSITION				
Total	$3374.04				

SEYMOUR R. MAY
Bus. Manager

MICRO CARD
TRADE MARK ®
22
39
14116 2
MATTHEW BENDER & COMPANY
MB
65
microcard

Complainants' Exhibit B-43.

Payroll (Check No. 6192)	No. of Empl.		Trade Bills	Check No.		Films and Acts
Bus. Manager	1	150.00	Newspapers	6212-13-14	310.00	FILMS
Asst. Bus. Manager	1	50.00	Other Advertising			M. G. M. Dist. Corp.
			Lobby Stills Photos			"Letty Lynton"
			Display Cut Outs	6193	58.29	
Treasurer				6194		
Asst. Treasurer			Posters—Lith.—Cards	6199	138.18	News #262
Cashiers	3	52.00	Trailers	6195-96	8.69	"Spanky"—Our Gang
Doormen	2	42.00	Loew's W'kly & Add.			Olympic Events
Rel. " & Adv.	1	25.00	" " Postage			
Ushers	7	87.60	Sign Shop	6197-98	10.09	Universal Film Exch.
Matron	1	7.00	Bill Posting	6200	3.79	Airmail Mystery #4
			Exterminating			
Ck. Rm.	1	14.00	Erad. Service	6202	18.00	
Watchman	1	23.00	N. P. Cuts	6212	18.86	National Screen Serv.
Elec. Maint.	1	51.98	Booth Supplies			"Tr. Letty Lynton"
Superintendent	1	25.00	Cleaners Supplies	6201	10.78	
Cleaners	5	65.00	Office Supplies			
Porters	3	57.00	Elec. Supplies	6211	2.71	
Engineer	1	49.00	Cooling Plant Supplies			
Fireman			" " Gas			
Artist	1	55.00	" " Water			
Stage Manager	1	81.00	" Elec. Power			"Whirligigs"
Electrician	1	72.45	Carbons			ACTS
Asst. Electrician			Steam	6205	200.00	Paul Kirkland
Property Man	2	91.00	Electric Light & Power	6205	300.00	Barte & Arden
Carpenter	1	58.50	Water General Service	6215	38.91	Four Flash Devils
Clearers	1	54.00	Lamps			LaVernes
Flymen	1	60.75	Music Scores			Three White Flashes
Operators	4	287.10	Organ Maintenance			Paul Keast
Stage Doorman		15.00	Piano Rental			George Giddon
Reel Boys			Telephone & Telegraph	6203	15.87	Gene DuPont
Organist	1	75.00	Tickets			C. Beverly—Captain
Orchestra			Ice, Cups and Filter Service			E. Warefield—Carp.
			Booking Office	6193	275.00	MLBA Production Exp.
Bill Poster			Detective Service	6193	7.60	MLBA Commissions
Publicity Man			Express			2 extra local girls
			Film Delivery	6210	7.95	Stage Band
Overtime			Production Exp.			Carloader
Booth	4	10.00	Traveling Exp.			Hauling Unit—Burke & McHugh
			Relief Mgr.	6193	165.45	
Organ Broad.	1	35.00	V. M. P. A. Dues			
			"Sound" Service Fee	6204	40.00	
			Credit ? ?	6193	20.68	Less $20.68 MLBA credit
			Miscel. Expense	6192	93.96	
Total		$1595.98	Total		$1703.45*	

Check No.			Films and Acts
FR	1239.50		
6206	75.00		
6206	100.00	Weather	
6206	50.00	Cool	
		"	
		Rn.—Cold	
6207	12.50	" "	
		Cold	
		Rn.—Cold	
		Cold	
6208	17.75	"	
		Fair	
		Cool	
		"	
		"	
	1494.75	"	
		"	
		Total Attend.	
6178	285.00		
6179	178.12		
6180	398.75		
6181	178.12		
6182	195.94		
6183	142.50		
6184	60.00		
6185	30.00		
6186	720.00		
6187	100.00		
6189	100.00		
6190	67.82		
6188	30.00		
6192	931.00	Expense	
6192	20.00	Pay Roll	
6209	49.00	Trade Bills	
		Films & Ac	
	3396.25	Check No.	
Total	$4891.00		

924

Complainants' Exhibit B-43.

Trade Bills	Check No.		Films and Acts
wspapers	6212-13-14	310.00	FILMS
her Advertising			M. G. M. Dist. Corp.
Lobby Stills Photos			"Letty Lynton"
Display Cut Outs	6193	58.29	
	6194		
ters—Lith.—Cards	6199	138.18	News #262
ilers	6195-96	8.69	"Spanky"—Our Gang
w's W'kly & Add.			Olympic Events
" " Postage			
n Shop	6197-98	10.09	Universal Film Exch.
Posting	6200	3.79	Airmail Mystery #4
Exterminating			
d. Service	6202	18.00	
P. Cuts	6212	18.86	National Screen Serv.
th Supplies			"Tr. Letty Lynton"
ners Supplies	6201	10.78	
e Supplies			
Supplies	6211	2.71	
ling Plant Supplies			
" " Gas			
" " Water			
" Elec. Power			"Whirligigs"
bons			ACTS
m	6205	200.00	Paul Kirkland
tric Light & Power	6205	300.00	Barte & Arden
er General Service	6215	38.91	Four Flash Devils
ps			LaVernes
ic Scores			Three White Flashes
an Maintenance			Paul Keast
o Rental			George Giddon
phone & Telegraph	6203	15.87	Gene DuPont
ets			C. Beverly—Captain
Cups and Filter Service			E. Warefield—Carp.
king Office	6193	275.00	MLBA Production Exp.
ective Service	6193	7.60	MLBA Commissions
ress			2 extra local girls
n Delivery	6210	7.95	Stage Band
duction Exp.			Carloader
veling Exp.			Hauling Unit—Burke & McHugh
ief Mgr.	6193	165.45	
M. P. A. Dues			
und" Service Fee	6204	40.00	
dit ? ?	6133	20.68	Less $20.68 MLBA credit
cel. Expense	6192	93.96	
Total		$1703.45*	

Theatre LOEW'S ROCHESTER
City Rochester, New York
Week Ending May 5, 1932

Check No.			Date		Total For the Day
		RECEIPTS			
FR	1239.50				
6206	75.00				
6206	100.00	Weather			
6206	50.00	Cool	Fri. Mat.	4/29	540.50
		"	" Eve.		961.80 1502.30
		Rn.—Cold	Sat. Mat.	4/30	927.05
6207	12.50	" "	" Eve.		1469.80 2396.85
		Cold	Sun. Mat.	5/1	724.45
		Rn.—Cold	" Eve.		1219.20 1943.65
		Cold	Mon. Mat.	5/2	488.70
6208	17.75	"	" Eve.		464.65 953.35
		Fair	Tues. Mat.	5/3	646.55
		Cool	" Eve.		608.30 1254.85
		"	Wed. Mat.	5/4	449.50
		"	" Eve.		562.20 1011.70
	1494.75	"	Thur. Mat.	5/5	524.45
		"	" Eve.		574.30 1098.75
		Total Attend.—25,175			$10161.45
6178	285.00				
6179	178.12				
6180	308.75				
6181	178.12				
6182	195.94				
6183	142.50		MISC. RECEIPTS		
6184	60.00		Napkins	5/4	9.50
6185	30.00		Cups	5/4	3.71
6186	720.00		Weight Mach.	5/4	6.14
6187	100.00		Candy Comm.	5/5	3.28
6189	100.00				
6190	67.82		TOTAL INCOME		$10184.08
6188	30.00				
6192	931.00	Expense			
6192	20.00	Pay Roll		$1593.38	
6192	49.00	Trade Bills		$1703.45	
6209		Films & Acts		$4891.00	8187.83
	3396.25	Check No.	Balance		$1996.25
			Overhead	3670.	
Total	$4891.00		Loss	1673.75	

Complainants' Exhibit C-3.

Payroll (Check No. 7178)	No. of Empl.		Trade Bills	Check No.		Films and Acts
Bus. Manager		70.—	Newspapers	7177	61.20	
Asst. Bus. Manager		30.—	Other Advertising			FILMS
			Lobby Stills Photos		6.25	
Treasurer			Display Cut Outs		41.42	May 28-29-30-31
Asst. Treasurer			Posters—Lith.—Cards		159.06	Letty Lynton
Cashiers	3	41.72	Trailers		50.62	Down Memory Lane
Doormen	2	44.—	Loew's Wkly & Add.		86.—	Hearst Metro News 270
Special Officers			" " Postage		46.49	
Ushers	12	135.—	Sign Shop		34.—	
Matron		12.—	Bill Posting	Bal 55.05	120.55	June 1-2-3
Pages			Subway Est.		125.—	Sky Bride
Watchman		22.—	Maintenance—Repairs		51.74	War Mamas
			Booth Supplies		60.85	Hearst Metro News 271
Superintendent			Cleaners Supplies			Letty Lynton Sound
Cleaners	5	61.—	Office Supplies		1.80	What A Knight 5/14-17
Porters	3	65.—	Elec. Supplies			
Engineer	2	120.—	Cooling Plant Supplies Oil		15.50	
Fireman			" " Gas			
			" " Water		60.—	
Stage Manager		73.—	" Elec. Power		175.—	
Electrician		70.—	Carbons		71.31	ACTS
Asst. Electrician		62.—	Coal—Steam			
Property Man		70.—	Electric Light & Power		225.—	May 28-29-30-31
Carpenter			Fire Alarm Service			Hoffman & Lambert
Clearers			Lamps			Elmer Cleve
Flymen		62.—	Music Scores		15.—	Miss Juliet
Operators	5	357.—	Organ Maintenance			Russ Brown
Stage Doorman		20.—	Piano Rental		36.—	Bernice & Emily Co
Reel Boys			Telephone & Telegraph		15.45	Act Comm
			Tickets			
Orchestra	9	703.	Ice, Cups and Filter Service			
			Booking Office		100.—	
Bill Poster	2	85.—	Detective Service			June 1-2-3
Publicity Man			Express		9.—	Millard & Millicent
			Film Delivery		7.50	2 Blossoms
			Production Exp.			Weist & Stanton
Overtime			Traveling Exp.			Eddie Garr
Midnight		17.76	Relief Mgr.			Southern Gaities
			V. M. P. A. Dues			Act. Comm.
			"Sound" Service Fee		40.—	
			Miscel. Expense	7178	35.91	
Total		$2120.48		Total	$1650.65	

Check No.			Theatre G.
			City Brook
			Week Endi
7177			REC
M.G.M.	800.—	Weather	
Col	18.—	Cldy—Warm	Sat. Mat.
	40.—	" "	" Eve.
		" Cool	Sun. Mat.
		" "	" Eve.
		Cl "	Mon. Mat.
Par.	450.—	" "	" Eve.
MGM	60.—	Fair "	Tues. Mat.
	30.—	" "	" Eve.
Adv.	2.75	Cl Warm	Wed. Mat.
Col	24.—	Cldy	" Eve.
		"	Thur. Mat.
	1424.75	"	" Eve.
		Cl & Warm	Fri. Mat.
		" "	" Eve.
7166	81.42		MISC. I
67	149.29		
68	95.—		
69	190.—	Expense	
70	434.28	Pay Roll	
	50.01	Trade Bills	
		Films & Acts	
	1000.00		
		Check No. 7179	Balance
71	38.—	These Lines to be Left Blan	
72	57.—	By Manager	
73	190.—		
74	203.58		REMARKS &
75	223.92	6/5/31	
76	37.50	Inc 7702.20	
		Exp 2548.47	
	750.00		
		Co Exc. 153.73	
Total	$3174.75		

Complainants' Exhibit C-3.

	Trade Bills	Check No.	
—	Newspapers	6 7177	61.20
—	Other Advertising		
	Lobby Stills Photos		6.25
	Display Cut Outs		41.42
	Posters—Lith.—Cards		159.06
72	Trailers		50.62
—	Loew's W'kly & Add.		86.—
	" " Postage		46.49
—	Sign Shop		34.—
—	Bill Posting	Bal 55.05	120.55
	Subway Est.		125.—
—	Maintenance—Repairs		51.74
	Booth Supplies		60.85
	Cleaners Supplies		
—	Office Supplies		1.80
—	Elec. Supplies		
—	Cooling Plant Supplies Oil		15.50
	" " Gas		
	" " Water		60.—
—	" " Elec. Power		175.—
—	Carbons		71.31
—	Coal—Steam		
—	Electric Light & Power		225.—
	Fire Alarm Service		
	Lamps		
—	Music Scores		15.—
—	Organ Maintenance		
—	Piano Rental		36.—
	Telephone & Telegraph		15.45
	Tickets		
	Ice, Cups and Filter Service		
	Booking Office		100.—
—	Detective Service		
	Express		9.—
	Film Delivery		7.50
	Production Exp.		
	Traveling Exp.		
76	Relief Mgr.		
	V. M. P. A. Dues		
	"Sound" Service Fee		40.—
—	Miscel. Expense	7178	35.91
148		Total	$1650.65

Films and Acts	Check No.		
Films			
May 28-29-30-31			
Letty Lynton	7177		
Down Memory Lane	M G.M.	800.—	Weather
Hearst Metro News 270	Col	18.—	Cldy—Warm
		40.—	" "
			" Cool
			" "
June 1-2-3			Cl "
Sky Bride	Par.	450.—	" "
War Mamas	MGM	60.—	Fair "
Hearst Metro News 271		30.—	" "
Letty Lynton Sound	Adv.	2.75	Cl Warm
What A Knight 5/14-17	Col	24.—	Cldy
			"
		1424.75	"
			Cl & Warm
			" "
Acts			
May 28-29-30-31			
Hoffman & Lambert	7166	81.42	
Elmer Cleve	67	149.29	
Miss Juliet	68	95.—	
Russ Brown	69	190.—	Expense
Bernice & Emily Co.	70	434.28	Pay Roll
Act Comm		50.01	Trade Bills
			Films & Acts
		1000.00	
			Check No. 7179 Balance
June 1-2-3			
Millard & Millicent	71	38.—	These Lines to be Left Blank
2 Blossoms	72	57.—	By Manager
Weist & Stanton	73	190.—	
Eddie Garr	74	203.58	
Southern Gaities	75	223.92	6/5/31
Act. Comm.	76	37.50	Inc 7702.20
			Exp 2548.47
		750.00	
Total		$3174.75	Co Exc. 153.73

Theatre GATES
City Brooklyn N. Y.
Week Ending June 3 1932

Receipts

		Date		Total For the Day
Sat.	Mat.	5/28	566.60	
"	Eve.	"	1057.30	1623.90
Sun.	Mat.	5/29	835.75	
"	Eve.	"	1512.40	2348.15
Mon.	Mat.	5/30	521.85	
"	Eve.	"	917.15	1439.00
Tues.	Mat.	5/31	437.60	
"	Eve.	"	485.65	923.25
Wed.	Mat.	6/1	184.10	
"	Eve.	"	408.80	592.90
Thur.	Mat.	6/2	201.55	
"	Eve.	"	325.30	526.85
Fri.	Mat.	6/3	170.65	
"	Eve.	"	289.85	460.50
				$7914.55
			Midnight Show	126.95
			Misc. Receipts	
			Total Income	$8041.50

Pay Roll	$2120.48	
Trade Bills	$1650.65	
Films & Acts	$3174.75	6945.88
		$1095.62
Overhead		2325.
Profit Loss		1229.38

Remarks & Opposition

(Signature illegible)
Bus. Manager

Complainants' Exhibit C-12.

Payroll (Check No. 596)	No. of Empl.		Trade Bills	Check No. 595	
Bus. Manager	1	75.—	Newspapers	595	59.35
Asst. Bus. Manager	1	40.—	Other Advertising		
			Lobby Stills Photos	"	97.58
Treasurer			Display Cut Outs	"	36.75
Asst. Treasurer			Posters—Lith.—Cards	"	42.94
Cashiers	1	20.	Trailers	"	11.75
Doormen	1	22.—	Loew's W'kly & Add.	"	49.50
Special Officers			" " " Postage	596	52.26
Ushers	6	58.—	Sign Shop	595	30.—
Matron	1	6.—	Bill Posting	"	
Pages			License Fee	"	60.—
Watchman	1	20.—	Maintenance—Repairs	"	168.92
			Booth Supplies	"	47.90
Superintendent			Cleaners Supplies	"	4.58
Cleaners	3	30.—	Office Supplies		
Porters	2	35.—	Elec. Supplies		
Engineer	1	60.—	Cooling Plant Supplies		
Fireman	1	30.—	" " Gas		
			" " Water	"	6.—
Stage Manager	1	73.—	" " Elec. Power	"	175.—
Electrician	1	80.—	Piano Rental	"	10.—
Asst. Electrician			Coal	"	10.25
Property Man	1	68.—	Electric Light & Power	"	250.—
Carpenter			Fire Alarm Service		
Cleaners			Lamps	"	31.75
Laymen	1	59.—	Music Serv.	"	15.—
Operators	5	414.—	Organ Maintenance		
Stage Doorman			Piano Rental		
Reel Boys	1	10.—	Telephone & Telegraph	"	31.50
			Tickets	"	11.20
Orchestra	8	545.—	Ice, Cups and Filter Service	"	31.97
			Booking Office	"	250.—
Bill Poster	1	50.—	Detective Service		
Publicity Man			Express	"	7.50
			Film Delivery	"	12.—
Overtime			Production Exp.		
Operators	3	55.50	Traveling Exp.	"	1.96
			V. M. P. A. Dues		
			"Sound" Service Fee	"	40.—
			Records	"	6.05
			Misc. Supp.	"	1.86
			Miscel. Expense	596	24.54
Total		$1750.50	Total		$1578.11

Films and Acts	Check No. 595	
FILMS		
6/4-7/32		
Letty Lynton	Metro	700.—
" " Score		
Down Memory Lane	Col.	24.—
Air Mail Mystery #11	Univ.	15.—
Metrotone News #272	Metro	40.—
6/8-10/32		
Young America	Fox	118.20
" " Score		15.—
High Hats & Low Brows	Pathe	45.—
Universal News #46	Univ.	30.—
Sou. Tr. The Mouthpiece		5.—
		992.20
ACTS		
6/4-7/32		
Rasso & Co.	583	57.—
Edwards & Morris	584	81.42
Leon Navarro	585	135.72
Pilcer & Douglas	586	190.—
Col. Stoopnagle & Budd	587	678.58
Comm.	593	60.14
6/8-10/32		
Zelda Bros.	588	61.08
Meryl & Lane	589	91.61
Sammy Krivoff & Co.	590	203.58
Eddie Garr	591	203.58
Adele Nelson's Elephants	592	203.58
Comm.	593	40.16
		2006.45
Total		$2998.65

Weather

Clear & Hot	
" "	
" "	
Clear & Cool	
" "	
" "	
" "

Complainants' Exhibit C-13.

Payroll (Check Nos. 7371-72-73-74, 7396-97 ·	No. of Empl.		Trade Bills	Check No.		Films and Acts	Check No.	
Bus. Manager		150.		7401-7407				
Asst. Bus. Manager	2	66.	Newspapers	7394-7400	583.63	FILMS		1250.
			Other Advertising	7381-92	7.75	Metro-Goldwyn-Mayer		
			Lobby Stills Photos					
Treasurer		35.	Display Cut Outs	7385	5.89	Letty Lynton		
Asst. Treasurer			Posters—Lith.—Cards			Metro-G-Mayer	7382	
Cashiers	5	89.	Trailers	7384	7.08	Hearst News No. 268		100.00
Doormen	2	36.	Loew's W'kly & Add.			The Knockout		125.00
Special Officers	2	51.	" " Postage			Nat'l Screen Ser. Co.	7379	17.58
Ushers	14	190.25	Sign Shop	7391-93	4.94	Trailer—Letty Lynton		
Matron	2	25.	Toilet Paper	7376	5.14			1492.58
Pages								
Watchman	1	30.	Maintenance—Repairs	7376-86	225.80			
Cleckroom Superintendent	1	14.	Booth Supplies	7377	45.21			
			Cleaners Supplies					
Cleaners	6	75.	Office Supplies	7385	5.34			
Porters	3	64.	Elec. Supplies					
Engineer & ass't Fireman	2	102.	Cooling Plant Supplies	7376	14.02			
			" Gas					
			" Water					
Stage Manager	2	129.	" Elec. Power			ACTS		
Electrician	2	120.	Carbons					
Electrician	1	65.	Ushers Supp.	7376	3.82	5 Bracellos	7365	427.50
Property Man	2	120.	Electric Light & Power	7387	246.50	Whitey Roberts	7366	190.00
Carpenter			Fire Alarm Service			Pease & Nelson Co.	7367	451.25
Clearers	4	212.	Lamps 56.43			3 Slate Brothers	7368	712.50
			Lamps Booth .85	7375	57.28	Easter & Hazelton Rev.	7369	997.50
						Marcus Loew Bkg. Ag.	7370	146.25
Flymen			Music Scores			Will Groh & Dog (Sun)	7398	30.00
Operators	4	324.	Organ Maintenance					2955.—
Stage Doorman		22.	Piano Rental					
Reel Boys			Telephone & Telegraph	7388-89-90	44.81			
Mr. Devlin's office		10.	Tickets					
Orchestra	20	1350.—	Ice, Cups and Filter Service					
			Booking Office	7385	100.00			
Bill Poster			Detective Service					
Press Dept.								
Publicity Man	2	50.50	Express					
Poster artist		45.	Film Delivery	7378	3.00			
Overtime Booth	4	3.32	Production Exp.					
			Traveling Exp.					
			Relief Mgr.	7385	36.75			
			V. M. P. A. Dues					
			"Sound" Service Fee	7383	40.00			
			Permit—Signs	7395	5.00			
			Sun license	7380	12.00			
			Miscel. Expense	7399	23.58			
Total		$3374.07		Total	$1477.54		Total	$4447.58

Theatre ORPH
City Boston
Week Ending

RECEIP

Weather			
Un		Fri.	Mat.
F & C		"	Eve.
"	W	Sat.	Mat.
"		"	Eve.
"		Sun.	Mat.
"		"	Eve.
"		Mon.	Mat.
"		"	Eve.
V Warm		Tues.	Mat.
"		"	Eve.
F & C		Wed.	Mat.
"		"	Eve.
F & C		Thur.	Mat.
"		"	Eve.

MISC. RECI

N. E. Tel. Com. 3/1-5/3/32
Candy Stand Com. 5/8-14/32

TOT

Expense
Pay Roll
Trade Bills
Films & Acts

Check No. Balance

Complainants' Exhibit C-13.

Trade Bills	Check No.		Films and Acts	Check No.	
apers	7401-7407				
Advertising	7394-7400	583.63	FILMS		1250.
y Stills Photos	7381-92	7.75	Metro-Goldwyn-Mayer		
play Cut Outs	7385	5.89	Letty Lynton		
s—Lith.—Cards			Metro-G-Mayer	7382	
rs	7384	7.08	Hearst News No. 265		100.00
W'kly & Add.			The Knockout		125.00
" Postage			Nat'l Screen Ser. Co.	7379	17.58
shop	7391-93	4.94	Trailer—Letty Lynton		
Paper	7376	5.14			1492.58
enance—Repairs	7376-86	225.80			
Supplies	7377	45.21			
ers Supplies					
Supplies	7385	5.34			
Supplies					
g Plant Supplies	7376	14.02			
" Gas					
" Water					
Elec. Power			ACTS		
ns					
s Supp.	7376	3.82	5 Bracellos	7365	427.50
ic Light & Power	7387	246.50	Whitey Roberts	7366	190.00
Alarm Service			Pease & Nelson Co.	7367	451.25
Lamps 56.43			3 Slate Brothers	7368	712.50
s Booth .85	7375	57.28	Easter & Hazelton Rev.	7369	997.50
			Marcus Loew Bkg. Ag.	7370	146.25
Scores			Will Groh & Dog (Sun)	7398	30.00
Maintenance					2955.—
Rental					
one & Telegraph	7388-89-90	44.81			
s					
ips and Filter Service					
ng Office	7385	100.00			
ive Service					
ss					
Delivery	7378	3.00			
ction Exp.					
ing Exp.					
Mgr.	7385	36.75			
P. A. Dues					
d" Service Fee	7383	40.00			
t—Signs	7395	5.00			
cense	7380	12.00			
Expense	7399	23.58			
Total		$1477.54		Total	$4447.58

Theatre ORPHEUM
City Boston
Week Ending 5/19 1932

RECEIPTS

Weather		Date		Total For the Day
Un		Fri. Mat.	5/13	1627.60
F & C		" Eve.		1258.75 2886.35
"	W	Sat. Mat.	14	1558.85
"		" Eve.		1752.60 3311.45
"		Sun. Mat.	15	685.70
"		" Eve.		1169.05 1854.75
"		Mon. Mat.	16	1217.50
"		" Eve.		513.00 1730.50
V Warm		Tues. Mat.	17	939.30
"		" Eve.		677.75 1617.05
F & C		Wed. Mat.	18	1279.00
"		" Eve.		1145.45 2424.45
F & C		Thur. Mat.	19	1106.85
"		" Eve.		916.30 2023.15
				$15847.70

MISC. RECEIPTS

N. E. Tel. Com. 3/1-5/3/32 16.02
Candy Stand Com. 5/8-14/32 44.11

TOTAL—INCOME $15907.83

Expense
Pay Roll $3374.07
Trade Bills $1477.54
Films & Acts $4447.58 9299.19

Check No. Balance $6608.64

Overhead 4910.—
Profit 1698.64

H. J. MORRIS
Bus. Manager

Complainants' Exhibit D.

Payroll (Check No. 1284)	No. of Empl.	
Bus. Manager	75.	
Asst. Bus. Manager	40.	
Treasurer		
Asst. Treasurer		
Cashiers	18.	
Doormen	22.	
Special Officers		
Ushers	5 58.	
Matron	12.	
Pages		
Watchman	22.	
Superintendent		
Cleaners	2 26.	
Porters	2 39.	
Engineer		
Fireman		
Stage Manager	73.	
Electrician	70.	
Asst. Electrician		
Property Man	70.	
Carpenter		
Clearers		
Flyman	65.	
Operators	5 357.	
Stage Doorman		
Reel Boys	14.	
Orchestra	8 628.	
Bill Poster	40.	
Publicity Man		
Overtime Merritt Odgen	2.64	
Total	$1631.64	

Trade Bills	Check No. 1283	
Newspapers		56.59
Other Advertising		20.67
Lobby Stills Photos		
Display Cut Outs		
Posters—Lith.—Cards		56.57
Trailers		17.67
Loew's W'kly & Add.		76.25
" " Postage		59.75
Sign Shop		30.
Bill Posting		
Maintenance—Repairs		106.76
Booth Supplies		
Cleaners Supplies		
Office Supplies		
Elec. Supplies		1.02
Cooling Plant Supplies		
" " Gas		
" " Water		
" Elec. Power		
Carbons		17.22
Coal—Steam		
Electric Light & Power		130.
Fire Alarm Service		19.54
Lamps		
Music Scores		15.
Organ Maintenance		
Piano Rental		36.
Telephone & Telegraph		
Tickets		
Ice, Cups and Filter Service		
Booking Office		200.
Detective Service		
Express		
Film Delivery		7.50
Production Exp.		
Traveling Exp.		
Relief Mgr.		
V. M. P. A. Dues		
"Sound" Service Fee		20.
Miscel. Expense	1284	18.82
Total		$889.36

Films and Acts

FILMS

5/28		5/31
Metro—Letty Lynton		
Col—Down Memory Lane		
Metro—News #270		
6/1		6/3
Para—Sky Bride		
Metro—War Mamas		
Metro—News #271		
Sound Tra—Letty Lynton		

ACTS

5/28		5/31
Earl, Jack & Betty		
Vera Cole		
Bell, Waters & Stone		
Kramer & Boyle		
Babe Egan & Red Heads		
M. L. B. A.		Comm
6/1		6/3
4 Hermans		
Freeman, Rogers & Renee		
Carl Emmy's Pets		
Rex Weber		
Jean Schwartz & Joey Ray Co.		
M. L. B. A.		Comm

	889.36
	1400.75
	2290.11
	18.82
	2271.29
Total	$2963.61

Theatre B
City Brool
Week Endi

REC

Check No. 1283	
Talk	800.
"	18.
	40.
	450.
	60.
	30.
	2.75
	1400.75

Weather		Date
Clear—Warm	Sat. Mat	
" "	" Eve	
Unsettled	Sun. Mat	
Clear—Cool	" Eve	
" "	Mon. Mat	
" "	" Eve	
" Warm	Tues. Mat	
" "	" Eve	
" "	Wed. Mat	
" "	" Eve	
Unsettled	Thur. Mat	
Clear—Cool	" Eve	
Very Warm	Fri. Mat	
" "	" Eve	

1272	108.58	
73	33.25	
74	190.	
75	271.42	Fort Hamilton Y. M. C. A.
76	325.72	
1282	48.89	
	977.86	
1277	71.25	Expense
78	57.	Pay Roll
79	213.75	Trade Bills
80	71.25	Films & Acts
81	142.50	
1282	29.25	Check No. Balance
	1562.86	

These Lines to be Left Bla
By Manager

REMARKS &

Total $2963.61

928

Complainants' Exhibit D.

Trade Bills	Check No. 1283	
apers		56.59
Advertising		20.67
by Stills Photos		
play Cut Outs		
s—Lith.—Cards		56.57
rs		17.67
W'kly & Add.		76.25
" Postage		59.75
hop		30.
osting		
nance—Repairs		106.76
Supplies		
rs Supplies		
Supplies		
Supplies		1.02
g Plant Supplies		
" Gas		
" Water		
Elec. Power		
s		17.22
Steam		
c Light & Power		130.
larm Service		19.54
Scores		
Maintenance		
Rental		36.
one & Telegraph		
s		
ips and Filter Service		
g Office		200.
ive Service		
ss		
Delivery		7.50
ction Exp.		
ing Exp.		
Mgr.		
P. A. Dues		
d" Service Fee		20.
l. Expense	1284	18.82
Total		$889.36

Films and Acts

FILMS

5/28		5/31
Metro—Letty Lynton		
Col—Down Memory Lane		
Metro—News #270		
6/1		6/3
Para—Sky Bride		
Metro—War Mamas		
Metro—News #271		
Sound Tra—Letty Lynton		

ACTS

5/28		5/31
Earl, Jack & Betty		
Vera Cole		
Bell, Waters & Stone		
Kramer & Boyle		
Babe Egan & Red Heads		
M. L. B. A.		Comm
6/1		6/3
4 Hermans		
Freeman, Rogers & Renee		
Carl Emmy's Pets		
Rex Weber		
Jean Schwartz & Joey Ray Co.		
M. L. B. A.		Comm

	889.36
	1400.75
	2290.11
	18.82
	2271.29
Total	$2963.61

Theatre BAY RIDGE
City Brooklyn, N. Y.
Week Ending June 3rd 1932

RECEIPTS

Check No. 1283		Weather		Date		Total For the Day
Talk	800.	Clear—Warm	Sat. Mat.	5/28	269.	
"	18.	" "	" Eve.	"	930.	1199.
	40.	Unsettled	Sun. Mat.	29	673.95	
	450.	Clear—Cool	" Eve.	"	1404.15	2078.10
	60.	" "	Mon. Mat.	30	441.55	
	30.	" "	" Eve.	"	1018.75	1460.30
	2.75	" Warm	Tues. Mat.	31	219.65	
	1400.75	" "	" Eve.	"	597.20	816.85
		" "	Wed. Mat.	6/1	81.75	
		" "	" Eve.	"	307.95	389.70
		Unsettled	Thur. Mat.	2	141.80	
		Clear—Cool	" Eve.	"	313.95	425.75
		Very Warm	Fri. Mat.	3	63.90	
		" "	" Eve.	"	234.60	298.50
						$6668.20

MISC. RECEIPTS

1272	108.58	
73	33.25	
74	190.	
75	271.42	Fort Hamilton Y. M. C. A. Tickets 30.
76	325.72	
1282	48.89	TOTAL INCOME $6698.20
	977.86	
1277	71.25	Expense
78	57.	Pay Roll $1631.64
79	213.75	Trade Bills $ 889.36
80	71.25	Films & Acts $2963.61 5484.61
81	142.50	
1282	29.25	Check No. Balance $ 1213.59
	1562.86	Overhead 1550.

These Lines to be Left Blank
By Manager — Profit Loss 336.41

REMARKS & OPPOSITION

S. ROSE
Bus. Manager

Total $2963.61

Payroll (Check Nos. 2156-7)	No. of Empl.		Trade Bills	Check No.	
Bus. Manager	1	150.	Newspapers	2155	440.96
Asst. Bus. Manager	1	45.	Other Advertising		
			Lobby Stills Photos		
Treasurer	1	40.	Display Cut Outs		69.81
Asst. Treasurer			Posters—Lith.—Cards		37.97
Cashiers	3	54.	Trailers		6.15
Doormen	2	44.	Loew's W'kly & Add.		54.05
Special Officers			" " Postage	2157	28.93
Ushers	16	192.	Sign Shop		120.
Matron	2	30.	Bill Posting		
Pages			Rubbish Removal		15.
Watchman—Supt.	1	30.	Maintenance—Repairs		100.
Switchboard	1	22.	Booth Supplies		
Superintendent			Cleaners Supplies		
Cleaners	11	153.	Office Supplies		9.80
Porters	3	48.	Elec. Supplies		11.64
Engineer	2	100.	Cooling Plant Supplies		
Fireman			" " Gas		
Painter	1	8.	" " Water		
Stage Manager	1	77.40	" Elec. Power		
Electrician	1	77.40	Records		2.20
Asst. Electrician	3	210.60	Valet		7.50
Property Man	1	77.40	Electric Light & Power		475.74
Carpenter			Fire Alarm Service		
Clearers	1	70.	Mats & Cuts		51.70
Clymen	1	72.	Music Scores		
Operators	6	491.	Organ Maintenance		
Stage Doorman			Piano Rental		
Reel Boys	1	16.	Telephone & Telegraph		98.76
Conductor	1	150.	Festv. Decorations		74.62
Orchestra	18	1526.	Ice, Cups and Filter Service		
Leat, organist	1	200.	Booking Office		800.
Bill Poster	2	80.	Detective Service		
Publicity Man			Slides		22.54
Organist	1	80.	Film Delivery		10.
Overtime			Production Exp.		
			Traveling Exp.		
Midnight		34.16	Relief Mgr.		8.35
Stage		10.80	V. M. P. A. Dues		
Booth		21.12	"Sound" Service Fee		40.
					2485.72
			Credit—Coal		51.98
					2433.74
			Miscel. Expense	2157	33.29

Films and Acts	Check No.		
FILMS			
Metro—"Letty Lynton"	2155	1500.	
" News #264		70.	
Fitz. Trav. "Ireland"		52.50	Weather
Nat. Scr. "Letty Lynton"		17.50	Cloudy
			"
		1640.00	"
			"
			Rain
			Cloudy
			Fair
			"
			Cool
			"
			"
			"
			Rain
			"
			Midnite show 5/7
ACTS			
"THREE SCREENS"			
Chaney & Fox	2152	302.81	
Al. Norman		231.56	Benefit—Women's
Joe Griffin		178.12	& Freedom of
Stella Power		89.06	
Franklyn D'Amore & Co.		285.00	
14 Hale Girls—Gert. Mazza—Captain		640.00	Bank interest—A
6 extra girls		120.00	
Thos. Keeney—carpenter		100.00	
M. L. B. A. Prod. Cost	2153	500.00	Expense
M. L. B. A.—Act. Comm.	2154	57.20	Pay Roll
Transfer	2155	107.50	Trade Bills
Stage—set show	2157	123.40	Films & Acts
		2734.65	Check No. 2158 B

These Lines to be
By Mana

R

1931
22,847.01 Rec.
15,496.11 Exp

7,350.90 Pro

Theatre JERSEY CITY
City Jersey City, N. J.
Week Ending May 12, 1932.

Check No.		Films and Acts	Check No.	
2155	440.96			
		FILMS		
		Metro—"Letty Lynton"	2155	1500.
	69.84	" News #264		70.
	37.97	Fitz. Trav: "Ireland"		52.50
	6.15	Nat. Scr. "Letty Lynton"		17.50
	54.05			
2157	28.93			1640.00
	120.			
	15.			
	100.			
	9.80			
	11.64			
	2.20	ACTS		
	7.50			
	475.74	"THREE SCREENS"		
	51.70	Chaney & Fox	2152	302.81
		Al. Norman		231.56
		Joe Griffin		178.12
		Stella Power		89.06
	98.76	Franklyn D'Amore & Co.		285.00
	74.62	14 Hale Girls—Gert. Mazza—Captain		640.00
		6 extra girls		120.00
	800.	Thos. Keeney—carpenter		100.00
		M. L. B. A. Prod. Cost	2153	500.00
	22.54	M. L. B. A.—Act. Comm.	2154	57.20
	10.	Transfer	2155	107.50
		Stage—set show	2157	123.40
	8.35			
	40.			2734.65
	2485.72			
	51.98			
	2433.74			
157	53.29			
1	$2487.03		Total	$4374.65

Weather		Date		Total For the Day
	RECEIPTS			
Cloudy	Fri. Mat.	6	691.90	
"	" Eve.		1730.70	2422.60
"	Sat. Mat.	7	862.65	
"	" Eve.		3121.15	3983.80
Rain	Sun. Mat.	8	1846.75	
Cloudy	" Eve.		3671.75	5518.50
Fair	Mon. Mat.	9	844.85	
"	" Eve.		1221.95	2066.80
Cool	Tues. Mat.	10	669.35	
"	" Eve.		1601.20	2270.55
"	Wed. Mat.	11	654.95	
"	" Eve.		2178.40	2833.35
Rain	Thur. Mat.	12	715.20	
"	" Eve.		1247.10	1962.30
				$21057.90
Midnite show 5/7/32				v 261.00
				21318.90
	MISC. RECEIPTS			
Benefit—Women's Intnl. League Peace & Freedom of J. City				347.85
				21666.75
Bank interest—April				3.81
	TOTAL INCOME			$21670.56

Expense			
Pay Roll	$4109.88		
Trade Bills	$2487.03		
Films & Acts	$4374.65		10971.56
Check No. 2158 Balance			$10699.00
These Lines to be Left Blank By Manager		Overhead	6100.
		Profit Loss	4599.00

REMARKS & OPPOSITION

1931
22,847.01 Rec.
15,496.11 Exp.
7,350.90 Prof.

(Name illegible)
Bus. Manager

Complainants' Exhibit D-8.

Payroll (Check No. 3857)	No. of Empl.	
Bus. Manager	1	110.00
Asst. Bus. Manager	1	45.00
Treasurer	1	30.00
Secty. & Tel. Op.	1	23.00
Cashiers	2	40.00
Doormen	4	59.70
Special Officers		
Ushers	18	199.26
Matron	2	28.00
Pages		
Watchman	1	21.00
Elev. Boys	2	32.00
Superintendent	1	50.00
Cleaners	6	85.00
Porters	6	113.00
Engineer	2	120.00
Fireman		
Painter	1	18.00
Stage Manager	1	90.00
Electrician	4	332.00
Asst. Electrician		
Property Man	2	157.00
Carpenter	1	83.00
Clearers	3	222.00
Flymen		
Operators	9	688.50
Stage Doorman	1	38.00
Reel Boys		
Leader (3840)	1	125.00
Orchestra (3825-39)		1385.00
Organist (3841)	1	125.00
Bill Poster	2	80.00
Publicity Man		
Midnite Show		70.06
Overtime		9.94
Booth—Late show		80.43
Stage—Chg. Signs		22.50
" —Roof		8.25
" —Opening		27.50
" —Closing		16.50
Total		$4524.64

Trade Bills	Check No. 3858	
Newspapers		650.00
Other Advertising		
Lobby Stills Photos		69.33
Display Cut Outs		43.02
Posters—Lith.—Cards		113.72
Trailers		8.44
Loew's Wkly & Add.		39.50
" " Postage	3857	24.30
Sign Shop Complete Lobby		139.50
Bill Posting		50.00
Flags—Banners		81.80
Maintenance—Repairs		278.05
Booth Supplies		47.36
Cleaners Supplies		
Office Supplies		3.35
Elec. Supplies		19.24
Cooling Plant Supplies		
" " Gas		
" " Water		
" Elec. Power		
Carbons		62.70
Coal—Steam		
Electric Light & Power		360.00
Fire Alarm Service		
Lamps		
Music Scores		
Organ Maintenance		
Piano Rental		
Telephone & Telegraph		
Tickets		
Cups		54.84
Booking Office		1000.00
Detective Service		
Express		7.00
Film Delivery		7.50
Production Exp.		
Traveling Exp.		
M. T.		1.20
V. M. P. A. Dues		
"Sound" Service Fee		40.00
Overture Sup.		10.00
Miscel. Expense	3857	42.22
Credit		232.36
Total		$2920.71

Films and Acts	Check No. 3858	
FILMS		
Metro—"Letty Lynton"		2000.00
" —News #266		70.00
" —"Milkman"—Cartoon—Est.		52.50
Natl—Tr—"Letty Lynton"		17.50
" —"—"Wet Parade"		17.50
		2157.50
"PARISIENNE"		
ACTS		
Lee Gails (Jean & Leon)	3843	451.25
A Avila & J Nile	3844	237.50
Radcliff & Rogers	3845-47	522.50
King King & King	3846-8-9	498.75
Sylvia Nelson	3850	142.50
J Hutchinson—Captain	3851	550.00
4 extra girls @ 20-ea	3852	80.00
J Hughes—Carp.—	3853-54	100.00
Production Charges	3855	1250.00
M L B A—Com on acts	3856	97.50
Orch—Stage Reh		31.00
Booth— " "		34.47
Stage—Take out "Bway Revue"		49.50
" —Take in—"Parisienne"		38.50
" —Reh & Hang "		123.75
" —"—"Keep Klowning"		5.50
" —Loading Truck		8.25
PRODUCTION BILLS		100.00
		4320.97
Total		$6478.47

Theatre P
City Bro
Week End
R

Weather		
Cloudy Mod	Fri. Ma	
" "	" Ev	
Fair Warm	Sat. Ma	
" "	" Ev	
Clear "	Sun. Ma	
" "	" Ev	
" "	Mon. Ma	
" "	" Ev	
" "	Tues. Ma	
" "	" Ev	
" "	Wed. Ma	
" "	" Ev	
" "	Thur. Ma	
" "	" Ev	

Midnite Show

Misc.

Expense
Pay Roll
Trade Bills
Films & Acts

Check No. 3859 Balance

These Lines to be Left Bl
By Manager

Remarks &

1931
Receipts — 18663.45
Expenses — 17339.69
Balance — 1323.76

930

Complainants' Exhibit D-8.

Trade Bills	Check No. 3858	
pers		650.00
dvertising		
Stills Photos		69.33
ay Cut Outs		43.02
-Lith.—Cards		113.72
		8.44
W'kly & Add.		39.50
" Postage	3857	24.30
op Complete Lobby		139.50
ting		50.00
Banners		81.80
ance—Repairs		278.05
upplies		47.36
Supplies		
pplies		3.35
pplies		19.24
Plant Supplies		
" Gas		
" Water		
Elec. Power		
		62.70
eam		
Light & Power		360.00
m Service		
ores		
aintenance		
ntal		
& Telegraph		
		54.84
		1000.00
Office		
Service		7.00
		7.50
very		
n Exp.		
Exp.		
		1.20
A. Dues		
Service Fee		40.00
Sup.		10.00
xpense	3857	42.22
		232.36
Total		$2920.71

Films and Acts	Check No. 3858	
FILMS		
Metro—"Letty Lynton"		2000.00
" —News #266		70.00
" —"Milkman"—Cartoon—Est.		52.50
Natl—Tr—"Letty Lynton"		17.50
" —"—"Wet Parade"		17.50
		2157.50
"PARISIENNE"		
ACTS		
Lee Gails (Jean & Leon)	3843	451.25
A Avila & J Nile	3844	237.50
Radcliff & Rogers	3845-47	522.50
King King & King	3846-8-9	498.75
Sylvia Nelson	3850	142.50
J Hutchinson—Captain	3851	550.00
4 extra girls @ 20-ea	3852	80.00
J Hughes—Carp.—	3853-54	100.00
Production Charges	3855	1250.00
M L B A—Com on acts	3856	97.50
Orch—Stage Reh		31.00
Booth— " "		34.47
Stage—Take out "Bway Revue"		49.50
" —Take in—"Parisienne"		38.50
" —Reh & Hang "		123.75
" —"—"Keep Klowning"		5.50
" —Loading Truck		8.25
PRODUCTION BILLS		100.00
		4320.97
Total		$6478.47

Theatre PARADISE
City Bronx, N. Y.
Week Ending May 19, 1932
RECEIPTS

Weather		Date		Total For the Day
Cloudy Mod	Fri. Mat.	13	737.75	
" "	" Eve.		1924.45	2662.20
Fair Warm	Sat. Mat.	14	837.65	
" "	" Eve.		3133.40	3971.05
Clear "	Sun. Mat.	15	948.00	
" "	" Eve.		3192.50	4140.50
" "	Mon. Mat.	16	513.25	
" "	" Eve.		789.50	1302.75
" "	Tues. Mat.	17	484.35	
" "	" Eve.		971.85	1456.20
" "	Wed. Mat.	18	605.10	
" "	" Eve.		1528.75	2133.85
" "	Thur. Mat.	19	478.30	
" "	" Eve.		1073.25	1551.55
				$17218.10
Midnite Show				781.50

MISC. RECEIPTS

TOTAL INCOME $17999.60

Expense		
Pay Roll	$4524.64	
Trade Bills	$2920.71	
Films & Acts	$6478.47	13923.82
Check No. 3859 Balance		$ 4075.78
These Lines to be Left Blank By Manager	Overhead	6460.
	Profit Loss	2384.22

REMARKS & OPPOSITION

1931
Receipts — 18663.45 Total Adm
Expenses — 17339.69 (33,401)
Balance — 1323.76

J. DE ROSA

Complainants' Exhibit D-10.

Payroll (Check No.)	No. of Empl.		Trade Bills	Check No.		Films and Acts	Check No.		
Bus. Manager		150.00	Newspapers	9468-9-70-71	299.06	FILMS			Screen "Lett
			Mayer Marvin Tickets			M-G-M			Stage "Whir
Asst. Bus. Manager		50.00	Other Advertising			"Letty Lynton"		1400.00	
			Lobby Stills Photos	9488	45.91	M-G-M			
Treasurer			Display Cut Outs	9488	51.46	News #264	9490	75.00	
			9468-9-70			Red Noses Pitts Todd	"	150.00	
Asst. Treasurer			Posters—Lith.—Cards	9488	8.69	Piscatorial Pleasures	"	50.00	
Cashiers	2	32.00	Trailers 9472	9488	25.98			275.00	
Doormen	1	20.00	Loew's W'kly & Add.			Nat'l Screen			Weather
Special Officers			" " Postage			5/6 Tkg. tr: "Letty Lynton"	9491	17.75	Rain
Ushers	14	122.00	Sign Shop	9473	4.90	4/15 pstg. "Flesh is Weak"	"	.08	"
Matron	1	10.00	Bill Posting			4/22 " "Any Old Port"	"	.23	"
Pages						4/29 " "Feller Needs Friend"	"	.25	"
Watchman	1	10.00	Maintenance—Repairs 9474	9488	30.47			18.31	"
			Booth Supplies	9476	8.80				Cool
Superintendent	1	16.00	Cleaners Supplies 9475-85	9487	22.93			1693.31	"
Cleaners	4	48.00	Office Supplies			"Whirligigs" unit			Rain
Porters	3	53.00	Elec. Supplies						"
Engineer	2	90.00	Cooling Plant Supplies			ACTS			
Fireman			" " Gas			Paul Kirkland	25%	9451 285.00	"
			" " Water			Barte & Arden	"	9452 178.12	"
Stage Manager			" Elec. Power			4 Flash Devils		9453 308.75	Cool
Electrician	1	75.50	Carbons	9477	67.69	LaVernes	"	9454 178.12	"
Asst. Electrician	1	70.50	Coal—Steam			3 White Flashes	"	9455 195.94	
Property Man	1	75.50	Electric Light & Power	9478	200.00	Paul Keast		9456 142.50	Attendance 2990
Carpenter & asst.	2	156.00	Fire Alarm Service			Geo. Kiddon		9457 60.00	
Clearers			Lamps			Gene Dupont		9458 30.00	
Flymen & asst.	2	146.00	Production overture 9479	9480	15.10	Charlotte Beverly, Capt.			
Operators	4	272.00	Organ Maintenance			14 Chester Hale Girls			
Stage Doorman	1	15.00	Piano tuning	9481	5.00	2 extra girls		9459 750.00	
Reel Boys			Telephone & Telegraph 9482	9486	84.41	E. Wakefield, carp.		9460 100.00	Expense
			Tickets			Prod. Expense		9461 100.00	Pay Roll
Orchestra			Ice, Cups and Filter Service			Lucia Romano, soloist over.		9462 25.00	Trade Bills
			Booking Office	9488	250.00				Films & Acts
Poster artist	1	60.00	Detective Service					2353.43	
Publicity Man			Variety subscription	9488	5.00	Act Comm.		9464 67.82	Check No.
			Film Delivery	9484	3.70				
Overtime stage spec. show		10.00	Production Exp.					2421.25	
stage open, close		33.00	Traveling Exp.						
			W. A. Downs	9488	36.68	Stage band		9465 930.00	
			V. M. P. A. Dues			Elect. changing colors		9466 6.00	
			"Sound" Service Fee	9489	40.00	Carloaders		9466 20.00	
			Sign serv. April	9483	55.00	Burns Bros. Hauling Unit		9492 58.00	
			H. F. Shaw exp.	9493	58.27				
			Miscel. Expense					3435.25	
Total		$1514.50	Total		$1319.05	Total		$5128.56	

Complainants' Exhibit D-10.

Trade Bills		Check No.	
spapers	9468-9-70-71		299.06
er Marvin Tickets			
er Advertising			
obby Stills Photos		9488	45.91
isplay Cut Outs		9488	51.46
-9-70			
ers—Lith.—Cards		9488	8.69
lers 9472		9488	25.98
w's W'kly & Add.			
" Postage			
Shop		9473	4.90
Posting			
ntenance—Repairs	9474	9488	30.47
h Supplies		9476	8.80
ners Supplies	9475-85	9487	22.93
e Supplies			
Supplies			
ing Plant Supplies			
" " Gas			
" " Water			
" Elec. Power			
ons		9477	67.69
—Steam			
tric Light & Power		9478	200.00
Alarm Service			
ps			
duction overture	9479	9480	15.10
an Maintenance			
o tuning		9481	5.00
phone & Telegraph	9482	9486	84.41
kets			
Cups and Filter Service			
king Office		9488	250.00
ective Service			
iety subscription		9488	5.00
n Delivery		9484	3.70
duction Exp.			
veling Exp.			
A. Downs		9488	36.68
M. P. A. Dues			
und" Service Fee		9489	40.00
n serv. April		9483	55.00
F. Shaw exp.		9493	58.27
cel. Expense			
	Total		$1319.05

Films and Acts			Check No.	
FILMS				
M-G-M				
"Letty Lynton"				1400.00
M-G-M				
News #264			9490	75.00
Red Noses Pitts Todd			"	150.00
Piscatorial Pleasures			"	50.00
				275.00
Nat'l Screen				
5/6 Tkg. tr. "Letty Lynton"			9491	17.75
4/15 pstg. "Flesh is Weak"			"	.08
4/22 " "Any Old Port"			"	.23
4/29 " "Feller Needs Friend"			"	.25
				18.31
				1693.31
"Whirligigs" unit				
ACTS				
Paul Kirkland		25%	9451	285.00
Barte & Arden		"	9452	178.12
4 Flash Devils			9453	308.75
LaVernes		"	9454	178.12
3 White Flashes		"	9455	195.94
Paul Keast			9456	142.50
Geo. Kiddon			9457	60.00
Gene Dupont			9458	30.00
Charlotte Beverly, Capt.				
14 Chester Hale Girls				
2 extra girls			9459	750.00
E. Wakefield, carp.			9460	100.00
Prod. Expense			9461	100.00
Lucia Romano, soloist over.			9462	25.00
				2353.43
Act Comm.			9464	67.82
				2421.25
Stage band			9465	930.00
Elect. changing colors			9466	6.00
Carloaders			9466	20.00
Burns Bros. Hauling Unit			9492	58.00
				3435.25
		Total		$5128.56

Screen "Letty Lynton"
Stage "Whirligigs" unit

Theatre LOEW'S STATE
City Syracuse, N. Y.
Week Ending May 12 193 ?

RECEIPTS

Weather		Date			Total For the Day
Rain	Fri.	Mat.	5/6	655.85	
"	"	Eve.		1143.80	1799.65
"	Sat.	Mat.	5/7	1245.95	
"	"	Eve.		1777.60	3023.55
"	Sun.	Mat.	5/8	1002.20	
"	"	Eve.		1653.25	2655.45
Cool	Mon.	Mat.	5/9	594.10	
"	"	Eve.		590.55	1184.65
Rain	Tues.	Mat.	5/10	580.80	
"	"	Eve.		658.95	1239.75
"	Wed.	Mat.	5/11	551.95	
"	"	Eve.		724.70	1276.65
Cool	Thur.	Mat.	5/12	446.05	
"	"	Eve.		545.40	991.45
Attendance 29903					$12171.15

MISC. RECEIPTS

TOTAL INCOME		$12171.15
Expense		
Pay Roll	$1514.50	
Trade Bills	$1319.05	
Films & Acts	$5128.56	7962.11
Balance—Deficit		$4209.04
Overhead	5000.	
Profit Loss	790.96	

Complainants' Exhibit D-20.

Payroll (Check Nos. 2554, 2583)	No. of Empl.	
Bus. Manager	1	125.00
Asst. Bus. Manager	1	40.00
Treasurer	1	30.00
Asst. Treasurer		
Cashiers	3	51.00
Doormen	1	25.00
Special Officers		
Ushers	17	165.25
Matron	2	24.00
Pages		
Watchman	2	20.50
Rlf. Drm. & Usher	1	15.00
Superintendent		
Painter	1	40.00
Porters	2	34.00
Engineer	2	113.00
Artist	1	65.00
Maintenance Man	1	55.00
Stage Manager	1	84.75
Electrician	2	149.50
Asst. Electrician		
Property Man	1	74.75
Carpenter	1	74.75
Clearers		
Flymen		
Operators	6	484.50
Stage Doorman	1	18.00
Reel Boys		
Ck. ??. & Tel. Opr.	1	25.00
Orchestra	25	1655.00
Organist	1	109.25
Bill Poster		
Publicity Man	1	85.00
Overtime		
Booth	6	55.92
Stage	1	5.26
Total		$3624.43

Trade Bills	Check No.	
Newspapers	2557-8-9	660.75
Other Advertising		
Lobby Stills. Photos		
Display Ad Cut Outs	2560-1	102.02
Posters—Lith.—Cards		
Trailers	2562	7.30
Loew's W'kly. & Add.		
" " Postage		
Sign Shop		
Bill Posting		
Clean Theatre	2563	225.60
Maintenance—Repairs	2564-5-6	36.81
Booth Supplies	2560	4.00
Cleaners Supplies	2567	1.76
Office Supplies	2560-8	6.55
Elec. Supplies		
Cooling Plant Supplies		
" " Gas		
" " Water	2569	2.15
" Elec. Power	2552	78.73
Toilet Supplies	2567	12.94
Steam	2553	34.80
Electric Light & Power	2552	350.00
Fire Alarm Service		
Lamps	2570	109.96
Music Scores		
Organ Maintenance	2571	7.50
Piano Tuning	2572	5.00
Telegraph	2573	5.10
Water	2569	25.00
Ice, Cups and Filter Service		
Booking Office	2560	100.00
Detective Service		
Express		
Film Delivery		
Production Exp.	2560-74	44.56
Traveling Exp.		
Relief Mgr.		
V. M. P. A. Dues		
"Sound" Service Fee	2575	40.00
Donations	2576	59.00
Credit (Seat Covering)	2560	4.36
Miscel. Expense	2582	38.22
Total		$1952.79

Films and Acts		Check No.	
FILMS			
M.G.M.			
"Letty Lynton"			
Joan Crawford and			
Robert Montgomery			
M.G.M.			
Metrotone News #268		2577	125.00
National Screen Service			
Trailer—"Letty Lynton"		2578	17.62
			142.62
ACTS			
"Blue Waves" Payroll		2555	2135.00
Dolores, Douglas & Eddy	475.00		
Serge Flash	380.00		
Phelps Twins	250.00		
Wilson, Keppel & Betty	380.00		
Chester Hale Girls	550.00		
Carpenter	100.00		
M.L.B.A. Commission		2579	65.00
Dolores, Douglas & Eddy	25.00		
Serge Flash	20.00		
Wilson, Keppel & Betty	20.00		
Production Expense		2580	1200.00
Extra Stagehands. (2)		2550	149.50
Carloader		2556	20.00
Hauling Scenery, etc.		2581	56.00
			3625.50
Total			$3768.12

"Letty
Theatre I
City Pitt
Week Endi

RE

Weather

Warmr	Fri.	Mat
"	"	Eve
Warm	Sat.	Mat
"	"	Eve
	Sun.	Mat
	"	Eve
Cool	Mon.	Mat
"	"	Eve
Warm	Tues.	Mat
"	"	Eve
Warm	Wed.	Mat
"	"	Eve
Warm	Thur.	Mat
"	"	Eve

Attendance—36,553

Misc. I

Personal Telegrams

Expense
Pay Roll
Trade Bills
Films & Acts

Check No. 2584 Balanc

These Lines to be Left Blan
By Manager

REMARKS &

Complainants' Exhibit D-20.

Trade Bills	Check No.	
...spapers	2557-8-9	660.75
...er Advertising		
...bby Stills Photos		
...isplay Ad Cut Outs	2560-1	102.02
...ders—Lith.—Cards		
...lers	2562	7.30
...w's Wkly & Add. Postage		
...		
...a Shop		
..., Bidding		
...n Theatre	2563	225.00
...ntenance—Repairs	2564-5-6	36.84
...th Supplies	2560	4.00
...mers Supplies	2567	1.70
...r Supplies	2560-8	6.55
... Supplies		
...ling Plant Supplies		
... " Gas		
... " Elec. Power	2569	2.45
... Supplies	2552	78.75
...	2567	12.94
...	2553	31.80
...ric Light & Power	2552	370.00
... Alarm Service		
...ps	2570	109.96
...c Scores		
...n Maintenance	2571	7.50
...o Timing	2572	5.00
...graph	2573	5.10
...	2569	25.00
...Cups and Filter Service		
...ling Office	2560	100.00
...tive Service		
...ress		
... Delivery		
...nction Exp.	2560-74	44.56
...eling Exp.		
...f Mgr.		
...I. P. A. Dues		
...nd Service Fee	2575	40.00
...ations	2576	59.00
...r Seat Covering)	2560	4.36
...el Expense	2582	38.22
Total		$1952.79

Films and Acts	Check No.	
FILMS		
M.G.M.		
"Letty Lynton"		
Joan Crawford and		
Robert Montgomery		
M.G.M.		
Metrotone News #268	2577	125.00
National Screen Service		
Trailer—"Letty Lynton"	2578	17.62
		142.62
ACTS		
"Blue Waves" Payroll	2555	2135.00
Dolores, Douglas & Eddy 475.00		
Serge Flash 280.00		
Phelps Twins 250.00		
Wilson, Keppel & Betty 380.00		
Chester Hale Girls 550.00		
Carpenter 100.00		
M.L.B.A. Commission	2579	65.00
Dolores, Douglas & Eddy 25.00		
Serge Flash 20.00		
Wilson, Keppel & Betty 20.00		
Production Expense	2580	1200.00
Extra Stagehands (2)	2554	149.50
Carloader	2556	20.00
Hauling Scenery, etc.	2581	56.00
		3625.50
Total		$3768.12

"Letty Lynton"
Theatre Loew's & U. A. Penn
City Pittsburgh, Penn.
Week Ending May 26th 1932.

RECEIPTS

	Weather		Date		Total For the Day
Warm	Fri. Mat.	5/20		979.85	
"	" Eve.	"		1576.85	2556.70
Warm	Sat. Mat.	5/21		1940.45	
"	" Eve.	"		2765.75	4706.20
	Sun. Mat.				
	" Eve.				
Cool	Mon. Mat.	5/23		1177.50	
"	" Eve.	"		1116.65	2293.95
Warm	Tues. Mat.	5/24		1094.10	
"	" Eve.	"		1295.60	2389.70
Warm	Wed. Mat.	5/25		1008.25	
"	" Eve.	"		1557.85	2566.10
Warm	Thur. Mat.	5/26		909.90	
"	" Eve.	"		989.50	1899.40
					$16412.05

Attendance—36,553

MISC. RECEIPTS

Personal Telegrams .55

TOTAL INCOME $16412.60

Expense		
Pay Roll	$3624.43	
Trade Bills	$1052.79	
Films & Acts	$3768.12	9345.34
Balance		$7067.26
Overhead		$550.—
Loss		1482.74

REMARKS & OPPOSITION

N. J. CULLEN
Bus. Manager

Payroll (Check No. 2577-8)	No. of Empl.	
Bus. Manager	35.00	
Asst. Bus. Manager	20.00	
Treasurer		
Asst. Treasurer		
Cashiers	3	43.50
Doormen	2	25.00
Special Officers		
Ushers	9	114.00
Matron		12.00
Pages		
Watchman		20.00
Artist		60.00
Superintendent		25.00
Cleaners	12	134.50
Porters	2	28.50
Engineer		60.00
Asst. Eng.		37.50
Stage Manager		72.50
Electrician		80.00
Asst. Electrician	2	137.50
Property Man		72.50
Carpenter		
Cleaners		
Flymen		70.00
Operators	6	195.00
Stage Doorman		10.00
Reel Boys		
Orchestra	16	1036.00
Bill Poster		
Publicity Man		
Overtime		
Total		$2588.50

Trade Bills	Check No.	
Newspapers	4295-4304-5-6	343.92
	4282-7-91-4302-3	57.98
Other Advertising		
Lobby Stills Photos	4282	
Display Cut Outs	4303	6.00
Posters—Lith.—Cards		
Trailers	4281	2.56
Loew's Wkly & Add.		
" " Postage		
Sign Shop	4279-4300	13.00
Bill Posting	4296	2.85
Cuts	4294	11.64
Maintenance—Repairs	4297-9	8.30
Booth Supplies		
Ushers Supplies	4298	1.00
Office Supplies	4287-4301	10.70
Elec. Supplies		
Cooling Plant Supplies		
" " Misc. Exp.	4303	15.85
" " Gas		
" " Water		
" " Elec. Power		
Cab Serv.	4293	6.40
Coal—Steam		
Electric Light & Power	4286	500.00
Towel Service	4283	10.00
Decorations	4292	20.00
Music Scores		
Organ Maintenance		
Piano Rental		
Telegraph	4284-5	13.44
Laundry	4290	3.50
Ice, Cups and Filter Service		
Booking Office	4307	302.76
Detective Service	4288	54.70
Express	4303	1.03
Film Delivery		
Production Exp.	4282-4303	7.11
Traveling Exp.		
Relief Mgr.		
V. M. P. A. Dues		
"Solind" Service Fee		40.00
		1432.74
Less MLBA Credit 6 pads nsp. summary		1.50
Less MLBA Credit for Cartons purchased in March		17.26
Miscel. Expense		
Total		$1413.98

"Letty Lynton" & Greetings" Idea

Films and Acts	Check No.	
Metro-Goldwyn-Mayer		523.06
"Letty Lynton"		H O
Metro-Goldwyn-Mayer		
Metrotone News #262	4273	40.00
" " #263	"	40.00
Boy Friend Comedy		
"You're Telling Me"	"	62.50
Columbia Pictures Corp.		
Curiosity C228	4274	40.00
National Screen Service Trailer on Letty Lynton & Postage	4272	21.40
		726.96
ACTS		
Fanchon & Marco Corp.		
"Greetings" Idea	4275	1500.00
" "	4276	1500.00
		3000.00
Drayage	4289	80.00
One Clearer	4277	16.50
		96.50
		3096.50
Total		$3823.46

Weather		Date		Total For the Day
Rain	Sat. Mat.	30	1163.90	
"	" Eve.		1473.25	2577.15
Clear	Sun. Mat.			
"	" Eve.	2	841.05	
"	Mon. Mat.		745.95	1387.00
"	" Eve.	3	802.75	
"	Tues. Mat.		753.85	1556.60
"	" Eve.	4	782.45	
"	Wed. Mat.		740.15	1522.60
"	" Eve.	5	755.70	
"	Thur. Mat.		659.00	1414.70
"	" Eve.	6	762.30	
"	Fri. Mat.		671.90	1434.20
"	" Eve.			
Total Admis: 27,966				$10902.25

MISC. RECEIPTS

Sanitary Napkins for April	4.85
TOTAL INCOME	$10697.10

Expense		
Pay Roll	$2588.50	
TradeBills	$1413.98	
Films & Acts	$3823.46	7825.94
Check No.	Balance—Deficit	$2271.16
	Overhead	2900.—
	Profit Loss	628.84

Complainants' Exhibit M.

2800 LIST OF NAMES OF OFFICERS AND DIRECTORS OF CORPORATIONS ENUMERATED IN DEFENDANT'S EXHIBIT L-1, AS OF THE YEAR 1932.

The following Corporations have the same Officers and Directors:

ASTORIA THEATRE CORPORATION
LOEW'S BOULEVARD CORPORATION
CEDRIC AMUSEMENT CORPORATION
ABINGDON AMUSEMENT CORPORATION
LOEW'S LEXINGTON, INC.
HUMANOVO PRODUCING COMPANY
NEVINS AMUSEMENT CORPORATION
PALACE BROOKLYN CORPORATION
MARCUS LOEW REALTY CORPORATION
2801 LUDLOW OPERATING CORPORATION
HIGHBRIDGE REALTY CORPORATION
CONCOURSE REALTY CORPORATION
CENTURY-PARKWAY CORPORATION
CROTONA-ELSMERE CORPORATION.
FAIRMONT THEATRE CORPORATION
167TH ST. AMUSEMENT CORPORATION
STEINWAY-38TH ST. CORPORATION
WOODSIDE OPERATING CORPORATION
CLINTON-COURT CORPORATION
CANTON MARKET THEATRE CORPORATION

These Officers and Directors are:

OFFICERS

2802

President	Nicholas M. Schenck
Vice-President	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
" "	R. Lazarus

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein

Complainants' Exhibit M (continued).

The following Corporations have the same Officers and Directors: 2803

NATOMA AMUSEMENT COMPANY
BERFORD AMUSEMENT CORPORATION
LOEW'S 86TH ST. CORPORATION
PUTNAM THEATRICAL CORPORATION
116TH ST. OPERATING CORPORATION
MARCUS LOEW INC.
READING THEATRE CORPORATION
DYCKWOOD AMUSEMENT CORPORATION
THE MARLOEW AMUSEMENT CORPORATION
YONKERS OPERATING CORPORATION
ANCHOR THEATRICAL CORPORATION
SALINA-JEFFERSON CORPORATION
INTERNATIONAL VAUDEVILLE COMPANY 2804
ETON AMUSEMENT CORPORATION
JERSEY BOULEVARD CORPORATION
LOEW'S DAYTON THEATRE COMPANY
MASCOT AMUSEMENT COMPANY

These Officers and Directors are:

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills 2805
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein

Complainants' Exhibit M (continued).

2806

Brevoort Holding Co. Inc.

Officers

President	Nicholas M. Schenck
Vice-President	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

Directors

2807

Nicholas M. Schenck	Arthur M. Loew
David L. Loew	Leopold Friedman
David Bernstein	Edward S. Schiller

Lomasch Theatre Corporation

Officers

President	Nicholas M. Schenck
Vice-President	David L. Loew
" "	Edward A. Schiller
Vice-President & Treasurer	David Bernstein
2808 Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
" "	R. Lazarus

Directors

Nicholas M. Schenck	David Bernstein
David L. Loew	Isidor Frey
Edward A. Schiller	Leopold Friedman

Complainants' Exhibit M (continued).

CONEY ISLAND THEATRE INC. 2809

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
" "	R. Lazarus

DIRECTORS 2810

Nicholas M. Schenck	David Bernstein
David L. Loew	Jesse T. Mills
Leopold Friedman	Isidor Frey

— — —

The following Corporations have the same Officers and Directors:

THE DELANCEY AMUSEMENT COMPANY
HILLSIDE THEATRE CORPORATION
WALTON-BURNSIDE AMUSEMENT CORPORATION

These Officers and Directors are:

OFFICERS 2811

President	Nicholas M. Schenck
Vice-President	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck	David Bernstein
David L. Loew	Leopold Friedman

Complainants' Exhibit M (continued):

2812

NEW BROAD COMPANY

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
" "	Arthur M. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
" Treasurer	Charles K. Stern
" "	Charles C. Moskowitz
" "	R. Lazarus

2813

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein

MAIN STREET AKRON AMUSEMENT COMPANY

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
Vice-President & Treasurer	David Bernstein
2814 Secretary	Leopold Friedman
Ass't Secretary	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	David L. Loew
" "	Charles C. Moskowitz
" "	R. Lazarus

DIRECTORS

Nicholas M. Schenck — David Bernstein
David L. Loew — Arthur M. Loew
Leopold Friedman

Complainants' Exhibit M (continued).

LOEW'S ATLANTA THEATRE COMPANY 2815

OFFICERS

President	Nicholas M. Schenck
Vice-President	Edward A. Schiller
" "	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	R. Lazarus

DIRECTORS 2816

Nicholas M. Schenck	David L. Loew
David Bernstein	Edward A. Schiller

The following Corporations have the same Officers and Directors:

LOEW'S HARRISBURG CORPORATION
LOEW'S HOUSTON COMPANY

These Officers and Directors are:

OFFICERS

President	Nicholas M. Schenck
Vice-President	Edward A. Schiller 2817
" "	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein

Complainants' Exhibit M (continued).

2818

LOEW'S INDIANA THEATRES

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

DIRECTORS

2819

Nicholas M. Schenck	Leopold Friedman
David Bernstein	Arthur M. Loew
David L. Loew	H. Helborn

Isidore Feibleman

The following Corporations have the same Officers and Directors:

LOEW'S THEATRE & REALTY CORP.
PARKWAY WILMINGTON CORPORATION
MARCUS LOEW BOOKING AGENCY

These Officers and Directors are:

OFFICERS

2820

President	Nicholas M. Schenck
Vice-President	David L. Loew
" "	Edward A. Schiller
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
" "	R. Lazarus

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein

Complainants' Exhibit M (continued).

Loew's N & K Corporation

2821

Officers

President	Nicholas M. Schenck
Vice-President	David L. Loew
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

Directors

2822

Nicholas M. Schenck	David Bernstein
David L. Loew	Edward A. Schiller

Loew's St. Louis Realty & Amusement Corporation

Officers

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
" "	Edward A. Schiller
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew

2823

Directors

Nicholas M. Schenck	Leopold Friedman
David Bernstein	Nathan Frank
David L. Loew	Charles Raymond
Louis Sher	

Complainants' Exhibit M (continued).

2824 The following Corporations have the same Officers and Directors:-

DIAMOND AMUSEMENT CORPORATION
BAY RIDGE AMUSEMENT CORPORATION

These Officers and Directors are:

OFFICERS

President	Nicholas M. Schenck
1st Vice-President	Audley Clarke
3rd " "	David L. Loew
2nd Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
1st Ass't Secretary	Louis Gold
2825 2nd " "	Jesse T. Mills
3rd " "	Isidor Frey
4th " "	H. Helborn
1st Ass't Treasurer	David L. Loew
2nd " "	Arthur M. Loew
3rd " "	Charles K. Stern
4th " "	R. Lazarus

DIRECTORS

Nicholas M. Schenck	Audley Clarke
David Bernstein	Louis Gold

MIDAS AMUSEMENT COMPANY

OFFICERS

2826 President	Nicholas M. Schenck
Vice-President	David L. Loew
" "	James Ranow
" "	Max Greenwald
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck	James Ranow
David Bernstein	Max Greenwald

Complainants' Exhibit M (continued).

GATES THEATRE CORPORATION 2827

OFFICERS

President	Nicholas M. Schenck
Vice-President	Charles Jaffa
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern.
" Secretary	Charles C. Moskowitz

DIRECTORS 2828

Nicholas M. Schenck	David L. Loew
David Bernstein	Charles Jaffa

NEW ROCHELLE CONSOLIDATED CORPORATION

OFFICERS

President	H. S. Brown
Vice-President	Nicholas M. Schenck
Treasurer	David Bernstein
Secretary	Wm. Mallard
Ass't Treasurer	O. R. McMahon
" "	Philip M. Stern
" "	Herman Zohbel
" "	H. E. Newcomb
Ass't Secretary	Leopold Friedman 2829
" "	Jesse T. Mills
" "	David L. Loew
" "	Charles K. Stern

DIRECTORS

Class A

Hiram S. Brown
B. B. Kahane
Wm. Mallard

Class B

Nicholas M. Schenck
David Bernstein
E. A. Schiller

Complainants' Exhibit M (continued).

2830

SUTTER AMUSEMENT CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
" "	Joshua Hellinger
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
2831 " "	R. Lazarus

DIRECTORS

Nicholas M. Schenck	Joshua Hellinger
David Bernstein	Robert Mintz

EVERGREEN AMUSEMENT CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
2832 Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck	Eugene Picker
David Bernstein	

Complainants' Exhibit M (continued).

LOEW'S BOSTON THEATRES COMPANY. 2833

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
" "	Arthur M. Loew
" "	David Blum
Secretary & Clerk	John H. Devlin
Ass't Treasurer	Len Cohen
" "	Charles K. Stern
Ass't Secretary	Leopold Friedman
" "	Victor J. Morris
" "	Jesse T. Mills

DIRECTORS 2834

Nicholas M. Schenck	Leopold Friedman
David Bernstein	Victor J. Morris

John H. Devlin

The following Corporations have the same Officers and Directors:

CHÂTEAU AMUSEMENT CORPORATION
HEMLOCK THEATRE CORPORATION

These Officers and Directors are:

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew 2835
" "	David V. Picker
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
" "	R. Lazarus

DIRECTORS

Nicholas M. Schenck
David Bernstein
Eugene Picker

Complainants' Exhibit M (continued).

2836 WARWICK AMUSEMENT CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	Charles B. Barkley
" "	David L. Loew
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

2837 DIRECTORS

Nicholas M. Schenck	Charles B. Barkley
David Bernstein	Marion J. Barkley

LOEW'S OHIO THEATRES, INC.

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
" "	Edward A. Schiller
2838 Secretary	Leopold Friedman
Ass't Secretary	Jesse T. Mills
" "	H. Helborn
" "	Isidor Frey
" "	E. A. Hahn
Ass't Treasurer	Charles K. Stern
" "	Arthur M. Loew
" "	Charles C. Moskowitz

DIRECTORS

Edward A. Schiller	Nicholas M. Schenck
Leopold Friedman	David Bernstein
E. A. Hahn	David L. Loew
	Jesse T. Mills

Complainants' Exhibit M (continued).

EVANSVILLE OPERATING CORPORATION 2839

OFFICERS

President	Nicholas M. Schenck
Vice-President	Harold B. Franklin
Secretary	William Mallard
Treasurer	David Bernstein
Ass't Secretary	Leopold Friedman
" "	David L. Loew
" "	Charles K. Stern
" "	Jesse T. Mills
" "	H. Helborn
" "	R. Lazarus
Ass't Treasurer	Herman Zohbel

2840

DIRECTORS

Class A

M. H. Aylesworth
Harold B. Franklin
Herman Zohbel

Class B

Nicholas M. Schenck
David Bernstein
E. A. Schiller

2841

Complainants' Exhibit M (continued).

2842

TOLEDO OPERATING CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	Isidore Feebleman
" "	David L. Loew
" "	Edward A. Schiller
Secretary	Leopold Friedman
Ass't Secretary	Charles K. Friedman
" "	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
2843 " "	Charles K. Stern
" "	R. Lazarus
" "	Charles C. Moskowitz

DIRECTORS

Nicholas M. Schenck	Charles K. Friedman
David Bernstein	Isidore Feebleman

SUBURBAN THEATRE CORPORATION

OFFICERS

President	Nicholas M. Schenck
2844 Vice-President	David L. Loew
" "	Myron Sulzberger
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck	Myron Sulzberger
David Bernstein	Rena Sulzberger

Complainants' Exhibit M (continued).

NORTH BERGEN AMUSEMENT CORPORATION 2845

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
Secretary	Leopold Friedman
Ass't Secretary	Jesse T. Mills
" "	Isidor Frey
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	R. Lazarus

DIRECTORS 2846

Nicholas M. Schenck
David Bernstein
David L. Loew

The following Corporations have the same Officers and Directors:

HAMFORD REALTY CORPORATION
WILTHAN REALTY CORPORATION

These Officers and Directors are:

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew 2847
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
" "	R. Lazarus

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein
Leopold Friedman

Complainants' Exhibit M (continued).

2848

HAWTHORNE AMUSEMENT CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
" "	David V. Picker
Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern
" "	Charles C. Moskowitz
2849 " "	R. Lazarus

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein

PROVIDENCE THEATRICAL CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice-President	David L. Loew
2850 Vice-President & Treasurer	David Bernstein
Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
" "	Chas. C. Moskowitz
Ass't Treasurer	Arthur M. Loew.
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck
David L. Loew
David Bernstein

Complainants' Exhibit M (continued).

LOEW-UNITED ARTISTS CORPORATION 2851
(Columbus, Ohio)

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
Secretary	Leopold Friedman
Ass't Treasurer	Arthur M. Loew
" "	R. Lazarus
" "	Charles K. Stern
" "	C. C. Moskowitz
Ass't Secretary	Isidor Frey
" "	H. Helbern
" "	Jesse T. Mills 2852

DIRECTORS

Class A

Nicholas M. Schenck
David Bernstein
David L. Loew

Class B

Dennis F. O'Brien
William P. Phillips
Harry D. Buckley

2853

Complainants' Exhibit M (continued).

2854

Louisville Operating Company, Inc.

Officers

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
Secretary	Leopold Friedman
Ass't Treasurer	Arthur M. Loew
" "	David L. Loew
" "	Charles K. Stern
Ass't Secretary	Jesse T. Mills
" "	Hattie Helborn

Directors

2855

Class A

Nicholas M. Schenck
David Bernstein
David L. Loew

Class B

Dennis F. O'Brien
William P. Phillips
Harry D. Buckley

Baltimore Consolidated Corporation

Officers

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
2856 " "	David L. Loew
" "	Edward A. Schiller
" "	Harry M. Warner
Secretary	Leopold Friedman
Ass't Secretary	Jesse T. Mills
" "	Isidor Frey
" "	H. Helborn
" "	Stanleigh P. Friedman
Ass't Treasurer	Arthur M. Loew
" "	Charles K. Stern

Directors

Nicholas M. Schenck — Edward A. Schiller
David Bernstein — Stanleigh P. Friedman
Harry M. Warner

Complainants' Exhibit M (continued).

THE STATE THEATRE CO. 2857

OFFICERS

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
" "	E. A. Schiller
" "	Arthur M. Loew
" "	David Blum
Secretary	John H. Devlin
Ass't Treasurer	Len Cohen
" "	Charles K. Stern
Ass't Secretary	Leopold Friedman
" "	Jesse T. Mills
" "	Victor J. Morris 2858

DIRECTORS

Nicholas M. Schenck	Victor J. Morris
David Bernstein	John H. Devlin
Leopold Friedman	

NORFOLK CONSOLIDATED CORPORATION

OFFICERS

President	Nicholas M. Schenck
Vice-President	Walter Vincent
Secretary	Jos. Egan
Treasurer	Sidney Wilmer 2859
Ass't Secretary	Leopold Friedman
" "	Jesse T. Mills
" "	H. Helborn
Ass't Treasurer	David Bernstein
" "	David L. Loew
" "	Charles K. Stern

DIRECTORS

Nicholas M. Schenck	Walter Vincent
E. A. Schiller	Sidney Wilmer

Complainants' Exhibit M (continued).

2866

Richmond Consolidated Corporation

Officers

President	Sidney Wilmer
Vice-President	Nicholas M. Schenck
Ass't Vice-President	Jesse T. Mills
" " "	H. Helborn
" " "	David L. Loew
" " "	Charles K. Stern
Secretary	Leopold Friedman
Treasurer	David Bernstein
Ass't Secretary	J. J. Murdock
Ass't Treasurer	Sidney Wilmer
" "	Walter Vincent
2861 " "	Joseph Egan

Directors

Sidney Wilmer	Nicholas M. Schenck
Walter Vincent	E. A. Schiller

Penn-Federal Corporation

Officers

President	Nicholas M. Schenck
Vice-President & Treasurer	David Bernstein
Vice-President	David L. Loew
" "	Edward A. Schiller
2862 Secretary	Leopold Friedman
Ass't Secretary	Isidor Frey
" "	Jesse T. Mills
" "	H. Helborn
" "	Charles K. Stern
Ass't Treasurer	Charles C. Moskowitz
" "	R. Lazarus
" "	Arthur M. Loew

Complainants' Exhibit M (continued).

DIRECTORS

Nicholas M. Schenck — Leopold Friedman
David Bernstein — David L. Loew

2863

WILLARD AMUSEMENT CORPORATION

OFFICERS

President	H. Klay Miner
Treasurer	A. H. Schwartz
Secretary	S. D. Holiner

DIRECTORS

H. Klay Miner — A. H. Schwartz
James T. McAllister — John Reis
David Schlein

2864

CONWALL REALTY CORPORATION

OFFICERS

President	H. Klay Miner
Vice-President	James T. McAllister
Treasurer	A. H. Schwartz
Secretary	S. D. Holiner

DIRECTORS

H. Klay Miner — James T. McAllister
A. H. Schwartz — Dr. R. M. Beach
S. D. Holiner — David Schlein
John Reis

2865

We have been unable to obtain the names of the Officers and Directors of the following Corporations:

LOEW'S LONDON THEATRES, LTD.

MARCUS LOEW'S THEATRES, LTD.

Report of Special Master.

2866

[SAME TITLE.]

APPEARANCES:

For Complainants, O'BRIEN, DRISCOLL & RAFTERY, by Arthur E. Driscoll, Esq. and Edward J. Clarke, Esq.

For Defendants, Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, J. ROBERT RUBIN, Esq., by Samuel D. Cohen, Esq., Walter H. Pollak, Esq. and Earle L. Beatty, of Counsel.

2867

And at hearings in California, LOEB, WALKER & LOEB, Esqs., by Milton H. Schwartz, Esq. and Walter S. Hilborn, Esq.

For Defendant, Culver Export Corporation, SAMUEL D. COHEN, Esq.

For Defendant: Loew's, Inc., LEOPOLD FRIEDMAN, Esq.

The decree of the United States District Court signed by Judge John C. Knox and filed in this case on July 31, 1936, states:

2868

> "That the above defendants and each of them have infringed and violated the said copyright and the exclusive rights of said complainants vested in them under the aforesaid copyright."

It then states the manner in which this has been done, as follows (the arrangement is mine):

1. "by copying the complainants' aforesaid dramatic composition;"

2. "by manufacturing therefrom a certain talking motion picture entitled 'Letty Lynton'."

3. "by distributing or selling to third parties licenses to exhibit said talking motion picture 'Letty Lynton' throughout the United States and its possessions and elsewhere." 2869

4. "by giving and causing to be given or aiding and abetting in the giving of public performances and representations for profit of complainants' dramatic composition 'Dishonored Lady' by means of giving or causing to be given or aiding and abetting in the giving of public performances and representations of the aforesaid talking motion picture 'Letty Lynton', and by otherwise trafficking in and dealing with complainants' dramatic composition for profit throughout the United States of America and other portions of the world." 2870

The decree then goes on to state:

> "That the complainants recover of the defendants and each of them all damages sustained by them and that the complainants recover of the defendants and each of them all gains and profits made by the defendants and each of them because of the said infringement upon complainants' copyright."

in the manner above described. 2871

The decree then proceeds to define my duties as Special Master by instructing me:

> "to ascertain and report the amount of complainants' damages herein and the amount of such gains and profits of the defendants and each of them, and in addition, the Special Master shall report separately the amount of such gains and profits of the defendants obtained from all sources outside of the United States."

Section 25 of the Copyright Act, in defining the liability of a person who has infringed a copyright, states in paragraph (b) in part as follows:

> "To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just."

Complainants in this case are asking for profits. The accounts which I have taken establish clearly what the sales of this picture were and the defendants have introduced in evidence voluminous records and testimony respecting every element of cost which they claim.

Every element of cost which I have found to be proper, including a substantial allowance for overhead, has been deducted from the gross amount received by the defendants through the use of the complainants' copyrighted work in the various manners described in the order above referred to.

The first hearing before me as Special Master was held on September 9, 1936. A subsequent hearing was held on October 21, 1936; then followed four adjournments and the next hearings were held on November 20, 1936, December 2, 1936 and December 11, 1936, which hearing was followed by several adjournments; the next hearing being held on February 1, 1937.

It had become apparent, as a result of the aforementioned hearings, that competent testimony respecting the accounting of the defendants herein could not be secured unless either the defendants produced in New York a large number of witnesses and a staggering amount of records from defendants' production studio at Culver City, California,

or the hearings before me as Special Master be moved to Culver City, California, and continued there. Faced with the expense and inconvenience of transporting witnesses and records from California to New York, the defendants agreed to pay the travelling and living expenses of the Special Master and of counsel for the complainants and his assisting accountant to and from California. Accordingly, the next hearing in this matter was held in Culver City, California, on March 1, 1937. 2875

Hearings were held daily in California, except Sundays, and one intervening day, from March 1st to and including March 8, 1937, and the testimony taken at said hearings is separately bound with the testimony filed herein and is entitled "Culver City Testimony". 2876

Hearings were again resumed in my office in New York on April 20, 1937, April 21, 1937, April 23, 1937, May 5, 1937, May 6, 1937, May 7, 1937, May 17, 1937, May 24, 1937, June 16, 1937, June 28, 1937, June 30, 1937, July 6, 1937, July 9, 1937, August 11, 1937, September 30, 1937 and October 5, 1937.

After the closing of the hearings on October 5, 1937, and after I had had an opportunity to read over the record, the attorneys for both sides appeared before me and argued certain points of law and discussed with me at length the facts presented. These conferences took place on November 22, November 23 and November 26, 1937. I then began the drafting of this report and on December 16, 1937, again had an extended conference with the attorneys for both sides regarding various controversial questions. After this, I resumed the drafting of this report and again on February 7, 1938, conferred with counsel for both sides. 2877

As a result of certain contentions made during these conferences by the complainants, the defendants requested an opportunity to present certain additional testimony, and accordingly I permitted the hearings to be reopened and a final hearing was held on March 16, 1938.

The testimony taken in New York is filed herein in two

78 volumes, pages 1 to 519 being volume 1 and pages 520 to 1240 being included in volume 2.

It may be noted here that Complainants' Exhibits are in one series, with alphabetical designations A to M, both inclusive, with addition of arabic numerals where exhibits consist of more than one sheet, and that the Defendants' Exhibits are in four series; first, those introduced in New York in connection with general accounting marked simply with arabic numerals 1 to 34, with addition of letters and numbers where exhibits consist of more than one sheet; second, those introduced in Culver City, California, in connection with general accounting marked with arabic numerals prefaced by letter "C", C-1 to C-34; third, those in-
79 troduced in connection with the accounting on behalf of the defendant Loew's Incorporated, marked L-1 to L-15, inclusive, and, fourth, there were references to testimony and to exhibits which either appear in the printed record of the case in the United States Circuit Court of Appeals, or were submitted (unprinted) to that Court as a part of that record. All such references either to testimony or to exhibits are numbered consecutively. References 1-18, inclusive, and in the case of exhibits introduced from such printed record, there were superadded exhibit numbers R-1 to R-7, inclusive.

There are filed herewith also the following memoranda
80 submitted to me:

1. Complainants' memorandum.
2. Defendants' memorandum.
3. Complainants' reply memorandum.
4. Defendants' reply memorandum.
5. Additional complainants' memorandum on six items having to do with overhead.
6. Defendants' memorandum on certain items of overhead.

7. Further memoranda by complainants on correct ratio of general overhead. 2881

8. Comparative analyses of play and picture, trial and play, submitted by defendants.

9. Complainants' memorandum opposing proposal to divide Loew's profits in vaudeville theatres, one-third to vaudeville and two-thirds to "Letty Lynton".

10. Memorandum by defendants re Exhibit L-14 and testimony of Vogel.

The complainants also submitted to me, to be used by me in reading their original memorandum above referred to, 2882 several groups of photostatic copies of certain exhibits with notations made therein by complainants' counsel indicating objections to certain items on these exhibits and giving cross references to the complainants' memorandum which detailed the reasons for these objections.

It may be noted here that defendants' original exhibits numbered 1, 2, 3, 4, 5, 6, 7 and 8 may be disregarded *in toto* inasmuch as during the course of the hearings they were superseded by other exhibits and testimony.

1. Apparently, from the testimony before me, the motion picture business divides itself into three distinct parts or operations: 2883

(a) Production, or making of the picture, including hiring of cast and securing of sets, costumes, literary material, the actual photography, (generally referred to as "shooting" the picture), and the development of the negative of the picture.

(b) Distribution, which includes the leasing of positive prints of the picture to theatre owners or operators (generally referred to as exhibitors), for exhibition in their respective theatres. Distribu-

MICRO CARD
TRADE MARK ®
22
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MATTHEW BENDER & COMPANY
14417
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microcard

2884 tion is generally made through a corporation maintaining branches (referred to as exchanges) in the different key cities throughout the country; and

(c) Exhibition, or the actual showing of the picture on the screen to the public by the owner or operator of a theatre.

2. The motion picture "Letty Lynton" was produced by Metro-Goldwyn-Mayer Corporation. It was thereafter turned over to Metro-Goldwyn Pictures Corporation at cost. Metro-Goldwyn Pictures Corporation turned over the picture to Metro-Goldwyn-Mayer Distributing Cor-
2885 poration for domestic distribution, upon an arrangement whereby the Distributing Company was to pay to the Pictures Corporation 80% of the gross receipts or proceeds received from the rental of said picture to exhibitors (Defendants' Exhibits 17, 18, 19).

Thereafter the Distributing Company rented the picture to exhibitors throughout the United States and its possessions, and paid to Metro-Goldwyn Pictures Corporation 80% of the gross receipts (Defendants' Exhibit 19).

The picture was also turned over by Metro-Goldwyn Pictures Corporation to Culver Export Company for foreign distribution, and to Regal Films, Ltd., for Canadian distribution. Culver Export Corporation in turn distributed
2886 it abroad (excepting Canada) through wholly owned foreign subsidiaries (except in Sweden), which in turn paid to Culver Export Corporation a percentage of the gross receipts varying with the different foreign subsidiaries (Defendants' Exhibits 17, 20, 21).

3. The picture was distributed in Canada through a contract with the Regal Films, Ltd., a Canadian corporation, not owned or controlled by any of the defendants, and the proceeds received by the Pictures Corporation from said Regal Films, Ltd., are accounted for by the Pictures Corporation (Defendants' Exhibit 18, N. Y. S. M., 375).

4. A separate account has been filed by each defendant named in this action. 2887

An account was filed by Metro-Goldwyn Pictures Corporation which included the 80% of the rentals received by Metro-Goldwyn Pictures Corporation from the Metro-Goldwyn-Mayer Distributing Corporation, and took as a deduction against said rentals, the cost of the making of the picture by the Producing Company (Defendants' Exhibit 18).

An account was filed by Metro-Goldwyn-Mayer Distributing Corporation which accounted for the 20% of the gross rentals retained by the Distributing Corporation (Defendants' Exhibit 19).

An account was filed by the Culver Export Corporation which accounted for the part of the proceeds derived from foreign distribution received by Culver Export Corporation from its foreign subsidiaries (Defendants' Exhibit 20). 2888

An account was filed on behalf of the foreign subsidiaries which accounted for the portion of the gross receipts from foreign rentals retained by those foreign subsidiaries (Defendants' Exhibit 21).

An account was filed by Loew's, Inc., which accounted for the profits of all of the Loew Theatres in which the said picture was exhibited (Defendants' Exhibits L-6—L-13, both inclusive).

5. The corporation organization chart as of August 31, 1932, appears as Defendants' Exhibit 17. This shows that Loew's, Inc., owned at that time 100% of the stock of the MGM Company, Inc., and that the MGM Company, Inc., owned 100% of the common stock of Metro-Goldwyn Pictures Corporation. The Metro-Goldwyn Pictures Corporation preferred stock was listed on the New York Stock Exchange and about 10% of it was owned by Loew's, Inc. Metro-Goldwyn Pictures Corporation in turn owned all of the capital stock of the Metro-Goldwyn-Mayer Distributing Corporation (domestic distributer), Metro-Goldwyn- 2889

2890 Mayer Corporation (producer) and the Culver Export Corporation.

6. The decree above quoted instructs the Special Master to "report separately the amount of such gains and profits of the defendants obtained from all sources outside of the United States". This, in effect, means that the account of the defendant, Culver Export Corporation and the account of its foreign subsidiaries are to be separately examined.

I shall now consider the accounting of the defendants, Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation and Loew's, Inc.

2891

ACCOUNTING OF METRO-GOLDWYN PICTURES CORPORATION.

(HEREINAFTER CALLED PICTURES CORP.).

1. The total film rental income of the Pictures Corp. from "Letty Lynton", excluding Canada, is stated in Defendants' Exhibit 18 to be $727,053.84 and since there is no dispute about this item, I find it as a fact. In accounting for this sum of money, Pictures Corp. credits itself (see Defendants' Exhibit 18) with the sum of $145,410.77,
2892 which amount was retained by Metro-Goldwyn-Mayer Distributing Corporation, representing 20% of the gross film rental income, and this amount is accounted for in the account of the Metro-Goldwyn-Mayer Distributing Corporation hereinafter referred to. The net film rental income, therefore, to be accounted for by Pictures Corp. amounts to $581,643.07.

2. The Pictures Corp. claims that it should be allowed as a credit an item of $12,505.33, representing what it calls the share of the distributing expense that "Letty Lynton"

should be charged with. The way it arrives at this sum 2893
is to take its total film rental income (excluding Canada), which amounted during the year in question to $30,020,526.08 and deduct from that 20% thereof, which was retained by Metro-Goldwyn-Mayer Distributing Corporation, arriving at a net film rental income of $24,016,420.86. It then lists its home office expenses (Defendants' Exhibit 18-B), which expenses total $1,872,601.74, and deducts from this amount the reimbursement it received from Metro-Goldwyn-Mayer Distributing Corporation of $1,304,984.38, leaving a net home office expense figure of $567,617.36. It adds to this depreciation on its equipment in the home office, amounting to $14,927.54, or a total alleged distributing expense of $582,544.90. It credits 2894
against this sum trailer income and miscellaneous income amounting to $66,513.27, arriving at a total distributing expense of $516,031.63, and this it finds to be 2.15% of the net film rental income. It then applies this ratio to the net film rental income of "Letty Lynton" and reaches the figure of $12,505.33. The claim of the defendants of this amount as an allowance of overhead in connection with the distribution is based, of course, on the relation of cost of distribution to gross receipts. The complainants object to this allowance and claim that the Pictures Corp. is simply a holding company and not concerned with distribution. It seems clear to me from the testimony taken in 2895
New York (8. M. 354) that the home office expense listed on Defendants' Exhibit 18-B was expense of distribution and that the accounting practice of the group of companies was such as to charge the Pictures Corp. with the sum indicated above. However, I do not agree with the method employed by the defendants in arriving at the proper charge to be made against the picture "Letty Lynton" as a part of the overhead connected with the distribution of defendants' pictures. I shall disallow this item and allow a credit of distribution expense to this defendant in this accounting in the amount of $8,517.48. My reason for the

2896 disallowance of the defendants' claim of $12,505.33 and the allowance in lieu thereof of $8,517.48 will be set forth at length when I consider the accounting filed herein by the Metro-Goldwyn-Mayer Distributing Corporation, which accounting is set forth in Defendants' Exhibit 19.

3. On Defendants' Exhibits numbered 18-D-1, 2, 3 and 4 are listed what may be termed, with the exceptions hereinafter noted, direct, clearly identifiable costs of production of the picture "Letty Lynton". I find that the following of these items are proper credits to the Pictures Corp. in this accounting and accordingly I allow them. There is no controversy between the parties as to the propriety of
2897 allowing these credits.

Direction:	
Compensation paid to Clarence Brown	$75,000.00
Compensation paid to James Basevi, Director of Miniature Department	575.42
	$75,575.42
Production Manager and Assistants	582.52
Assistant Director and Clerks	2,043.91
Compensation paid to Cameramen and Assistants, representing compensation paid to	
2898 24 individuals	4,185.63
Editors and Cutters	2,789.49
Compensation paid to Stock Talent:	
Joan Crawford	$16,916.68
Robert Montgomery	7,500.02
Nils Asther	2,400.00
Helen Robinson	17.51

Lewis Stone	1,125.00	2899
Karen Morley	41.66	
Belle Donovan	20.00	
Ruth Holly	25.01	
Nika Justin	15.00	
Walda Mansfield	33.32	
Gladys Mason	11.66	
Betty Sanford	20.00	
Ruth Renick	8.33	
	$28,134.19	

Compensation paid to Picture Talent: 2900

Max Robson	$ 2,833.32
Louise C. Hale	3,000.00
Commission	30.17
	$ 5,863.49

Extra Talent including salaries and the fees of the Central Casting Office $11,152.75

Compensation paid for story:

Wanda Tuchok	$ 2,333.33	2901
John Meehan	23,333.34	
D. Taylor	1,866.66	
Mitzi Cummings	52.50	
Book cost	3,850.00	
Miscellaneous expense	5.64	
Scrip expense	554.67	
	$31,996.14	

2002 Wardrobe—Womens:

Purchased	$ 186.95
Studio construction	4,618.34
Outside rentals	200.00
Studio altering, fitting, etc.	1,094.01
Damage and loss	.50
Transportation	68.19
Laundry and cleaning	90.42
Repairs by prop. shop	3.85
Make-up	251.61
	$ 6,513.87

2003

Wardrobe—Mens:

Purchased	$ 150.00
Outside rentals	181.63
Studio altering, fitting, etc.	530.12
Laundry and cleaning	70.58
Transportation	18.11
Make-up	282.44
	$ 1,232.88

2004 Lighting:

Lining sets—salary	$ 887.52
Operation sets—salary	2,017.16
Striking sets—salary	268.18
Supplies and expense	47.14
Rent outside electric equipment	206.47
Operation of power plant	21.00
	$ 3,447.47

Automobiles and truck hire:		2905
Company equipment	$ 372.49	
Outside rentals	264.93	
	$ 637.42	
Meals and lodging	$ 19.85	
Meals—company restaurant	182.35	
Location expense:		
Salary and location man	20.79	
Negative raw stock	5,142.80	
Negative processing	1,243.78	2906
Positive raw stock	3,677.91	
Positive processing	2,614.54	
Titles	87.49	
Publicity salaries	3,179.64	
Stills	1,153.93	
Workmen's compensation insurance	803.49	
Special shots	1,288.55	
Miscellaneous unclassified expense	1,722.07	
Recording charges	6,558.00	
Re-recording charge	940.78	
Music	956.42	
Musicians	1,704.08	
Cost of sets:		2907
The names of the sets are listed and the labor cost and material cost of each set is specified and these items amount in the aggregate to	33,144.90	
An additional item was added subsequently amounting to	52.75	
The total of all these items is	$238,649.30	

2908 4. Complainants contend that a credit amounting to $2,000 claimed by the defendants representing the salary of Joan Crawford, one of the stars in the picture, for her idle time between the finishing of the previous picture and the beginning of work on "Letty Lynton" is improperly claimed as a credit by the defendants. A similar item amounting to $2,500 in the case of Robert Montgomery is also objected to by the complainants (C. C. S. M., 47-51). I find, however, on the authority of *Duplate Corporation* v. *Triplex Safety Glass Company*, 298 U. S. 448, that the evidence as reflected in this particular case of the amounts paid to these two stars and charged against this picture for their idle time between the finishing of their previous
2909 picture and the beginning of their work in "Letty Lynton" indicates that these payments should be regarded as reasonable costs in the production of "Letty Lynton". Accordingly, I allow these credits to the defendants, amounting in the aggregate to $4,500.00.

5. Listed in Defendants' Exhibits 18-D-1, 2, 3 and 4 are certain departmental overheads, which appear to have been charged on the books of the company and which are objected to by the complainants.

In the Camera Department an item of $1,045.17 is claimed as a credit by the Pictures Corp. and represents
2910 an overhead charge figured at 25% of the wages of the men who actually worked on this picture in the Camera Department (C. C. S. M., 37-41).

In the Editors and Cutters Department an item of $221.57 is claimed as a credit for overhead, which represents 8% of the direct charges for labor and materials (C. C. S. M., 44).

An overhead charge of $896.05 is claimed as a credit in the Stock Talent Department and is figured on 25% of the cost of the stock talent in the picture, exclusive of Crawford and Montgomery, and is an arbitrary figure set up on the books of the company each year (C. C. S. M., 52-53).

The departmental overhead claimed as a credit in connection with the Scenario Department amounted to $3,310.80 and this was figured on a basis of 12% of the writers' salaries working on the particular picture involved (C. C. S. M., 57, 58). 2911

The departmental overhead claimed as a credit in connection with the Musicians Department amounted to $610.76 and this was figured on a basis of 23% of the labor of musicians working on the picture (C. C. S. M., 67).

The method used in figuring overhead in the Womens Wardrobe Department amounting to a sum of $2,500, was that the head of the department "prorated weekly on the basis of his knowledge of the wardrobe operation over the pictures in process". His proration was not based on any total disbursements or any total of labor costs or any total of any kinds of costs but the proration was done according to his judgment (C. C. S. M., 135). 2912

The method of estimating the overhead in the Lighting Department is identical with the departments other than the Womens Wardrobe Department, that is, it was calculated on a percentage of the direct labor cost and the percentage used was 8%, resulting in a figure of $275.71 (C. C. S. M., 61).

As to these claims for credit for departmental overhead based on labor and materials made on the books of the company in the regular course of business, I find that they should be allowed to the defendants as reasonable charges. They total $6,359.56. This leaves to be considered, with respect to these departmental overhead charges, one item only, that is, a charge of $2,500 in Womens Wardrobe Department described above. The method employed in fixing this charge was the judgment of the head of the department and it resulted in an over absorption of overhead in that particular department in the aggregate amounting to $3,593.52 (C. C. S. M., 60). I shall disallow this item as not having been based on the cost of labor and materials used in this department. I shall deal with the overhead of 2913

2914 the Womens Wardrobe Department hereafter in considering the subject of the general studio overhead.

6. On Defendants' Exhibit 18-D-3 credits are claimed by the defendants for expenditures in connection with negative and positive raw stock and negative and positive processing. I have corrected those referring to the negative and positive processing to eliminate all profit, pursuant to the testimony of Mr. Craig, the defendants' accounting officer, found in the testimony taken at Culver City (C. C. S. M., 483-4) and the corrected amounts are included in the items appearing above which I have allowed as credits to the defendants. There is clearly no reason why the picture "Letty Lynton"
2915 should be charged with any profit to the defendants in these items of negative and positive processing and accordingly I disallow the items appearing on Defendants' Exhibit 18-D-3 under the heading "Negative Processing and Positive Processing" to the extent that any profit is included therein according to the testimony of Mr. Craig (C. C. S. M., 483-4).

7. Complainants object to the publicity salaries item claimed as a credit on Defendants' Exhibit 18-D-3. This item amounts to $4,206.10. Complainants take the position that either this item should be entirely eliminated or it should be turned into the general overhead. I shall allow
2916 this item as a credit on the basis of the testimony of Mr. Craig (C. C. S. M., 145) to the effect that the formula adopted by the management was to divide the publicity cost 70% to the pictures actually in production and 30% to pictures in preparation or upon which production had finished but release had not taken place. Mr. Craig's testimony, which was uncontradicted, is that there is more demand for publicity in connection with a picture while it is in the "shooting" stage than after the production is completed. I do not think that this allocation can be considered unreasonable or arbitrary and, accordingly, I allow

the item as a credit. Expenditures for publicity of this sort must be regarded as a part of the cost of "Letty Lynton". (*Metallic Rubber Tire Company* v. *Hartford Rubber Co.*, 275 Fed. 315 at 323.) 2917

8. On Defendants' Exhibit 18-D-4 appears an item "Construction Supervision", amounting to $3,704.65, which is claimed by the defendants as a credit. It appears from the testimony (C. C. S. M., 86, 87, 88) that the Construction Department, Property Department and Art Department were all concerned with the manufacture of the sets for the picture "Letty Lynton". The Art Department designs the sets and prepares the blueprints, the Construction Department builds the sets, and the Property Department dresses the sets. The item of $3,704.65 represents the part of the departmental overhead of these three departments which the defendants claim should be charged against the picture "Letty Lynton". The testimony further shows that 65% of the direct cost in the Art Department was added for overhead (C. C. S. M., 87); that the overhead charged in the Property Department was 14% of the direct cost, and that 5% of the cost of the construction work was added for overhead in the Construction Department. While I am rather shocked at the 65% charge in the Art Department, I shall allow the defendants as a credit in this accounting this item of Construction Supervision amounting to $3,704.65 since I find from Defendants' Exhibit 18-D-4 that the total cost of sets eliminating this item of overhead was $33,144.90 and I find a charge of approximately 11% for overhead as a direct cost of the production of these sets is not unreasonable. 2918 2919

9. This brings me to a consideration of Defendants' Exhibit 18-D-5 and first to a determination as to whether the items listed under the caption "General Studio Overhead" and totalling $5,891,374.57 are proper in arriving at the final figure of General Studio Overhead as stated.

2920 I shall first consider the item of Studio Overhead amounting to $2,246,793.28 listed in Defendants' Exhibit 18-D-5 and detailed in schedule in Defendants' Exhibit 18-E-1 and 18-E-2. The following items appear on Defendants' Exhibit 18-E-1 as debits and credits and which are included in the item $2,246,793.28 above referred to and are not objected to by the complainants except that complainants object to the allowance of any Studio Overhead:

	Dr.	*Cr.*
Salaries—Accounting Department	$100,421.33	
2921 Expenses—Accounting Department	21,309.88	
Salaries—Production Department	72,346.20	
Expenses—Production Office	2,368.15	
Salaries—Casting Office	41,600.32	
Expenses—Casting Office	35,210.19	
Salaries—Projection Department	2,225.51	
Expenses—Projection Department	31.42	
Salaries and Expenses — Business Office	48,817.61	
Drayage and Auto Hire	1,748.47	
Plant, Engineering and Planning	50,660.93	
Expense of Personnel Department	220.63	
Maintenance—Repair of Buildings	32,553.44	
2922 Repair and Maintenance of Facilities	151,527.64	
Railway Transportation	2,054.97	
Mailing Expense	11,058.40	
Printing and Stationery	14,745.02	
Stock Library Expense	16,298.66	
Fan Mail Expense	2,514.53	
New York Office Expense in Connection with Production	151,125.59	
Stamp Tax	432.72	
Film Rentals for Studio Showing	3.05	
Heating and Ventilation	6,357.82	

	Dr.	*Cr.*	2923
Button Deposit		18.00	
Salvage Yard		9.41	
Dues	24,765.60		
Freight & Handling		7,809.33	
Telephone Expense	86,677.60		
Telegraph Expense	8,651.48		
Executive Dining Room Expense	8,485.20		
Flowers for Executive Office	702.61		
Private Dining Room in Commissary	1,501.43		
Income from Use of Flowers		4,011.45	
Adjustment of Overhead for year ended 8/27/31		9,910.89	2924
	$896,446.40	$21,759.08	

10. I shall now consider the items of Studio Overhead listed in Defendants' Exhibit 18-E-1 to which specific objection has been made by the complainants.

In objecting to the first two items appearing on Defendants' Exhibit 18-E-1, that is, Salaries and Expenses of the Executive Department, complainants refer to the testimony of Mr. Craig (C. C. S. M., 187-199) from which it appears that the salaries of those executives, assistants, secretaries and stenographers, any part of whose time or labor was directly concerned in the making of "Letty Lynton", and 2925
which salaries are included in the first item on Defendants' Exhibit 18-E-1, only amount to $403,000 and that the balance of this sum of $1,047,599.43 that is $644,599.43 is made up of salaries of executives and their assistants, secretaries and stenographers who were not in any way connected with the making of "Letty Lynton" and therefore this should not be included in the Studio Overhead in which "Letty Lynton" should share. It is important to keep clearly in mind that at this point I am trying to determine the amount of the General Studio Overhead. Later, I shall

2926 determine what proportion of the General Studio Overhead should be shared by the picture "Letty Lynton".

I have no hesitation in saying that the total salaries and expenses of the Executive Department are a part of the studio overhead inasmuch as these salaries and expenses undoubtedly represent a part of the general expenses of carrying on this business. If the complainants' contention is accepted and the sum of only $403,000 is considered as a part of the General Studio Overhead, it is perfectly clear that the General Studio Overhead will be incorrectly stated to the extent of $644,599.43 (and the expenses of the Executive Department amounting to $16,482.79). Accordingly, I reject the complainants' contention that in
2927 establishing the amount of the General Studio Overhead the salaries of only such of the executives, assistants, secretaries and stenographers as the testimony shows spent some time or labor in connection with the picture "Letty Lynton" should be included and I allow as a part of the General Studio Overhead the amount of all of the salaries and expenses of the Executive Department as listed in the first two items of Exhibit 18-E-1, that is, $1,047,599.43 and $16,482.79.

11. Complainants object to an item of $2,745.00, which is included in the item "Salaries Maintenance" of $123,
2928 602.31 appearing on Defendants' Exhibit 18-E-1. This sum of $2,745.00 appears to represent unassigned salaries of doctors and nurses (C. C. S. M., 210-212). It appears from the testimony (C. C. S. M., 212) that the company maintained on the lot a first aid station and a nurse who was always in attendance and who was available for call on any production that needed her services on the lot. It seems clear to me that, even though there is no proof that doctors and nurses were used in connection with the production of "Letty Lynton", this is a proper overhead charge of an organization of this sort.

12. The next two items to which complainants object in this schedule are the Legal and Other Expenses re Patent Rights $2,060.52 and Legal Salaries and Expense $30,573.43. While these items had nothing to do with the production of "Letty Lynton" (C. C. S. M., 206-217) they were for general corporation work. These items I hold to have been properly included in General Studio Overhead. 2929

13. The next item objected to by the complainants is the item entitled Rental of Studio and Facilities amounting to $334,464.61. This item represented part of the depreciation as explained by Mr. Mills in his testimony (N. Y. S. M., 188-189). The total depreciation of the Los Angeles studio, equipment and buildings is shown on Defendants' Exhibit 9 as amounting to $520,631.21. This item appears on Defendants' Exhibit 18-D-5. I shall eliminate this item from this schedule and will consider it hereafter at the same time that I consider the question of the investment in the studio plant and equipment and the item entitled "Interest Paid". 2930

14. Insurance General amounting to $33,635.91 and objected to by the complainants, and Insurance Miscellaneous Compensation totalling $54,051.30, and Taxes, City, County and State $72,461.51, I hereby allow as part of the General Studio Overhead under the authority of *Gordon v. Turco-Halvah Co.*, 247 Fed. 487. 2931

15. The three items: Losses not covered by Insurance $496.65; Entertainment $8,440.23 and Donations $6,928.99 referred to in the testimony (C. C. S. M., 221-223 and 251-252) were in no direct way connected with the production of "Letty Lynton". A substantial amount of the entertainment expense was incurred in giving a dinner to Vice President Curtis and in giving a dinner to the Olympic athletes. The donations were voluntary or charitable contributions made by the defendants. These were expenses of

2932 the business actually incurred in good faith and though the complainants may claim they were improvident, nevertheless, they are a part of the General Studio Overhead of the business (*Larson* v. *Wrigley*, 20 F. [2d] 830, 832) and accordingly I allow them.

16. I find that the item Salaries of Directors, Unassigned $27,715.49 to which complainants object, should be allowed as a proper part of the General Studio Overhead. This item may be supported by the reasoning in *Duplate Corporation* v. *Triplex Safety Glass Co.*, 298 U. S. 448 and by remarks made in paragraph numbered 10, *supra*, and under the doctrine of *Larson* v. *Wrigley*, *supra*.

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17. The items which go to make up the Miscellaneous Unclassified Expense item of $19,357.06 while having nothing directly to do with the production of the picture "Letty Lynton" there is no evidence in the record to show that they should be charged to any other particular picture produced by the defendants. They are properly chargeable to the General Studio Overhead as general expenses of the studio and I allow the entire item.

18. With respect to the items "Rejected Continuity Charges and Songs" amounting to $63,996.57 and Accumulations on Rejected Pictures amounting to $151,686.80

2934 which are described in C. C. S. M., 229-230, these songs and music and pictures which were not used during the fiscal year were charged into the overhead for that year by the defendants, and complainants object to this procedure on the grounds that the sums in question were payments made for rejected continuities and songs that had nothing to do with "Letty Lynton" and that the defendants have no right to charge the complainants with the losses they incurred of such a character. The complainants are right in their contention that the defendants cannot charge them with "losses incurred by the defendants through their wrongful

invasion of the complainants' property (*Duplate Corporation v. Triplex Safety Glass Co.*, 81 F. [2d] 352 at 355 and cases cited). But this is not the case here. I am attempting to determine the General Overhead charges or what is really the general expense of the studio during the year in question and it seems clear to me that these particular items were properly chargeable under such account since they were part of the general expenses of the business during the year in question. I shall accordingly allow these items as part of the General Studio Overhead (*Duplate Corporation v. Triplex Safety Glass Co.*, 298 U. S. 448, at 453). 2935

19. The item "Uncollectible Accounts Receivable" amounting to $3,970.81 claimed by the defendants as part of the General Studio Overhead should more properly be regarded as an item which should appear in a miscellaneous profit or loss account and accordingly I disallow it. 2936

20. The item Home Office Unclassified $46,081.93 is objected to by the complainants and it appears from the testimony (C. C. S. M., 232) that it represents the cost of making tests in New York Office of various people being considered as screen possibilities though none of them appeared in "Letty Lynton". This is a part of the general expense of the defendants and it seems to me is a proper charge to be included in General Studio Overhead and I accordingly allow it. 2937

21. The item Experimental Work Trick Cameras amounting to $24,678.10, explained in C. C. S. M., 232, is clearly a part of the general expense of operation of the studio and as such properly a part of the General Overhead expense of the studio, and accordingly I allow it. The evidence respecting this experimental work is clear and this item is a very different item from that described by the master in *Computing Scale Co. v. Toledo Computing Scale Co.*, 279 Fed. 648 at 658.

2938 22. I will now consider the items listed on Defendants' Exhibit No. 18-E-2, first taking up the debit items and then the credit items. The item of $298,025.47 represents salaries of unused or idle artists which have not been assigned to any particular pictures. I hold that this is a proper item to be included in the General Studio Overhead (*Larson* v. *Wrigley*, *supra*).

23. The balance of the debit items represent items of overhead of various departments of the company which have not been absorbed specifically into particular pictures and I hold that all of these items are properly part of the General Studio Overhead of the company.

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24. With respect to the credit items: I shall allow all of these credits with the exception of the item "Wardrobe Department $3,593.52", which I shall disallow as a credit inasmuch as I have disallowed departmental overhead of this department and this item of $3,593.52 represents an over-absorption of such overhead. I shall also disallow the item under "Laboratory" amounting to $861,839.24 inasmuch as I have allowed as a charge against this picture the actual cost of the laboratory work done on this picture and have disallowed any excess charges over and above the actual cost of the laboratory work. Accordingly, there is no reason why the complainants should receive any benefit 2940 from this credit item and it is therefore eliminated. All of the other items in the credit column I hereby allow as proper credits to the General Studio Overhead account.

25. As hereinbefore stated, the overhead of the Women's Wardrobe Department in the sum of $2,500 charged against "Letty Lynton" as a part of the departmental overhead of the Department, I disallowed inasmuch as it was not based on labor and material but was simply an arbitrary figure based on the judgment of the head of the department. The overhead of this department appears in Defendants' Ex-

hibit C-4 and the total charges amount to $73,786.32. There 2941
should be added to this sum an additional item appearing on this exhibit and listed as "112-5 Miscellaneous" amounting to $4,675.11, making a total of $78,461.43. There should be deducted from this total the items listed on this exhibit and numbered "110", "111" and "113" totalling $2,126.53. Deducting this sum from the total charges as reconstituted above, leaves a sum of $76,334.90. This sum should be added to the General Studio Overhead as stated above.

26. On Defendants' Exhibit No. 18-D-5 the second item claimed by defendants as a part of the General Studio Overhead is an item entitled "Addition to Reserve for Continuities $500,000.00". The testimony respecting this 2942
item appears at pages 562-587 N. Y. S. M. Continuities are stories or parts of stories which may be used in connection with the production of a motion picture. The accountants examining the books in 1930 apparently found an accumulation of continuities costing approximately $881,000 and they decided to recommend to the management that they write off approximately $505,000 of these continuities. The next year they found that some of the continuities that had been written off in 1930 were reinstated because they were used and during that year they recommended that only a very small amount be written off. In 1932 they concluded that there should be a reserve 2943
set up against this continuity account and they recommended that $500,000 be set up as this reserve. This was not a write off. This was the first year in which a reserve was set up. The defendants argued that this reserve was set up and correctly stated the amount of investment in continuities for 1932 that should be designated as worthless. However, there is no testimony in the record to show that none of this reserve subsequently was reduced by the use of the continuities. In fact, there is testimony in the record to show that a substantial amount of the write off for continuities in 1930 was subsequently shown to be unneces-

2944 sary as the continuities were used and went into production. In a case of this sort accountants would probably differ as to whether this kind of a reserve should be a charge against earnings or against surplus. It seems to me that the evidence I have referred to indicates that this charge was really a charge made to more conservatively state the capital assets of the company and that it should be regarded as a charge against surplus rather than as a part of the overhead of the business. Accordingly, I find that this item of $500,000 is improperly included in the General Studio Overhead and should be eliminated.

2945 27. A credit is listed on Defendants' Exhibit No. 18-D-5 of income from royalties from music publishers amounting to $11,520.35 and this I find should be allowed.

28. The next item I shall consider is the item listed on Defendants' Exhibit 18-D-5 entitled "Compensation paid to Louis B. Mayer Pictures" amounting to $922,141.09. It is clear from the evidence that the salaries paid to Messrs. Mayer, Thalberg and Rubin during the year in question were at the weekly rate of $2,500, $4,000 and $2,000 respectively. (Mr. Rubin's salary was split into two items, one which was a part of the New York Office expense in connection with the production. These two total approxi-
2946 mately $2,000 a week—Defendants' Exhibit 18-C-1 and Defendants' Exhibit 11.) (As to Mr. Mayer's of $2,500—see C. C. S. M., 187; and as to Mr. Thalberg's salary, see C. C. S. M., 188 and Defendants' Exhibit 18-D-5 under "Salaries paid by New York".) These salaries are approximately correct, but were in fact slightly less than this on account of a temporary cut which I shall disregard for the purposes of this discussion though the correct amounts appear in the accounting.

The defendants have introduced in evidence (Exhibit 33) in support of their contention that this payment of $922,141.09 to Messrs. Mayer, Thalberg and Rubin, who com-

prised the partnership of Louis B. Mayer Pictures, should 2947
be allowed as part of the general expenses and included in the General Studio Overhead of the production company.

In support of their argument that Defendants' Exhibit 33, under which these payments were made, was simply a contract for personal services and that the payments made therein are part of the general cost of running the business, the defendants cite two cases—*Stromberg Motor Devices Co.* v. *Zenith-Detroit Corp.*, 73 F. (2d) 62 at page 65, Cir. Ct. of Appeals, 2nd Cir.; and *Stromberg Motor Devices Co.* v. *Detroit Trust Co.*, 44 F. (2d) 958 at page 963, Cir. Ct. of Appeals, 7th Cir. The court in the first case, in referring to the agreement under which the payments were made, noted the fact that the agreement was entered into 2948
some time before the patent in question was infringed and that there was no reasonable basis for believing that there was any attempt to divide profits as a result of the contract. The court stated:

> "While the sharing of profits as such would not be permitted to the detriment of the plaintiff, a *bona fide* royalty agreement, such as this one seems to have been, had no other effect than to add to the expense of the business and reduce the defendant's actual profits."

2949
The court thereupon allowed the credit.

In the *Stromberg* case in the 7th Circuit, the court pointed out (at p. 963) that the payments were made to the manager of the business who received a small fixed salary and a certain percentage of the business done. The court held that there was nothing in the record to question the good faith of the contract as one for remuneration for services. The amount of the payment involved was approximately $98,000 and the court found that the business was well conducted, was a large business and very profitable, and that the compensation to the manager as a result of

2950 these payments was not at all out of reason as such matters go.

The complainants objecting to the inclusion of these payments under Defendants' Exhibit 33 in the general expenses of the production of these pictures, cite in particular the case of *Lee* vs. *Malleable Iron Range Co.*, 47 Fed. 795, at page 798. In this case, as it appears at page 798, three of the defendant's managers were paid commissions in an aggregate of something over $200,000 by way of compensation over and above regular salaries and the defendant claimed that these commissions were items of cost of production to be deducted. In stating the account, the master held that these payments were not salaries, but in reality
2951 a division of profits and the court upheld the master's decision in the following language:

> "The large amount, the terms of corporate resolutions for their contingent award, their progressive increase with increased profits, and their treatment as such dividends or division upon the books, are alone sufficient to support the master's view. The resolutions, if lawful, while authority for their ultimate payment, nevertheless placed no obligation upon the beneficiaries not already comprehended within their contracts for service at stipulated salaries. In
2952 my judgment, a good way to test out the status of these payments in respect of cost or profits is to consider whether defendant, as a manufacturer, in endeavoring to make up a yearly budget upon any assumed volume of business, in any aspect of the matter, would have included these payments, or any estimate thereof, as an item of cost of manufacture. Obviously not. The arrangement or plan was but the introduction of the common co-operative idea between employer and employe, in which the former agreed to give and did give to the latter a percentage of profits, if and when earned."

I shall consider Defendants' Exhibit 33 in the light of 2953
these authorities. Defendants' Exhibit 33 is an agreement between Metro Pictures Corporation and Louis B. Mayer, Inc., dated April 7, 1924, and modified from time to time by subsequent agreements all of which are contained in Defendants' Exhibit 33. The effect of the original agreement of April 7, 1924, was to place Messrs. Mayer, Thalberg and Rubin (acting through Louis B. Mayer Pictures, Inc., of which company they constituted the board of directors and officers), as supervisors and managers of the motion pictures to be produced by the Metro Pictures Corporation. On page 8 of the contract, Louis B. Mayer Pictures, Inc., which controlled the individuals mentioned, 2954
agrees to make no charge to the Metro Pictures Corporation except a charge of $1,500 a week for Mr. Mayer's salary, $650 a week for Mr. Thalberg's services and $600 a week for Mr. Rubin's services and the actual cost of maintaining an office.

It is interesting to note that the contract provides, at page 9, that in arriving at the cost of production no charge was to be made for interest on monies advanced for production. According to this contract, Louis B. Mayer Pictures, Inc., for its compensation is entitled to receive a sum equal to 20% of the net receipts of the Metro Pictures Corporation or the actual distributors of the pictures from the distribution or other disposition of each of said 2955
pictures produced. Various changes were effected, as appears in Defendants' Exhibit 33, and on February 16, 1927, as appears from page 30 of this Exhibit Loew's, Inc., made an agreement with Louis B. Mayer Pictures, a partnership composed of Messrs. Mayer, Thalberg and Rubin, and Metro-Goldwyn Pictures Corporation, which was the successor to Metro Pictures Corporation. This contract modified and changed the agreements theretofore made and included in Exhibit 33. Under this contract, Loew's, Inc., takes over the contract from Metro-Goldwyn Pictures Cor-

2956 poration and assumes it from September 1, 1926 to April 7, 1932. In lieu of the compensation of 20% of the net profits payable to the partnership composed of Messrs. Mayer, Thalberg and Rubin, it is provided in this agreement (Defendants' Exhibit 33, p. 31) that the partnership should be paid by Loew's, Inc., a certain percentage of the combined net profits of Loew's, Inc., and of its subsidiaries and its companies and ventures. This percentage was determined after deducting from the combined net profits of Loew's, Inc., its subsidiaries and companies and ventures a sum amounting to $2.00 a share on the present issued and outstanding capital stock of Loew's, Inc. The agreement expressly provided that this did not necessarily mean that
2957 a dividend of $2.00 a share on the Loew's stock would have to be paid or that any dividends would have to be paid to Loew's by its subsidiaries. The percentage of the net profits was simply figured after deducting an amount equal to $2.00 a share on the Loew's stock from the consolidated net profits of all the Loew enterprises. By paragraph 12 of this agreement (pp. 38-39), it is expressly stated that the salaries of Messrs. Mayer, Thalberg and Rubin and the cost of the New York office are separate and in addition to the percentage compensation provided in this agreement and it is specifically stated that these salaries and expenses shall be a proper cost charge
2958 in computing the combined net profits. However, the percentage compensation to the partnership is expressly stated not to be a cost charge in computing profits.

The agreement of December 15, 1932, which appears on page 52 of Defendants' Exhibit 33 extended the original agreement as modified until December 31, 1938 and gave to Messrs. Mayer, Thalberg and Rubin, in addition to their salaries and the compensation they enjoyed through the partnership Louis B. Mayer Pictures, certain options to purchase an aggregate of 200,000 shares of common stock of Loew's.

The salaries of Messrs. Mayer, Thalberg and Rubin,

being, respectively, at the weekly rate of approximately 2959
$2,500, $4,000 and $2,000 or a yearly rate of approximately
$135,000, $200,000 and $100,000, respectively, can only be
regarded as very substantial salaries, no matter how large
the business. It must be borne in mind that the testimony
shows that these salaries were paid these gentlemen for
their part in the producing end of the business and that
credit for these salaries as a cost of the business is taken
by the Metro-Goldwyn Pictures Corporation in its account
appearing in Defendants' Exhibit 18 and schedules at-
tached. As stated above, the agreement (Defendants' Ex-
hibit 33) expressly provided that these salaries would be
regarded as a proper cost charge in computing the net
profits and I have allowed all of these salaries as a part 2960
of the general expenses of Metro-Goldwyn Pictures Cor-
poration. I find that there is nothing in the record to ques-
tion the good faith of this contract. It was entered into
long prior to any dispute arising out of the production of
the picture "Letty Lynton". I can find, however, no evi-
dence in the record to justify a holding that the sum paid
by virtue of Defendants' Exhibit 33 to Louis B. Mayer
Pictures during the year of this accounting was a part of
the general expenses of the production of pictures by the
Metro-Goldwyn Pictures Corporation during the year in
question. The contract itself, as pointed out above, specif-
ically says (Defendants' Exhibit 33—p. 39) that this per- 2961
centage compensation to the partnership shall not be con-
sidered a cost in computing the net profits of this enterprise.
The percentage as determined on page 31 of Defendants'
Exhibit 33 is arrived at after the ascertainment of the
consolidated annual net profits of Loew's, Inc., and all its
subsidiaries and its companies and ventures. It is per-
fectly clear from this that the percentage to be paid had
no relation whatsoever to the cost of production and in no
sense could it be considered as a part of the cost of pro-
duction. The percentage to be paid is a percentage of
profits and there can be no profits until after the deduction

2962 of all costs and expenses. It must be conceded that there would have been no distribution of a percentage of profits under this contract in the ordinary way until after the deduction of all amounts paid authors for the rights to plays to be produced. Compensation paid the authors of "Letty Lynton", if purchased in the ordinary way, would have been deducted before arriving at any profit distributable under this contract. The recovery which I am called upon to find in this case in effect takes the place of the amount which should have been paid to the authors of "Letty Lynton", as aforesaid, and accordingly must be deducted from gross income before it can be said that there was any profit distributable under the contract (Defend-
2963 ants' Exhibit 33). Therefore, the amount of any payment of profits under the aforesaid contract cannot affect the amount of recovery to be paid these complainants. I find no place for the inclusion of this payment in the general overhead or general expenses of the Metro-Goldwyn Pictures Corporation as set forth in its account (Defendants' Exhibit 18 and subsequent pages). Certainly, if Judge Geiger's test should be applied in this case, as quoted above in *Lee v. Malleable Iron Range Co., supra*, this payment should be disallowed. I shall disallow the item of $922,141.09 appearing on Defendants' Exhibit 18-D-5 as compensation paid to Louis B. Mayer Pictures.

2964 29. I shall now consider the items listed under salaries paid by New York on Defendants' Exhibit 18-D-3. The first of these is an item paid Thalberg amounting to $151,650. The testimony respecting this payment is found on pages 181-183 N. Y. S. M. I find that this is a proper charge to the General Studio Overhead and accordingly I allow it.

30. The next item entitled "Other Production Executives" shows payments aggregating $26,000 as listed on Defendants' Exhibit 13. Though these payments were not

made until after the fiscal year in question they were charged back into the fiscal year to the general overhead and were paid to men who were part of the general organization (N. Y. S. M., 230-233) though these individuals did not have anything specifically to do with the production of "Letty Lynton". I find that this item of $26,000 is a proper charge to the General Studio Overhead and accordingly I allow it (*Larson* v. *Wrigley*, *supra*). 2965

31. The item of interest amounting to $1,559,559.79 appearing on Defendants' Exhibit 18-D-5 is described in N. Y. S. M., 191-193 and 239-246 as payment of interest at the rate of 6% per annum made during the year in question on the money loaned by Loew's, Inc., to Metro-Goldwyn Pictures Corporation and then by the Pictures Corporation to the producing company. At the beginning of the year in question the loans stood at approximately $29,000,000 and at the end of the year the loans were approximately $22,000,000. That is, during the year in question the loans were reduced by approximately $7,000,000. According to the testimony, the money was loaned by Loew's, Inc., and invested in pictures, processes, books and rights. The loans date back to the inception of the company or roughly to about 1920 or twelve years before the accounting year in question. The loans were not represented by notes but took the form of an open account. There was no attempt made at the hearings to show in any detail what these monies were used for. It was conceded by the defendants' witness (N. Y. S. M., 242-3) that in less than six months from the beginning of the work on the picture "Letty Lynton" all of the monies expended thereon by the defendants were recovered in cash from the sale of the picture. It is also conceded that the pictures company did not credit the "Letty Lynton" Account with any interest on monies received on account of the sale of the picture "Letty Lynton" (N. Y. S. M., 246). I shall hereafter allow in this accounting as a part of the general 2966 2967

2968 expenses of the defendants full depreciation on the studio and facilities and also full interest on the investment in the studio plant and equipment as claimed in Defendants' Exhibit 18-D-5 and I believe defendants should be allowed interest on the working capital necessary to produce the picture "Letty Lynton". However, the evidence is not entirely clear as to just how much working capital was necessary to carry out the production of this picture. I find from all the evidence in the record that the amount of working capital necessary to produce this picture could not have been more than $300,000 and I rather believe that this is a high figure and I also find that this capital could not
2969 have been employed for more than six months. (Again I believe that this is an outside period of time and probably it was not employed for as long as that inasmuch as the testimony above referred to shows that the entire cost was recovered within a period of six months.) Figuring interest at 6% on this sum for six months, it amounts to $9,000 and I shall allow this item as a part of the direct cost of the production of "Letty Lynton".

It is interesting to note in connection with the claim of the defendants that this item of interest of $1,559,559.79 should be included in the general expenses of the cost of production of pictures that the course of conduct of the defendants does not substantiate its claim. I do not say
2970 that this is conclusive but it is clear that under Defendants' Exhibit 33 it is expressly stated that there shall be no charge for interest on monies advanced for production.

32. I shall now consider the items on Defendants' Exhibit 18-D-5 of Depreciation Los Angeles Studio and Interest on Investment in Studio. The depreciation in the Los Angeles Studio appears in Defendants' Exhibit No. 9 and amounts to $520,631.21. The rate of depreciation on the equipment was 15% and that on the buildings was 5%. The testimony with reference to the calculation of this depreciation appears on pages 357-364, N. Y. S. M. De-

fendants' Exhibit 18-F shows how the item appearing as 2971
Interest on Investment in Studio amounting to $310,584.16 is computed. The value of the land is the appraised value of the land as of the year in question in this accounting (N. Y. S. M., 364 and references) and the value of the buildings is the actual cost of the buildings as shown by the books less depreciation at the rate of 5%, and the value of the equipment is the cost of the equipment as shown by the books less depreciation at the rate of 15% (N. Y. S. M., 365, 366, *et seq.*). Complainants object to this method of computing values and claim that the value of the property during the year in question when it was used by the production of "Letty Lynton" is the 2972
only true test of value and that taking the cost of the buildings and equipment less the depreciation does not necessarily show the actual value of the buildings and equipment at the time of its use by this production. Theoretically, complainants may be right but it is a very common practice for companies in attempting to arrive at a proper statement of their assets represented by buildings and equipment to state the value of such assets at cost less depreciation. I agree with the defendants that to have required a physical appraisal of the value of all of the buildings and equipment at Culver City during the fiscal year 1932 would have been an interminable task and I am not at all sure that the result would have been any 2973
more accurate as to the value of these properties than the method employed by the defendants in setting up these values in this account. I shall find that the method employed by the defendants in estimating the values of the land and equipment at Culver City in use during the year in question is a fair and reasonable method and that they should be permitted to include in the General Studio Overhead in this accounting on Defendants' Exhibit 18-D-5 the depreciation shown on Defendants' Exhibit 9 amounting to $520,631.21. Interest on the average investment in

2974 studio, plant and equipment shown on Defendant's Exhibit 18-F of $310,584.16 must also be allowed as a part of the General Expense of conducting the studio. Inasmuch as I eliminated the item of Rental of Studio and Sicilities amounting to $334,464.61 appearing on Defendants' Exhibit 18-E-1, which item was simply a part of depreciation, I also eliminate it as a credit on Defendants' Exhibit 18-D-5 and allow the full amount of depreciation of Los Angeles Studio in the amount of $520,631.21 as a part of the General Studio Overhead. (*Gordon* v. *Turco Halvah Co.*, 247 Fed. 487; *The Tremolo Patent*, XXIII, Wall. 518; *National Carbon Co.* v. *Richardson*, 16 Fed. Supp. 239, aff'd 85 F. [2d] 490.)

2975

33. Pursuant to the aforementioned disposition of the various items appearing under General Studio Overhead on Defendants' Exhibit 18-D-5, I find that the correct amount of General Studio Overhead should be $3,849,686.58 instead of the item as listed on Defendants' Exhibit 18-D-5 of $5,891,374.57.

34. I shall now consider the question as to what proportion of the General Studio overhead or expense should be allocated to the production of the picture "Letty Lynton" and as such added to the cost of production of said picture.

2976 We have seen from the testimony that Departmental Overhead in practically every instance was charged against this picture either on the basis of labor and materials used or of facilities used. It appears from the testimony (C. C. S. M., 489) that it was the practice of the studio to add to the cost of each feature production a charge of overhead at the rate of $1,559 per camera-day. A "camera-day" is a term used for a shooting day—a day on which a production is actually in process of being photographed (C. C. S. M., 489). This was a method adopted by the studio in an effort to absorb the studio overhead in the separate pictures and it resulted in an aggregate amount charged to

"Letty Lynton" for the 33 "shooting days" which this pic- 2977
ture consumed of $51,447. This amount does not appear in the amended accounting because this amount, added to such amounts as under this method were allocated to the other pictures produced during the year, was not sufficient to absorb the total overhead of the studio in the fiscal year. Further, this method does not take into account the actual costs of the labor and materials put into any individual picture; for example, on Defendants' Exhibit C-25 the picture #601 "Polly of the Circus" took 33 "shooting days" and cost approximately $430,000 while "Letty Lynton" #611 required 33 "shooting days" and cost, according to this compilation $316,000. Accordingly, I shall hold that 2978
this method of computing overhead, that is, the so-called "shooting day" method, is not acceptable in ascertaining the proportion of the overhead or general expenses of the business directly chargeable against the picture "Letty Lynton".

Defendants have suggested another method of computing overhead and this method appears on pages 559-560 (C. C. S. M.). This theory may be briefly explained by reference to this testimony and to Defendants' Exhibit C-25. The defendants, using their Exhibit C-25, take the pictures wholly produced in the year 1932 and add to them the total of the percentages of pictures produced in 1931 and partly in 1932 and the percentages of pictures partly produced in 2979
1932 and 1933 calculated entirely by "shooting" days. The result of this computation is a total of 3,702.1 "shooting days" and in order to get the number of completed pictures represented by that percentage they divide that figure by 100 and the result is 37 completed pictures. Again referring to this exhibit and tabulating the percentages according to cost of pictures, the result is 3,640.7 and dividing this by 100 gives a result of 36.4 pictures completed. According to this theory, the defendants contend that the overhead should be divided numerically among the completed pictures and that "Letty Lynton" should bear 1/36th

2980 of the General Studio Overhead or general expenses during the year in question. This is the explanation of the item appearing on Defendants' Exhibit 18-D-5 in the amount of $163,649.29.

I find that this numerical division of the overhead on the basis described and the method of determining the number of pictures produced in the year as described in the above quoted testimony is not a satisfactory method for determining the proportion of the overhead to be charged as a direct cost to the picture "Letty Lynton". This numerical method results in an equal charge of a proportion of overhead to each picture produced in the year irrespective of what the picture costs in direct labor and materials.
2981 In other words, if one picture cost $100,000 to produce and it took 30 days to produce and another picture cost $500,000 to produce and production took the same number of "shooting days", each of these pictures would be charged with the same amount of the general overhead or general expenses of the business. This does not seem to me to be fair or reasonable.

Complainants' position, of course, is that this picture should not be charged with any part of the overhead but I cannot accept this suggestion as representing the law in a matter of this sort. If any part of the general overhead is to be charged against this picture, complainants claim
2982 it should be based on the ratio of the cost of labor and materials put into "Letty Lynton" to the total cost of labor and materials on all pictures produced in the same fiscal year. In their Memorandum (p. 12), complainants take the cost of labor and materials of all the pictures as per Defendants' Exhibit C-25 corrected by the addition of two pictures and find a total cost of pictures produced during the year in question of $16,251,443.32. Complainants then deduct the studio overhead absorbed in the pictures as per Defendants' Exhibit C-29 amounting to $2,158,868, from this amount, leaving a balance constituting labor and materials consumed in the pictures produced

during the year in question of $14,097,575.32. Complainants then take the labor and materials used in "Letty Lynton" as claimed by the Defendants' Exhibit 18-D-5 of $262,682.69 and find that the ratio of the labor and materials used in "Letty Lynton" to the total labor and materials used in all pictures produced during the year amounts to .018. 2983

I find that this is the correct method to compute the proportion which should be charged against the picture "Letty Lynton" of the General Studio Overhead during the year in question. Having determined the total of the General Studio Overhead in the production of motion pictures by the defendants, I am now attempting to determine what is a fair and proper method of allocating this general overhead and general expenses to the pictures produced. The complainants' method, which bases overhead on cost of labor and materials, seems to me the sound way to handle this situation. 2984

On the fourth page of Defendants' Exhibit C-30, defendants seek to prove that even though the method advocated by the complainants is used to determine the proportion of the overhead or general expenses which should be borne by "Letty Lynton", still the estimate of the cost of "Letty Lynton" for the purposes of this computation is inaccurate because in the total cost of all pictures the cost of all foreign versions are included but in the cost of "Letty Lynton" the foreign versions of "Letty Lynton" are not included and if these are included the total cost of "Letty Lynton" would be $300,176.38 and the proper ratio would then be .0213. Complainants meet this claim by pointing out that what is being determined here is the ratio of the total of labor, materials and departmental overhead expended upon the domestic version of "Letty Lynton" to the total labor, materials and departmental overhead costs incurred at Culver City on all productions. It seems to me that the complainants are right and that in the accounting of the Pictures Corp. we are dealing with the production costs of 2985

2986 the domestic version of "Letty Lynton" and that is all. The cost of the foreign versions of "Letty Lynton" is accounted for in Defendants' Exhibit 20-D, which is part of the accounting of the Culver Export Corporation and Culver Export Corporation is the only one in a position to charge as a part of the cost thereof a fair proportion of overhead.

35. Having found the cost of "Letty Lynton" on Defendants' Exhibit 18-D-5 to be $262,629.21 the ratio should be .018. Using this ratio to the total overhead of $3,849,686.58 as stated above, I find that a sum amounting to $69,294.36 should be added to the cost of "Letty Lynton", mak-
2987 ing a total negative cost of $331,923.57 instead of the total negative cost of $426,331.98 appearing on Defendants' Exhibit 18-D-5. 25% of this amount, according to the account, is charged to Culver Export Corporation and, accordingly, this 25%, amounting to $82,980.89, should be deducted, leaving what I find to be the negative cost to Pictures Corp. of the production of "Letty Lynton", that is $248,942.68.

36. There is no dispute about the positive and other direct costs listed on Defendants' Exhibit 18-D-5 with the exception of the dues listed as payable to the Motion Pictures Producers and Distributors Association amounting
2988 to $3,630.12. I have examined Defendants' Exhibit 32 which is a form of application for Class A membership in the Motion Pictures Producers and Distributors of America, Inc., together with copies of resolutions with reference to fees and dues adopted by the incorporators of the Association and it would appear from a reading of these resolutions that while the particular contingency which has arisen in this case has not been provided for in said resolutions, nevertheless, the whole tenor of paragraph 6 of the resolutions is to the effect that the Association will rectify and adjust as may be necessary any payments made for or on

account of membership fees. It is difficult for me to see 2989
how the defendants should receive credit in this accounting for these fees paid which were apparently based on gross receipts to which the defendants were not entitled if the findings which I shall make in this case are upheld. Accordingly, I find here that this credit claimed by the defendants may not be allowed to them as a part of the cost of producing "Letty Lynton". Accordingly, the item on Defendants' Exhibit 18-D-5, the cost of positives and other direct costs, should be $68,163.13 instead of $71,793.25.

37. I hereby find that the total production cost to the Pictures Corp., excluding Canada, of "Letty Lynton" was 2990
$317,105.81.

38. Pursuant to the above stated findings, I find that the production cost appearing on Defendants' Exhibit 18 of "Letty Lynton" is $317,105.81 instead of $391,542.24 and that the net income, excluding Canada is $256,003.11.

39. There is no dispute about the Canadian film rental income and the amount retained by the Regal Films, Limited, and the net film rental income from Canada appearing on Defendants' Exhibit 18. Accordingly, I find these items to be accurately stated on said exhibit.

2991

40. There is no dispute about the cost of prints or the ERPI royalty and I disallow the MPPDA dues of $79.69 which is similar to the other item of MPPDA dues which I disallowed above. This disallowance results in the net income from Canada amounting to $12,858.03 and I accordingly find that this amount is accurate. The net income from "Letty Lynton" to the Pictures Corp. from all sources is therefore found to be $268,861.14.

41. The final item on Defendants' Exhibit 18 is a claim for an allowance on the part of the defendants for Federal

2992 income taxes. I disallow this claim for the reasons hereinafter stated in the closing pages of this report.

42. In the interest of simplicity, I shall now restate the first page of Defendants' Exhibit 18 pursuant to the findings heretofore set forth:

Reference to Findings by Paragraph No.			
1	Film Rental Income (excluding Canada)		$727,053.84
1	Less: Retained by MGM Dist. Corp. (20%)		145,410.77
1	Net Film Rental Income		$581,643.07
2.8	Distribution Expense		8,534.15
			$573,108.92
2–38	Production Cost		317,105.81
	Net Income (excluding Canada)		$256,003.11
39	Canadian Film Rental Income	$27,369.72	
39	Less: Retained by Regal Films	11,432.29	
39	Net Film Rental Income	$15,937.43	
	Less:		
40	Cost of Prints	2,479.40	
40	ERPI Royalty	600.00	
		3,079.40	
40	Net Income from Canada		12,858.03
40	Net Income from "Letty Lynton"		$268,861.14

ACCOUNTING OF METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION. 2995

(HEREINAFTER CALLED DISTRIBUTING CORP.)

1. I shall now consider the accounting of Distributing Corp., set forth in Defendants' Exhibit 19. The net film rental income to be accounted for by the Distributing Corp. is simply the total film rental income of "Letty Lynton" less 80% thereof which is reflected in the account of the Pictures Corp. Accordingly, in this accounting the net film rental income to be accounted for I find to be $145,410.77.

2996

2. The pictures that were produced by the defendants were turned over to the Distributing Corp. to distribute. The method of distribution is explained in the testimony (N. Y. S. M., 624) and may be summarized by saying that the Distributing Corp. made contracts for a large number of pictures at one time and used contracts patterned on Defendants' Exhibit 16 for this purpose. There was no possible way of segregating the exact costs of distribution to any individual picture. Defendants' Exhibit 16 provided apparently for a license fee or minimum guarantee against percentage of receipts and for a statement of gross receipts in excess of which the distributor would share. The designation of the picture was by production number and by the name of the star. The name of the picture itself was apparently not included in this contract. 2997

3. The contention of the defendants, as indicated on Defendants' Exhibit 19-A, is that in order to determine the ratio of the distribution expense to film rental income with respect to the picture "Letty Lynton" the total film rental income (excluding Canada) of the entire business should be taken and from this in the Distributing Corp. accounting there should be deducted 80% thereof, which, accord-

2998 ing to the practices of the companies, was handed over to the Pictures Corp., leaving a net film rental income to the Distributing Corp. of $6,004,105.22. The net distributing expense then is calculated in Defendants' Exhibit 19-A to have been $4,615,558.49 and since this sum amounts to 76.87% of the net film rental income that is the ratio which should be applied in estimating the distributing expense applicable to the picture "Letty Lynton". This amount is shown on Defendants' Exhibit 19 to be $111,777.26 and defendants claim that this represents the distributing expense of "Letty Lynton" and should be deducted from the net film rental income, leaving a balance
2999 of $33,633.51 to be accounted for before any allowance for Federal income taxes. It must be remembered, as pointed out in paragraph numbered 8, supra, the Pictures Corp. claim an item of $12,505.33 as its share of the cost of distribution of this picture, and it lists items showing that its total distributing expense amounted to $516,031.63. What the defendants are claiming is that the Distributing Corporation expense in connection with "Letty Lynton" amounts to $111,777.26 and the Pictures Corp. expense in connection with distribution of "Letty Lynton" amounts to $12,505.33 or a total of $124,282.59 as representing the cost of distribution of the Distributing Corp. and of the Pictures Corp. with respect to the picture "Letty Lynton".

3000 4. Sales of all pictures during the year 1932, as stated in Defendants' Exhibit 19-A was $30,020,526.08 and the total distribution cost of all pictures during the year 1932 as claimed in Defendants' Exhibits 18 and 19 were the following:

Metro-Goldwyn-Mayer Distributing Corp.	$4,615,558.49
Metro-Goldwyn Pictures Corp.	516,031.63
or a total distribution cost of all pictures during 1932 of	$5,131,590.12

And this sum amounts to 17.094% of the gross sales of all 3001
pictures. If you take the gross sales of "Letty Lynton", $727,053.84 and multiply it by 17.094%, you will arrive at the figure $124,282.58, which is the total figure which is claimed as distributing expense by both the Distributing Corp. and the Pictures Corp.

5. The contention of the defendants is based on the theory that distribution expense must be determined in relation to gross sales.

6. The complainants, on the other hand, strenuously object to this method of computation and claim that any 3002
division which would divide the expense of distribution in proportion to the gross receipts deliberately penalizes a good picture to the benefit of a poor picture. Complainants point out the practice of the defendants as hereinabove detailed in the making of contracts for the exhibition of these pictures and claim that the only fair method of dividing the distribution expense is the numerical method or in other words to divide the expense equally among the number of pictures distributed.

7. In order to test the fairness of the defendants' contention, let us suppose the production and distribution of two feature pictures, A and B, which were distributed 3003
as was the usual practice by the defendants with other feature pictures under a form of contract similar to that in evidence in this case (Defendants' Exhibit 16). Let us assume that the net film rental income of picture A was set forth in an exhibit similar to Defendants' Exhibit 19 and that this net film rental income amounted to $1,000. Now let us assume the net film rental income, similarly set forth, of picture B amounted to $200,000. Under defendants' theory the distribution expense of picture A would be listed on Defendants' Exhibit 19 as $760 and the distribution expense of picture B would be listed as

3004 $152,000. This result seems to me obviously unfair. A complainant similarly situated to the complainant in this case apparently would be able to hold a defendant in a case in which the A picture was involved for $240 profit when obviously the picture would have shown a substantial loss to the defendants and the burden of carrying the distribution expense of the unsuccessful picture would have been borne by picture B.

8. It seems to me that on the testimony produced at this accounting respecting the method employed by the defendants in distributing the pictures produced, the fairest and most comprehensive principle to adopt in spreading 3005 the distribution expense among these pictures is to determine the number of pictures distributed during the year in question and to divide the expense of distribution equally among such pictures.

9. The question then is: How many pictures were produced and distributed by the defendants during the year in question? Complainants claim that a total of at least 60 pictures were distributed by the defendants during the year in question and by this they mean the equivalent of 60 feature pictures and in support thereof they claim that the testimony shows (N. Y. S. M., 963-4), that 43 3006 feature pictures were distributed, among these being the feature picture LETTY LYNTON, which apparently, according to the Defendants' Exhibit R-4, was a nine-reel feature picture; that 43 two-reel shorts and 41 one-reel shorts and 104 news reels were distributed; that in these shorts and news reels there were a total of 231 reels distributed and that dividing this by 9, the number of reels in LETTY LYNTON, we have approximately 25 nine-reel pictures, adding this to the 43 feature pictures brings a total of what is equivalent to 68 feature pictures. In this way, complainants support their contention that 60 feature pictures were distributed during the year, and accordingly,

complainants claim that the distribution expense should be divided into 60 parts, one part thereof being chargeable to LETTY LYNTON. 3007

10. I am in the position, therefore, of choosing between these two methods of computing the proper distribution charge to make against LETTY LYNTON. As between the two methods, I find that the complainants' method is to be preferred. However, if I carried it to its logical conclusion I should find that there were at least 68 pictures equivalent to a feature picture distributed during the year but the complainants ask me to find that there were only 60 such pictures distributed during the year. In the absence of any proof other than the claim of the defendants that their method of allocation of distribution expense is a more equitable one and that the complainants' claim is unreasonable assuming that complainants' method is adopted, I shall find that the distribution expense should be divided into 60ths and one-sixtieth thereof be allotted against the picture LETTY LYNTON. 3008

11. I have already allowed under paragraph 2, of this report dealing with the accounting of Pictures Corp., a credit in the Pictures Corp. of a sum amounting to $8,517.48, representing the Pictures Corp.'s share of the distributing expense of the picture LETTY LYNTON. This distributing expense of the Pictures Corp., it will be remembered, appears on Defendants' Exhibits 18-A and 18-B and includes a share of the home office expense and depreciation of equipment in the home office. 3009

The items of distributing expense claimed by the Distributing Corp., as appears on Defendants' Exhibit 19-A, which are contested by the complainants, include the following:

Home office expense	$1,304,984.38
Depreciation, plants equipment	48,151.63

3010

Accounts receivable (written off)	11,100.00
Interest on investment in branch office equipment	20,375.62

12. I shall allow as a part of the distributing expense the home office expense as listed on Defendants' Exhibit 19-B. It seems clear to me that these items were a part of the expenses of distribution of defendant. With reference to the item of depreciation of branch office equipment, I shall allow this item as a part of distribution expense and overrule complainants' contention that the defendants having failed to show the actual value of this equipment at the beginning of the year in question cannot claim

3011

depreciation on its cost value less depreciation. If defendants had been put to that proof it would have greatly lengthened these hearings and, besides I find the method adopted by the defendants to be an accounting method in very general use.

13. With reference to the item "Accounts Receivable Written Off", $11,100, I shall sustain complainants' objection to the inclusion of this item under distributing expense for the year in question. Such an item is more properly chargeable to some other account, such as "Reserve for Bad Debts" or "Surplus".

3012

14. I shall allow the item "Interest on Investment in Branch Office Equipment" amounting to $20,375.62 for the same reason as I have allowed similar items in the Pictures Corp. account.

15. The total distribution cost of both the Distributing Corp. and the Pictures Corp. is, therefore, stated to be $5,120,490.12. 1/60th of this is $85,341.50. Inasmuch as the Pictures Corp. in its accounting on Defendants' Exhibit 18 claims $12,505.33 or approximately one-tenth of the total charge claimed by both the Distributing Corp.

and the Pictures Corp. for costs of distribution (See paragraph numbered 4, supra). I allow one-tenth of the $85,341.50 or $8,534.15, as a proper deduction in the Pictures Corp. accounting, Defendants' Exhibit 18 (See paragraph numbered 8) and nine-tenths of said $85,341.50 or $76,807.35 to the Distributing Corp. in its accounting, Defendants' Exhibit 19. Deducting this amount from the net film rental income paid of $145,410.77 listed on Defendants' Exhibit 19 leaves as the net income from LETTY LYNTON before taxes the sum of $68,603.42. 3013

16. The final item on Defendants' Exhibit 19 is a claim for an allowance on the part of the defendants for Federal income taxes. I disallow this claim for the reasons hereinafter stated in the closing pages of this report. 3014

17. I shall now restate the first page of Defendants' Exhibit 19, pursuant to the findings heretofore set forth:

Film Rental Income	$727,053.84	
Less: Metro Goldwyn Pictures Corp. share (80%)	581,643.07	
Net Film Rental Income	$145,410.77	
Distributing Expense	76,807.35	
Net Income from LETTY LYNTON		$68,603.42

3015

ACCOUNTING OF LOEW'S, INC.

1. Loew's, Inc., is one of the defendants named herein and by the order of reference, I am directed to ascertain and report the amount of the gains and profits of Loew's Inc., by its use of the picture LETTY LYNTON. It appears

3016 from Defendants' Exhibit 17 that Loew's, Inc., is the "top holding company" of the group of corporations through which the picture LETTY LYNTON was produced and distributed both here and abroad. The gain and profits of the producing and distributing companies have been discussed above in this report.

2. In addition to this, the evidence shows (Defendants' Exhibits L-1 and L-6-L-13, both inclusive, that Loew's Inc., itself or through its wholly owned subsidiary, Marcus Loew Booking Agency (N. Y. S. M., 193) had an interest in a large number of theatres in which the picture LETTY LYNTON was *exhibited*.

3017

3. The accounting filed herein by Loew's, Inc. (Defendants' Exhibits L-6-L-13, inclusive) it is claimed, shows the sums of money for which Loew's, Inc., is accountable to these complainants as a result of the *exhibition* of LETTY LYNTON in the theatres listed in Defendants' Exhibit L-1 (Loew's, Inc., has contended that it is not accountable at all to these complainants).

4. The Defendants' Exhibit L-1, which comprises four separate pages, lists the theatres in question.

The first sheet is a statement of corporations operating theatres which played LETTY LYNTON, the entire common 3018 stock interest of which theatres was wholly owned by Loew's, Inc., during the year in question.

The second sheet contains a list of corporations operating theatres which played LETTY LYNTON, the common stock of which corporations was partly owned by Loew's, Inc., during the year in question.

The third sheet lists corporations operating theatres which played LETTY LYNTON, in which corporations Loew's Inc., had an indirect stock interest in whole or in part through one or more intermediary corporations.

The fourth sheet is a list of theatres which played 3019
LETTY LYNTON which were not owned or leased by Loew's, Inc., or any other defendant in this action but were theatres which were managed by Marcus Loew Booking Agency (a wholly owned subsidiary of Loew's, Inc.) under written management agreements with the owners of said theatres.

As there is no dispute about the accuracy of these lists, I find that the lists comprised under Defendants' Exhibit L-1 contain an accurate statement of Loew's, Inc., interest in the theatres stated therein.

5. The theatres listed on Defendants' Exhibit L-1 and 3020
described above in paragraph 4 were the theatres of the Loew's circuit of theatres in which LETTY LYNTON was exhibited (see paragraphs 3 and 6). These theatres were operated as a circuit by Loew's through the instrumentality of its wholly owned subsidiary, Marcus Loew Booking Agency (see paragraph 8 and citations including N. Y. S. M., 1066). The corporations which owned these theatres were primarily in the theatrical business and only incidentally engaged in real estate activities which arose out of the renting of the excess space in the buildings of which the theatres were a part (N. Y. S. M., 1176). It seems clear from the evidence that Loew's, Inc., acting through its managing agency, the Marcus Loew Booking 3021
Agency, used these corporations as agents for the exhibition of the pictures produced by the production agency of the Loew organization. Accordingly, I find that Loew's, Inc., is accountable to these complainants for the gains or profits accruing to it through the exhibition of LETTY LYNTON by the theatres owned by these corporations.

6. The Complainants' Exhibits B, B-1-B-45, all inclusive, and C, C-1-C-23, all inclusive, and D, D-1-D-20, all inclusive, and E, E-1-E-7, all inclusive, and Defendants' Exhibits L-2 and L-4 are photostatic copies of weekly re-

3022 ports of all of the theatres referred to in Defendants' Exhibit L-1 for the period of time during which the picture LETTY LYNTON was exhibited at these theatres.

7. On Defendants' Exhibits L-6, L-8, L-8+L-10 and L-12 under the headings "Box office receipts of period in which LETTY LYNTON together with other attractions was exhibited", "Cost of feature LETTY LYNTON" and "Cost of other attractions during period in which LETTY LYNTON was exhibited" appear amounts of money set opposite each theatre, which amounts are taken from the weekly reports of the theatres above referred to. There is no dispute regarding the accuracy of these figures and accordingly I
3023 find that these three columns of figures, which appear on Defendants' Exhibits L-6, L-8, L-8+L-10 and L-12, as aforesaid, accurately represent what they purport to represent.

8. I find that the amounts set opposite each theatre under the heading "Payroll and trade bills for entire week" appearing on Defendants' Exhibits L-6, L-8, L-10 and L-12, which amounts have been taken from the photostatic exhibits above referred to, are accurate and, include a "booking fee" paid to the Marcus Loew Booking Agency. There is no dispute regarding any of these items except the "booking fee". The booking fee was paid by each of
3024 the theatres to the Marcus Loew Booking Agency for its services (N. Y. S. M., 1068). The services of the Marcus Loew Booking Agency was to supervise the operation of all the so-called Loew theatres. It had an accounting department, a film booking department, a film buying department, theatre operating department, construction and purchasing departments, etc., etc. (N. Y. S. M., 1066-1067). It had "the say-so in the making up of the show, operating the entertainment and booking the show" (N. Y. S. M., 790). It hired the more important help. It made up the program. It booked the vaudeville acts. It booked the orchestras. It always acted as the agent for the landlord (N. Y.

S. M., 792). The amount of the booking fee with respect 3025
to each theatre was determined in September previous to the beginning of the so-called picture year and was a uniform charge throughout the year and was based on the judgment of the various operating heads and officials of the company as to what was a fair charge for that particular theatre considering the various conditions and the work involved in connection with the theatre (N. Y. S. M., 767). The amount of the fee fixed was approximately 3% of the gross business of the theatre spread over a period (N. Y. S. M., 1074). The booking office loses money according to the witness Mills (N. Y. S. M., 767). Apparently, from the evidence the booking agency operations with respect to 3026
these theatres was a valuable service to the theatres and a part of the cost of their operations and accordingly I shall allow this fee to stand as an expense included under the heading "Payroll and Trade Bills".

9. There appears on Defendants' Exhibit L-6 a column headed "Overhead for Entire Week" and in this column opposite each theatre is listed a sum of money. This sum has been taken from the last column of Defendants' Exhibit L-7. Defendants' Exhibit L-7 shows how the weekly overhead of each of the theatres listed was calculated.

There is a similar column headed "Overhead for Entire Week" on Defendants' Exhibits L-8, L-10 and L-12 and 3027
the figures listed in this column are taken from the last column on Defendants' Exhibits L-9, L-11 and L-13, respectively, which latter exhibits show how the weekly overhead of the theatres listed thereon was arrived at.

Defendants' Exhibits L-8, L-8+L-9, L-10, L-11, L-12, L-13 were all prepared on the same principle as Defendants' Exhibits L-6 and L-7, proper allowance being made for the interest of Loew's, Inc., in the theatres listed in these various exhibits (N. Y. S. M., 722, 777, 779).

Assuming for the moment that defendants are entitled

3028 to have a credit allowed them for some overhead in the computation of their gains or profits from the exhibition of LETTY LYNTON in these theatres, I find that there is no substantial question raised by the complainants (N. Y. S. M., 1084) as to the accuracy of the amounts which are set forth in Defendants' Exhibits L-7, L-9, L-11 and L-13 and included in the compilation of the general overhead of these theatres, which overhead has been first compiled on a yearly basis and then reduced to a weekly basis by dividing in each instance the total by fifty-two. Accordingly, I find the items listed as aforesaid in the column headed "Overhead for the Entire Week" to be
3029 accurate.

10. Complainants contend, first, that LETTY LYNTON should not be charged with any of the overhead of these theatres, and second, that even assuming LETTY LYNTON should bear some proportion of the overhead of the theatres in which it was exhibited, nevertheless, the method employed by the defendants in calculating this overhead is unjust in that it requires the complainants to share in the expenses of real estate operations of the defendant in the profits of which the complainants can never have any interest.

11. Defendants' witness Moscowitz (N. Y. S. M., 1066)
3030 testified that he was "In charge of the operation of a *circuit of theatres* for Loew's, Inc." The theatres in this circuit in which LETTY LYNTON was exhibited are listed in Defendants' Exhibit L-1. As pointed out above, the evidence is clear and undisputed as to the receipts of these theatres when LETTY LYNTON was being exhibited, as to the cost to the theatres of the picture, as to the cost of other attractions during period in which LETTY LYNTON was exhibited, as to the number of days LETTY LYNTON was exhibited, as to the weekly payroll and trade bills of each theatre and as to the weekly overhead of each

theatre. These facts provide a sufficient basis for the 3031
determination of the gains and profits of each theatre arising from the exhibition of the picture in question.

12. I reject the contention of the complainants that defendants should be denied any credit for the overhead of these theatres during the time LETTY LYNTON was exhibited.

13. The contention of the complainants that even though LETTY LYNTON should bear its share of the theatre overhead, nevertheless it must not be subjected to the burden of any overhead arising from the so-called real estate operations of the defendants, must be considered 3032
in the light of the evidence in the record pertaining to this "circuit of theatres". The testimony of the defendants' witness Vogel to the effect that Loew's theatres are not in the real estate business as such and that its real estate activities are only incidental to the use of the excess space of the buildings in which the theatres are located is uncontradicted (N. Y. S. M., 993). It is true that in many instances theatres in this circuit are owned by corporations which derive substantial rent and other income from offices and stores which are a part of the building of which the theatre is also a part (Defendants' Exhibits L-7, L-9, L-11, L-13). In the compilations appearing on these exhibits it will be seen that this so-called 3033
"other income" is always deducted from the gross overhead and the net weekly overhead arrived at after this deduction has been made. Defendants have put in evidence a compilation (Defendants' Exhibit L-14) which relates to the theatres whether owned or leased which the Loew's circuit *built* (N. Y. S. M., 1177). This exhibit lists the "Income from Commercial Space", "Expense of Commercial Space", "Profit or Loss" and "Cost of Commercial Space". Obviously, such a compilation could not have been made by defendants with respect to theatres which

3034 defendants had not itself *built* for the data described by the witness on page 1179 of N. Y. S. M. would not have been available. This Exhibit L-14 shows that in the aggregate these theatres turned in a profit from the use of commercial space which went to reduce the aggregate overhead of these theatres (N. Y. S. M., 1187). The Candy Income or income from candy concessions in certain of the theatres appearing on Defendants' Exhibit L-15 also was added to the so-called other income of these theatres and thereby reduced the overhead of these theatres as figured above.

It may be that in the case of each theatre a more
3035 accurate method of computing the weekly overhead could have been devised. However, the testimony in this case presents this method and no other. I am not prepared to reject it. In fact, it seems to me the most practicable one that could have been devised in the light of the evidence. I, accordingly, find that the weekly overhead of these theatres to be the amounts set opposite each theatre under the heading "Overhead for Entire Week" appearing on Defendants' Exhibits L-6, L-8, L-10 and L-12.

14. Having determined the "Payroll and Trade Bills for the Entire Week" and the "Overhead for Entire Week", complainants and defendants differ as to the allocation
3036 of parts of these items as charges against the picture LETTY LYNTON in those instances when the picture was exhibited for a period of less than a week. Complainants contend that these charges should be figured on a *per diem* basis: that is the weekly charge should be divided by seven and the result multiplied by the number of days LETTY LYNTON played. Defendants contend that the box office receipts for the entire week during which LETTY LYNTON was exhibited should be determined and that then the receipts for the days on which LETTY LYNTON was exhibited should be fixed and that the percentage which

the second amount bore to the first amount should be used 3037
in determining what percentage of the payroll and overhead expenses for the entire week should be borne by the picture LETTY LYNTON (N. Y. S. M., 679-680).

The expenses of these theatres were on a seven day weekly basis (N. Y. S. M., 682, 729).

From the testimony (N. Y. S. M., 679-698) it appears that most of these theatres were on a flat rental basis as regards the cost of any particular picture and there was no necessity for applying any of the principles used in the contracts written on a profit sharing basis between distributors and exhibitors in which contracts in some instances the weekly playing time was divided into tenths 3038
and a greater part of the expenses was allocated to the days at the end of the week at which time the gross receipts were expected to be larger than at any other time during the week. It seems clear to me from this testimony that inasmuch as this picture was rented on a flat rental basis it is only proper to charge it with the expenses of the theatre during the days it was exhibited in said theatre, estimating these expenses on a *per diem* basis and I so hold.

15. Based on the above findings, it is now possible to determine the gains or profits, or loss applicable to the period in which "Letty Lynton" (together with other at- 3039
tractions) was exhibited in each of the theatres listed on Defendants' Exhibit L-1. By then taking "Loew's, Inc., Percentage of Interest" in each theatre as listed on Defendants' Exhibits L-6, L-8, L-10 and L-12 it is a simple calculation to determine the "Amount of Loew's, Inc., profit or loss during period in which "Letty Lynton" (together with other attractions) was exhibited. Using their own figures, defendants have done this in the next to the last column on its exhibits L-6, L-8, L-10 and L-12.

The complainants and the defendants differ as to how this profit or loss should be treated.

3040 Complainants claim all the profits and reject all the losses.

Defendants contend that complainants are entitled to only two-thirds of the profits and must bear two-thirds of the losses.

First I shall examine the defendants' contention. The division of the profits two-thirds to "Letty Lynton" and one-third to the other attractions which were exhibited along with "Letty Lynton" is admittedly arbitrary (N. Y. S. M., 669). Defendants point out that assuming the playing time of "Letty Lynton" and assuming the average length of a moving picture entertainment "Letty Lynton" occupied about two-thirds of the total time (N. Y.
3041 S. M., 672). Further, defendants state that the total cost of "Letty Lynton" to all the theatres is approximately 64% of the sum total of the cost of "Letty Lynton" and the cost of the other attractions which were exhibited along with "Letty Lynton" (N. Y. S. M., 724). Based on these considerations, defendants say it is fair to assume that "Letty Lynton" was responsible for only two-thirds of the profits.

A careful analysis of the facts presented in the exhibits referred to in paragraph 6, *supra*, leads me to reject the defendants' contention. It appears from these exhibits that the so-called "other attractions" may properly be di-
3042 vided into two classes. The first class (and in this class should be placed a great majority of the theatres) is composed of theatres which exhibited along with "Letty Lynton" one or two "shorts" such as news reels or comics the cost of which was very small compared to the cost of the feature picture "Letty Lynton". The second class (and this class numbered 18 out of a total of approximately one hundred theatres) is composed of theatres in which vaudeville was exhibited along with "Letty Lynton".

With reference to the playing of vaudeville in the Loew chain of theatres, the witness Vogel (N. Y. S. M., 1197) testified that in his opinion the chain receipts were increased

by the fact that vaudeville was shown with the film. On cross-examination, the same witness testified (N. Y. S. M., 1216-1219, incl.) that in 1932, the year when "Letty Lynton" was exhibited, eighteen of the theatres in the Loew chain showed vaudeville while five years prior to that time there were perhaps one hundred theatres in the chain which ran vaudeville and that today there were only three of the theatres in the chain which ran vaudeville and that in 1932 vaudeville was on its way out as an attraction in the Loew chain of theatres, and asked particularly about the Penn Theatre of Pittsburgh (Complainants' Exhibit D-20), the witness identified certain of the weekly expenses of the theatre as applicable to vaudeville and admitted that even on his assumption that the theatre would not have grossed more than about $10,000 during the week instead of the actual $16,000 it did gross if vaudeville had not been played, nevertheless the expenses of vaudeville ate up practically the entire difference between $10,000 and $16,000 so that there was practically no profit whatever in vaudeville in that the vaudeville expenses ate up one-third of the box office gross receipts. An examination of the weekly box office statements of the theatres which played vaudeville (Complainants' Exhibits B-4, B-11, B-13, Defendants' Exhibit L-2, Complainants' Exhibits B-27, B-29, B-37, B-39, B-44, C-3, C-12, C-13, D, D-4, D-10, D-8, D-20 and E-7) shows that in many instances the direct expenses of vaudeville amounts to or is in excess of one-third of the receipts of the box office and that there could be practically no contribution to overhead as a result of the vaudeville performances. 3043 3044 3045

An examination of the weekly box office statements of the theatres in the first class mentioned above shows that the other attractions exhibited at the same time that "Letty Lynton" was playing were of minor importance and there is no practical way that any relation that they could have to the gross receipts during the period "Letty Lynton" was exhibited can be determined.

From the above it is clear to me that the cost of the

3046 other attractions including vaudeville are properly deducted from the gross receipts and in that way credited to the defendants in this account and that the complainants are entitled to recover the net profits represented by Loew's, Inc., Percentage of Interest and I so find.

16. There remains the question of the losses. I have heretofore held that these theatres represented a chain through the agency of which Loew's, Inc., exhibited this picture. It seems to me that complainants cannot apply in this case the strict rule applicable to an accounting by a trustee and accept the profits and reject the losses and accordingly I hold that defendants are entitled to deduct from
3047 the profits which they are accountable for the losses as calculated pursuant to the above findings.

16-a. A claim has been made by the defendants for taxes and I hold that this claim must be denied and the Federal Income Taxes treated in the same manner as the other claims for taxes which are dealt with in the last pages of this report under the heading "Income Taxes".

17. In order that the findings which I have made above may be translated into a schedule of account, I have set up, based on these findings, the following papers:

1. A compilation to take the place of Defendants' Ex-
3048 hibit L-6.

2. A compilation to take the place of Defendants' Exhibit L-8.

3. A compilation to take the place of Defendants' Exhibit L-8+.

4. A compilation to take the place of Defendants' Exhibit L-10.

5. A compilation to take the place of Defendants' Exhibit L-12.

They are as follows:

COMPILATION TO TAKE THE PLACE OF DEFENDANTS' EXHIBIT L-6.

Theatre	1 Payroll and Trade Bills for Entire Week	2 Overhead for Entire Week	3 1 & 2 Reduced to Per Diem Basis	4 No. of Days Letty Lynton Played	5 Amt. of 1 & 2 Applicable to Letty Lynton	6 Cost of Letty Lynton	7 Cost of Other Attractions	8 Total Chargeable to Letty Lynton 5 Plus 6 and 7	9 Box Office Receipts	10 9 less 8	11 Loew's % of Interest	12 Profit or Loss
Astoria	$2,010.15	$1,781.71	$541.69	2	$1,083.38	$250.00	$58.00	$1,391.38	$1,998.80	$607.42	100	$607.42
Century	1,246.16	499.56	248.53	2	497.06	150.00	25.50	672.56	834.55	161.99	100	161.99
Avenue B	1,563.58	663.79	318.19	3	954.57	325.00	115.25	1,394.82	1,539.60	144.78	100	144.78
Bedford	1,654.15	1,558.66	458.97	3	1,376.91	450.00	123.00	1,949.91	2,906.25	956.34	100	956.34
Boulevard	2,286.32	673.59	422.84	4	1,691.36	800.00	902.28	3,393.64	4,716.10	1,322.46	100	1,322.46
Breevort	1,403.76	642.04	292.25	3	876.75	300.00	100.50	1,277.25	1,152.25	*125.00*	100	*125.00*
Circle	1,500.63	622.87	303.32	2	606.64	200.00	67.00	873.64	1,018.60	144.96	100	144.96
Commodore	1,686.55	2,511.71	599.79	3	1,799.25	525.00	113.00	2,437.25	3,246.05	808.80	100	808.80
Coney Island	2,071.74	2,756.37	689.73	3	2,069.19	750.00	125.75	2,944.94	5,424.80	2,479.86	100	2,479.86
Delancey	1,767.00	818.99	369.33	3	1,107.99	525.00	105.00	1,737.99	2,970.50	1,232.51	100	1,232.51
86th St.	1,543.46	531.53	296.43	2	592.86	350.00	50.00	992.86	1,202.45	209.59	100	209.59
Orpheum	3,792.61	1,550.94	763.36	4	3,053.44	700.00	1,368.57	5,122.01	6,188.80	1,066.79	100	1,066.79
83rd St.	2,878.56	2,732.53	801.58	4	3,206.32	1,200.00	126.75	4,533.07	9,913.35	5,380.28	100	5,380.28
Newark	4,557.81	3,457.23		7	8,015.04	3,000.00	2,617.00	13,632.04	17,423.95	3,791.91	100	3,791.91
Elsmere	1,428.35	971.03	342.76	3	1,028.28	225.00	78.25	1,331.53	897.85	*433.68*	100	*433.68*
Fairmont	1,950.89	1,641.98	513.26	4	2,053.04	900.00	161.75	3,114.79	5,510.75	2,395.96	100	2,395.96
42nd Street	1,446.54	788.48	319.28	2	638.56	350.00	72.00	1,060.56	1,579.55	518.99	50	259.49
46th Street	1,811.91	2,155.44	566.76	4	2,267.04	800.00	159.00	3,226.04	4,627.90	1,401.86	83⅓	1,168.21
Hillside	1,473.74	1,823.13	470.98	3	1,412.94	450.00	95.75	1,958.69	2,779.35	820.66	66⅔	547.10
Kameo	2,083.45	1,264.81	478.32	3	1,434.96	675.00	84.75	2,194.71	4,247.15	2,052.44	100	2,052.44
Lexington	2,450.89	2,629.39	727.75	3	2,177.25	900.00	100.50	3,177.75	6,593.75	3,416.00	100	3,416.00
Lincoln Sq.	1,560.12	731.03	327.30	3	981.90	450.00	92.75	1,524.65	2,182.60	657.95	100	657.95
Melba	1,614.75	2,418.60	576.19	2	1,152.38	400.00	48.00	1,600.38	2,678.25	1,077.87	100	1,077.87
Metropolitan	6,363.58	2,829.32	1,313.27	7	9,192.90	2,000.00	3,563.46	14,756.36	16,856.50	2,100.14	100	2,100.14
National	1,831.04	780.99	373.14	4	1,492.56	700.00	146.75	2,339.31	3,431.70	1,092.39	75	819.29
116th St.	1,570.73	836.41	343.87	4	1,375.48	400.00	135.00	1,910.48	2,237.80	327.32	100	327.32
167th St.	1,894.44	1,632.11	503.79	3	1,511.37	750.00	125.75	2,387.12	5,226.70	2,839.58	100	2,839.58
Palace	1,408.64	992.72	343.05	3	1,029.15	225.00	80.75	1,334.90	1,686.25	351.35	100	351.35
Seventh Ave.	1,472.85	965.31	339.73	3	1,019.19	375.00	123.00	1,517.19	2,049.20	532.01	100	532.01
State, N. Y.	7,946.27	4,000.66	1,706.70	7	11,946.93	3,000.00	5,120.00	20,066.93	23,169.00	3,102.07	83⅓	2,585.05
New York	2,488.96	2,203.02	670.28	1	670.28	150.00	32.50	852.78	755.30	*97.48*	33⅓	*32.49*
Triboro	3,754.48	2,841.21	942.24	4	3,768.96	700.00	1,075.03	5,543.99	6,315.60	771.61	100	771.61
Woodside	1,600.50	1,188.73	398.46	3	1,195.38	500.00	84.75	1,780.13	2,495.35	715.22	100	715.22
Akron	1,914.47	2,490.82	616.47	4	2,465.88	754.03	105.12	3,325.03	3,770.15	445.12	100	445.12
Atlanta, Grand	1,252.92	1,966.50		6wk	2,219.42	414.84		3	2,0			

	[illegible]	[illegible]	[illegible]	4	1,691.36	800.00	902.28	3,393.64	4,716.10	1,322.46	100	1,322.46
Breevort	1,463.76	642.04	292.25	3	876.75	300.00	100.50	1,277.25	1,152.25	*125.00*	100	*125.00*
Circle	1,500.63	622.87	303.32	2	606.64	200.00	67.00	873.64	1,018.60	144.96	100	144.96
Commodore	1,686.55	2,511.71	599.79	3	1,799.25	525.00	113.00	2,437.25	3,246.05	808.80	100	808.80
Coney Island	2,071.74	2,756.37	689.73	3	2,069.19	750.00	125.73	2,944.94	5,424.80	2,479.86	100	2,479.86
Delancey	1,767.00	818.99	369.33	3	1,107.99	525.00	105.00	1,737.99	2,970.50	1,232.51	100	1,232.51
86th St.	1,543.46	531.53	296.43	2	592.86	350.00	50.00	992.86	1,202.45	209.59	100	209.59
Orpheum	3,792.61	1,550.94	763.36	4	3,053.44	700.00	1,368.57	5,122.01	6,188.80	1,066.79	100	1,066.79
83rd St.	2,878.56	2,732.53	801.58	4	3,206.32	1,200.00	126.75	4,533.07	9,913.35	5,380.28	100	5,380.28
Newark	4,557.81	3,457.23		7	8,015.04	3,000.00	2,617.00	13,632.04	17,423.95	3,791.91	100	3,791.91
Elsmere	1,428.35	971.03	342.76	3	1,028.28	225.00	78.25	1,331.53	897.85	*433.68*	100	*433.68*
Fairmont	1,950.89	1,641.98	513.26	4	2,053.04	900.00	161.75	3,114.79	5,510.75	2,395.96	100	2,395.96
42nd Street	1,446.54	788.48	319.28	2	638.56	350.00	72.00	1,060.56	1,579.55	518.99	50	259.49
46th Street	1,811.91	2,155.44	566.76	4	2,267.04	800.00	159.00	3,226.04	4,627.90	1,401.86	83⅓	1,168.21
Hillside	1,473.74	1,823.13	470.98	3	1,412.94	450.00	95.75	1,958.69	2,779.35	820.66	66⅔	547.10
Kameo	2,083.45	1,264.81	478.32	3	1,434.96	675.00	84.75	2,194.71	4,247.15	2,052.44	100	2,052.44
Lexington	2,450.89	2,629.39	727.75	3	2,177.25	900.00	100.50	3,177.75	6,593.75	3,416.00	100	3,416.00
Lincoln Sq.	1,560.12	731.03	327.30	3	981.90	450.00	92.75	1,524.65	2,182.60	657.95	100	657.95
Melba	1,614.75	2,418.60	576.19	2	1,152.38	400.00	48.00	1,600.38	2,678.25	1,077.87	100	1,077.87
Metropolitan	6,363.58	2,829.32	1,313.27	7	9,192.90	2,000.00	3,563.46	14,756.36	16,856.50	2,100.14	100	2,100.14
National	1,831.04	780.99	373.14	4	1,492.56	700.00	146.75	2,339.31	3,431.70	1,092.39	75	819.29
116th St.	1,570.73	836.41	343.87	4	1,375.48	400.00	135.00	1,910.48	2,237.80	327.32	100	327.32
167th St.	1,894.44	1,632.11	503.79	3	1,511.37	750.00	125.75	2,387.12	5,226.70	2,839.58	100	2,839.58
Palace	1,498.64	992.72	343.05	3	1,029.15	225.00	80.75	1,334.90	1,686.25	351.35	100	351.35
Seventh Ave.	1,472.85	905.31	339.73	3	1,019.19	375.00	123.00	1,517.19	2,049.20	532.01	100	532.01
State, N. Y.	7,946.27	4,000.66	1,706.70	7	11,946.93	3,000.00	5,120.00	20,066.93	23,169.00	3,102.07	83⅓	2,585.05
New York	2,488.96	2,203.02	670.28	1	670.28	150.00	32.50	852.78	755.30	*97.48*	33⅓	*32.49*
Triboro	3,754.48	2,841.21	942.24	4	3,768.96	700.00	1,075.03	5,543.99	6,315.60	771.61	100	771.61
Woodside	1,600.50	1,188.73	398.46	3	1,195.38	500.00	84.75	1,780.13	2,495.35	715.22	100	715.22
Akron	1,914.47	2,400.82	616.47	4	2,465.88	754.03	105.12	3,325.03	3,770.15	445.12	100	445.12
Atlanta, Grand	1,252.92	1,966.50		6wk.	3,219.42	414.84	144.57	3,778.83	2,074.20	*1,704.63*	50	*852.31*
Dayton	1,442.33	1,339.93		7	2,782.26	2,240.75	219.18	5,242.19	7,481.50	2,239.31	100	2,239.31
Harrisburg	1,213.43	1,134.64		6wk.	2,348.07	1,412.15	193.91	3,954.13	5,326.30	1,372.17	100	1,372.17
Houston	2,226.34	2,043.49		7	4,269.83	1,050.00	176.58	5,496.41	7,552.40	2,055.99	100	2,055.99
Indianapolis	2,165.97	1,735.54		7	3,901.51	2,605.84	309.84	6,817.19	7,692.60	875.41	100	875.41
Valencia	7,178.98	5,882.91		7	13,061.89	2,000.00	3,988.25	19,050.14	18,378.00	*672.14*	100	*672.14*
Kings	3,828.00	6,383.88		7	10,211.88	1,500.00	230.75	11,942.63	15,553.20	3,610.57	100	3,610.57
Pitkin	4,639.77	5,960.16	1,514.27	4	6,057.08	700.00	1,225.61	7,982.69	7,141.95	*840.74*	100	*840.74*
Kansas City, Midland	3,422.14	6,667.72		7	10,089.86	2,000.00	280.95	12,370.81	10,537.90	*1,832.91*	100	*1,832.91*
Nashville Vendome	1,290.75	804.89		6wk.	2,095.64	1,582.75	181.25	3,859.64	6,331.00	2,471.36	100	2,471.36
Reading	1,351.40	1,375.56		6wk.	2,726.96	1,647.41	212.58	4,586.95	7,363.29	2,776.34	100	2,776.34
Rochester	3,274.20	3,081.29		7	6,355.49	1,239.50	3,651.50	11,246.49	10,161.45	*1,085.04*	100	*1,085.04*
St. Louis	4,489.10	3,254.70		7	7,743.80	2,750.00	457.83	10,951.63	12,790.05	1,838.42	100	1,838.42
Wilmington	1,049.22	246.58		6wk.	1,295.80	1,459.78	137.58	2,893.16	4,188.40	1,295.24	100	1,295.24
										Total		$54,029.90

Figures in italic appear in red on original.

COMPILATION TO TAKE THE PLACE OF DEFENDANTS' EXHIBIT L-8.

Theatre	1 Payroll and Trade Bills for Entire Week	2 Overhead for Entire Week	3 1 & 2 Reduced to Per Diem Basis	4 No. of Days Letty Lynton Played	5 Amt. of 1 & 2 Applicable to Letty Lynton	6 Cost of Letty Lynton	7 Cost of Other Attractions	8 Total Chargeable to Letty Lynton 5 Plus 6 and 7	9 Box Office Receipts	10 9 less 8	11 Loew's % of Interest	12 Profit or Loss
Alpine	$1,830.37	$712.28	$363.23	3	$1,089.69	$450.00	$110.75	$1,650.44	$2,102.20	$451.76	50	225.88
Burland	1,846.41	847.26	384.81	3	1,154.43	600.00	125.75	1,880.18	3,628.25	1,748.07	50	874.03
Burnside	1,730.89	1,099.29	404.31	3	1,212.93	600.00	110.75	1,923.68	3,800.25	1,876.57	95	1,782.74
Gates	3,771.13	1,689.71	780.12	4	3,120.48	800.00	1,060.75	4,981.23	6,461.25	1,480.02	53.89	797.58
Inwood	1,514.04	762.42	325.20	3	975.60	375.00	78.25	1,428.85	1,638.50	209.65	66.67	1,397.73
New Rochelle	2,161.90	1,486.97	521.26	3	1,563.78	675.00	112.25	2,351.03	3,976.35	1,625.32	42	682.63
Premier	1,919.43	1,691.63	515.86	3	1,547.58	550.00	125.75	2,223.33	3,267.90	1,044.57	50	522.28
Rio	1,616.47	1,259.98	410.92	3	1,232.76	390.00	97.25	1,630.01	2,874.05	1,244.04	50	622.02
Spooner	1,461.63	962.19	343.40	2	686.80	250.00	58.00	994.80	1,155.35	160.55	50	80.27
Victoria	1,672.57	1,476.72	449.89	3	1,349.67	300.00	330.00	1,979.67	2,006.95	27.28	56.25	15.34
Victory	1,280.79	595.50	268.04	3	804.12	200.00	89.50	1,093.62	1,127.45	33.83	75	25.37
Warwick	1,275.37	310.84	226.60	3	679.80	150.00	83.25	913.05	1,007.30	94.25	50	47.12
Yonkers	3,321.73	1,017.32	619.86	4	2,479.44	700.00	1,281.86	4,461.30	3,950.65	*510.65*	66.67	*340.45*
Boston Orpheum	4,791.48	3,664.49		7	8,455.97	1,250.00	3,197.58	12,903.55	15,847.70	2,944.15	50	1,472.07
Cleveland, Allen	2,768.57	3,543.08		7	6,311.65	2,103.82	352.62	8,768.09	13,307.65	4,539.56	86.71	3,936.25
Cleveland, Granada	1,450.46	1,824.46	467.84	4	1,871.36	275.00	55.12	2,201.48	2,303.90	102.42	86.71	88.80
Cleveland, Mall	1,118.74	873.80	284.64	4	1,138.56	125.00	39.12	1,302.68	925.05	*377.63*	86.71	*327.44*
Cleveland, Park	1,503.16	1,988.18		7	3,491.34	500.00	85.16	4,076.50	5,005.85	929.35	86.71	805.83
Evansville, Victory	1,044.65	2,457.94	457.51	4	1,830.04	300.00	110.00	2,240.04	2,944.00	703.96	50	351.98
London, Loew's	1,041.99	1,229.97		6wk.	2,271.96	750.00	240.00	3,261.96	2,670.66	*591.30*	25	*147.82*
Toledo, Valentine	1,410.31	514.97		7	1,925.28	1,250.71	292.62	3,468.61	5,002.85	1,534.24	50	767.12
Toronto, Yonko St.	2,189.71	2,653.18		6wk.	4,842.89	1,750.00	550.00	7,142.89	6,157.88	*985.01*	58.75	*578.69*
Washington, Palace	4,841.01	2,015.53		7	6,856.54	5,811.70	429.60	13,097.84	17,623.40	4,525.56	71.25	3,224.46
White Plains, State	1,347.80	904.73	321.79	4	1,287.16	1,232.59	86.08	2,605.83	3,541.65	935.82	37.50	350.93
										Total		$16,676.03

Figures in italic appear in red on orig

COMPILATION TO TAKE THE PLACE OF DEFENDANTS' EXHIBIT L-8+.

3055

Theatre	Corporation	Profit of Corp'n Re Letty Lynton Showing	Loew's Inc. Per Cent. Stockholding	Loew's Inc. Share Landlord Profit
Willard	Willard Amusement Corp.	729.99	10.7	78.11
Mt. Vernon	Willard Amusement Corp.	499.02	10.7	53.40
Plaza	Conwall Realty Corp.	867.00	10.44	90.51
				$222.02

3056

3057

COMPILATION TO TAKE THE PLACE OF DEFENDANTS' EXHIBIT L-10.

Theatre	1 Payroll and Trade Bills for Entire Week	2 Overhead for Entire Week	3 1 & 2 Reduced to Per Diem Basis	4 No. of Days Letty Lynton Played	5 Amt. of 1 & 2 Applicable to Letty Lynton	6 Cost of Letty Lynton	7 Cost of Other Attractions	8 Total Chargeable to Letty Lynton 5 Plus 6 and 7	9 Box Office Receipts	10 9 less 8	11 Loew's % of Interest	12 Profit or Loss
Bayridge	$2,491.00	$1,457.85	$564.12	4	$2,256.48	$800.00	$1,038.61	$4,095.09	$5,554.25	$1,459.16	50	$729.58
Canal	1,466.01	1,640.64	443.80	3	1,331.40	375.00	86.50	1,792.90	2,039.15	246.25	100	246.25
Embassy, No. Bergen	1,383.03	856.76	319.68	3	959.04	689.39	120.75	1,769.18	3,446.95	1,677.77	50	838.88
Grand	2,346.12	2,246.04	656.02	3	1,968.06	600.00	110.75	2,678.81	5,678.20	2,999.39	100	2,999.39
Jersey City	6,245.25	4,629.87		7	10,875.12	1,500.00	2,874.65	15,249.77	21,318.90	6,069.13	100	6,069.13
175th St.	3,031.62	4,802.93	1,119.22	4	4,476.88	1,200.00	136.75	5,813.63	8,334.45	2,520.82	100	2,520.82
Oriental	2,158.26	1,987.72	592.28	4	2,369.12	1,000.00	146.75	3,515.87	5,732.00	2,216.13	66.67	1,477.42
72nd Street	2,809.56	3,517.66	903.88	3	2,711.64	750.00	148.50	3,610.14	4,818.30	1,208.16	100	1,208.16
Paradise	7,445.35	5,143.80	1,798.35	7	12,589.15	2,000.00	4,478.47	19,067.62	17,999.60	*1,068.02*	100	*1,068.02*
State, Providence	2,558.32	4,806.47	1,052.11	7	7,364.79	2,500.00	221.25	10,086.04	12,407.20	2,321.16	100	2,321.16
State, Syracuse	2,833.55	4,999.53	1,119.01	7	7,833.08	1,400.00	3,728.56	12,961.64	12,171.15	*790.49*	100	*790.49*
Parkway, Baltimore	1,019.77	537.27	222.43	7	1,557.04	868.75	110.10	2,535.89	4,482.15	1,946.26	50	973.13
Columbus, Broad	1,766.11	3,519.04	755.02	7	5,285.15	2,629.08	267.62	8,181.85	9,133.10	951.25	50	475.62
State, Louisville	1,871.22	2,839.96	674.45	7	4,711.18	2,241.62	219.16	7,171.96	8,381.70	1,209.74	50	604.87
Valencia, Baltimore	1,201.47	2,135.09	476.65	7	3,336.56	387.49	105.10	3,829.15	2,583.30	*1,245.85*	30	*373.75*
Stanley, Baltimore	2,430.86	2,970.73	771.65	7	5,401.59	5,483.08	317.60	11,202.27	14,054.95	2,852.68	30	855.80
State, Boston	2,692.74	4,040.66	947.62	7	6,733.40	3,500.00	321.33	10,554.73	13,564.50	3,009.77	50	1,504.88
State, Norfolk	1,481.90	1,713.62	456.50	6wk.	3,195.52	1,484.57	210.50	4,890.59	5,938.25	1,047.66	33.33	349.22
Loew's Richmond	1,447.59	1,387.16	404.95	6wk.	2,834.75	2,371.37	267.60	5,473.72	8,742.65	3,268.93	33.33	1,089.64
Loew's Canton	1,660.16	1,854.03	502.02	4	2,008.08		120.12	2,128.20	2,539.45	411.25	100	411.25
Penn, Pittsburgh	5,576.67	8,370.36	1,949.43	6wk.	13,947.03		3,768.12	17,715.15	16,412.05	*1,303.10*	44.12	*574.92*
										Total		$21,868.02

Figures in italic appear in red [illegible]

COMPILATION TO TAKE THE PLACE OF DEFENDANTS' EXHIBIT L-12.

Theatre	1 Payroll and Trade Bills for Entire Week	2 Overhead for Entire Week	3 1 & 2 Reduced to Per Diem Basis	4 No. of Days Letty Lynton Played	5 Amt. of 1 & 2 Applicable to Letty Lynton	6 Cost of Letty Lynton	7 Cost of Other Attractions	8 Total Chargeable to Letty Lynton 5 Plus 6 and 7	9 Box Office Receipts	10 9 less 8	11 Loew's % of Interest	12 Profit or Loss
Broadway	$1,563.45	$594.33	$308.25	3	$924.75	$600.00	$95.75	$1,620.50	$3,344.15	$1,723.65	50	$861.82
Freeman	1,178.03	631.26	258.47	3	775.41	300.00	82.00	1,157.41	1,722.10	564.69	50	282.34
Mt. Vernon	1,712.31	1,077.62	398.56	4	1,594.24	800.00	145.75	2,539.99	3,661.15	1,121.16	33.33	373.72
Plaza	1,607.06	1,080.62	383.95	4	1,535.80	800.00	159.00	2,494.80	4,087.05	1,592.25	33.33	530.75
Prospect	1,705.82	1,229.68	419.35	3	1,258.05	675.00	125.75	2,058.80	3,966.30	1,907.50	33.33	635.83
Sheridan	1,706.67	1,521.84	461.21	3	1,383.63	750.00	410.75	2,244.38	4,923.45	2,679.07	50	1,339.53
Willard	1,684.98	852.06	362.43	3	1,087.29	675.00	125.75	1,888.04	3,722.35	1,834.31	33.33	611.43
Fox-Atlanta	3,997.63	2,200.57	885.45	6wk.	6,198.20	523.06	3,300.40	10,021.66	10,092.25	70.59	50	35.29
										Total		$4,670.71

3063 3062 3061

MICRO CARD 22
TRADE MARK ®
39
MATTHEW BENDER & COMPANY
14417
359
microcard

3064 CULVER ACCOUNTING.

1. The defendants claim that the complainants in this proceeding are not entitled to share in any of the profits made by reason of the sale or use of the picture LETTY LYNTON in foreign countries inasmuch as the United States Copyright Act cannot be held to have any extraterritorial effect.

2. The Culver Export Corporation (hereinafter called Culver) is one of the defendants in this proceeding, and in the decree of the District Court referred to on page 2
3065 of this report Culver is held to have infringed and violated the complainants' copyright. Culver, as appears from Defendants' Exhibit 17, is a wholly owned subsidiary of Metro-Goldwyn Pictures Corporation and is a domestic corporation with offices at 1540 Broadway, New York City (N. Y. S. M., 1009).

> "The Culver Export Corporation at that time had entire charge of the marketing of MGM pictures outside of the United States and Canada" (Testimony of Loew, N. Y. S. M., 991).

3. Culver had a large number of wholly owned sub-
3066 sidiaries and these subsidiaries are listed on the second page of Defendants' Exhibit 17. The gross business of what Mr. Loew called the "Foreign Department" in 1933 was almost fifteen and one-half million dollars (N. Y. S. M., 994). In other words, this was the gross business of Culver.

4. It is clear from the testimony of Mr. Loew (N. Y. S. M., 989, *et seq.*) that Culver was simply an agency used for the purpose of handling the foreign business of distribution and exhibition of Loew's, Inc. pictures—and accordingly, I find this to be the fact.

5. It is also clear from Mr. Loew's testimony and from Defendants' Exhibit 21 that the foreign subsidiaries of Culver were merely agents used by Culver for the distribution and exhibition of pictures in the various countries in which they were incorporated and accordingly I find this to be the fact. 3067

6. It is also clear from the testimony of Mr. Loew, above referred to, that the central control and executive direction of these foreign subsidiaries rested in the executive offices of Culver located at 1540 Broadway, New York City, that is, in the general New York offices of Loew's, Inc., and I so find this to be the fact. 3068

7. Having found these facts, I reject defendants' contention basing my rejection on the plain language of the decree and on the fact that Culver has done in the United States certain of the acts enumerated in the decree for which it is held accountable by the decree.

8. Under the decree appointing me Special Master, I am instructed "to report separately the amount of such gains and profits of the defendants obtained from all sources outside the United States".

9. The defendant, Culver, which is a wholly owned subsidiary of the defendant, Metro-Goldwyn Pictures Corporation and which in turn owns 100% interest in various subsidiaries distributing in foreign countries with the exception of the distribution company in Sweden (Defendants' Exhibit 17), has filed an account for itself and for its foreign subsidiaries (Defendants' Exhibits 20 and 21). 3069

10. Culver and its subsidiaries handled the distribution of the defendants' films throughout the world outside Continental United States and Canada. The total film rental income received by all of the foreign subsidiaries

3070 from the picture LETTY LYNTON amounted to $414,986.41 (Defendants' Exhibit 20, N. Y. S. M., 451).

11. The film rental income reported on Defendants' Exhibit 20, amounting to $2,876.10, represents income from the picture LETTY LYNTON mainly from the United States Navy or steamship lines, sold direct by Culver instead of through a subsidiary (N. Y. S. M., 452).

12. The total film rental income received by Culver and its subsidiaries from the distribution of LETTY LYNTON outside of the United States and Canada amounts to
3071 $417,862.51 (Defendants' Exhibit 20, N. Y. S. M., 452).

13. From this sum should be deducted the sum of $142,339.84, which is the total of all monies from LETTY LYNTON retained by the foreign subsidiaries of Culver and accounted for by them in Defendants' Exhibit 21 (Defendants' Exhibit 20, N. Y. S. M., 452).

14. In other words, Culver in Defendants' Exhibit 20 is accounting for $275,522.67 of the total film rental income derived from the picture LETTY LYNTON by Culver and its subsidiaries (Defendants' Exhibit 20, N. Y. S. M., 452).

3072 15. The defendant Culver claims that a share of its distribution expense should be deducted from this gross film rental income and in order to determine what share it sets forth on Defendants' Exhibit 20-A the total film rental income from all pictures received by Culver during the year in question and deducts from this the amount retained by the foreign subsidiaries and the net result is a net film rental income from all pictures received by Culver during the year in question of $10,630,429.70. It then sets up what it claims to be the distribution expense of Culver less certain profits on exchange and certain miscellaneous income and finds that its total distribution

expense amounts to $484,058.15 and that this amount is 3073
4.55% of the total net film rental income. Accordingly, it claims a deduction of $12,536.28, which sum amounts to 4.55% of Culver's share of the film rental income from LETTY LYNTON; as set forth on Defendant's Exhibit 20. Complainants reject this claim on the ground that Culver is not shown to have performed any useful function in distributing LETTY LYNTON. I shall allow Culver in this accounting the sum of $9,805.79 as a credit for distributing expense and I shall give my reasons for so doing hereafter in paragraphs 33-36, both inclusive, when considering the allowance to be made for distributing expense to the foreign subsidiaries of Culver.

16. On Defendant's Exhibit 20-D is shown what the 3074
defendant claims was the production cost to the Culver of the picture LETTY LYNTON. The first item of this exhibit —the English version—that is 25% of the cost of production to the Metro-Goldwyn Pictures Corporation, must be altered in view of the corrected cost of production as found by me in the accounting herein filed of the Metro-Goldwyn Pictures Corporation (see paragraph No. 35) and instead of $106,582.99 this item should be $82,989.89. It is proper to say here that this percentage (25%) of the cost of production charged by the Pictures Corporation against Culver may properly be accepted as a satisfactory percentage provided the complainants are held to be entitled to recover 3075
in this proceeding against the Culver. In the event that the court should hold that the complainants are not entitled to recover against the Culver, then it would seem to be fair to increase the percentage of the production cost which Culver should bear, thereby reducing the cost of production of the Pictures Corporation. As is pointed out by the complainants in their memorandum (p. 43), if you take the basis of the relative receipts of Culver from the foreign distribution and the other defendants from the domestic distribution, it will be found that of the total

3076 receipts Culver's share amounted to 35.65% and it would seem that if Culver is *not* to be held accountable in this action it would be fairer for Culver Export Corporation to assume 35.65% of the negative cost of this picture instead of the 25% charged against it on the books of the Pictures Corporation. In the event that it is held by the court that Culver is *not* accountable to these complainants, the accounting of the Pictures Corporation as herein found by me should be recalculated and the cost of production credited to the Pictures Corporation should be reduced in line with the facts expressed herein.

17. There is no dispute about the negative cost of the
3077 German, French and Italian versions as listed on Defendants' Exhibit 20-D, and, as pointed out on pages 19 and 20 of the Objections filed to this report by the defendants, the charges claimed by the defendants of $1,500 in each instance, representing overhead, appear to have been accepted by the complainants and accordingly I shall allow these items.

18. There is no dispute regarding the other items listed on Defendants' Exhibit 20-D and accordingly I allow them as stated thereon.

19. In line with the above findings, I restate Defendants' Exhibit 20-D to read as follows:

3078

Negative Cost

English Version (25% from Metro-Goldwyn Pictures Corp'n)		$ 82,980.89
German Version	$12,600.50	
French "	13,619.33	
Italian "	10,741.10	
		36,960.93
		$119,941.82

Prints			3079
French Version	7,373.18		
German "	9,801.95		
Italian "	3,592.79		
Spanish "	2,275.70		
English "	22,001.90		
		45,045.52	
E. R. P. I. Royalty	3,456.00		
German Electric Co. Royalty	2,468.00		
Music Royalty	1,046.98		
		6,970.98	3080
Total Production Cost Culver Export Corporation		$171,958.32	

and in this form I find that the cost of production properly credited to the Culver Export Corporation in its account as set forth in Defendants' Exhibit 20 should be $171,958.32.

20. The final item on Defendants' Exhibit 20 is a claim for an allowance on the part of the defendants for Federal income taxes. I disallow this claim for the reasons hereinafter stated in the closing pages of this report.

3081

21. I shall now restate the first page of Defendants' Exhibit 20 pursuant to the findings heretofore set forth:

Reference to Paragraphs of Findings Numbered		
3	Film Rental Income by Foreign Subsidiaries	$414,986.4.
4	Film Rental Income—Direct	2,876.10

3082	5	Film Rental Income	$417,862.51
	6	Less: Retained by Foreign Subsidiaries	142,339.84
	7	Culver Share Film Rental	$275,522.67
	8	Distributing Expense	9,805.79
			$265,716.88
	9–12 (Both inc.)	Total Production Cost	171,958.32
3083		Net Income from LETTY LYNTON	$93,758.56

22. The accounting of the foreign subsidiaries of Culver is contained in Defendants' Exhibit 21. There is no dispute about the item "Film Rental Income" listed at $414,986.41 and the deduction therefrom of the Culver Export Corporation's share amounting to $272,646.57, leaving a net "Film Rental Income" to be accounted for in this account of $142,339.84, and accordingly I find these figures to be correct.

23. The distributing expense listed on this schedule of $84,260.05 is challenged by the complainants and I will
3084 revert to this item hereafter.

24. There is no dispute about the minority interest share of Sweden amounting to $526.52 and there is no dispute regarding the item "Cost of prints—England" amounting to $6,619.27, and accordingly I find these items to be correct.

25. Complainants challenge in their brief the inclusion in the cost of negatives of the Spanish version an item of $2,670.80 for overhead. This appears in the breakdown of the cost of the Spanish version on De-

fendants' Exhibit 4 and the testimony regarding it ap- 3085
pears on N. Y. S. M., 109-132, which testimony relates to Defendants' Exhibits 7 and 8. Subsequently these exhibits were withdrawn and returned to counsel for the defendants (N. Y. S. M., 626). Counsel for the defendants were under the impression that counsel for the complainants had at that time agreed to the item of cost of Spanish version including the overhead. Counsel for the complainants now advise me that under the circumstances the complainants withdraw their objection to the item "Cost of Negative—Spanish Version" in the sum of $7,638.94. Accordingly, I find this to be a proper credit to the defendants in the account—Exhibit 21. 3086

26. I shall now consider the item "Distributing Expense" appearing on Defendants' Exhibit 20 in the sum of $12,536.28 and the item "Distributing Expense" appearing on Defendants' Exhibit 21 in the sum of $84,260.05.

27. The defendants' theory with reference to the distributing expense appearing on Defendants' Exhibit 20 in the sum of $12,536.28 may be understood by an examination of Defendants' Exhibits 20-A, 20-B and 20-C. The distributing expense of Culver less certain items is there figured to be $484,058.15 and this sum amounts to 4.55% of the net film rental income of Culver. Accord- 3087
ingly, this percentage of Culver's share of the film rental income derived from the foreign distribution of the picture LETTY LYNTON and amounting to $275,522.67, which percentage amounts to $12,536.28, is taken as the distributing expense chargeable to the picture LETTY LYNTON in this accounting and deductible in the accounting of Culver from Culver's share of the film rental income from this picture. As I have stated in the other accountings filed herein, I do not approve of this method of estimating the share of the distributing expense which should be charged

088 against LETTY LYNTON for the simple reason that this method unduly penalizes a successful picture. As I have indicated in the other accountings, it seems much fairer to determine as nearly as possible how many feature pictures (or the equivalent of feature pictures) were distributed during the year in question and then divide the distribution expense numerically among those pictures.

28. In Defendants' Exhibit 21 with its attached schedules the defendants set forth in great detail the distributing expense of the foreign subsidiaries of Culver by countries. After a careful consideration of Defendants' Exhibits
089 21-B-1, B-2 and B-3 I find that the total distributing expense as set forth therein by countries is an accurate statement of said expense. The specific objections raised by the complainants and set forth on pages 47 and 48 of Complainants' Memorandum, I shall disallow. The principal objections by complainants relate to the items which appear on Defendants' Exhibits 21-B-1, B-2 and B-3 under the title "New York Overhead Charged (Salaries and Travelling—Field Supervisors)" totaling $178,538.33 and the items under the heading "Depreciation of Equipment" totaling $137,810.39.

29. So far as the items under "New York Overhead"
090 are concerned, these seem to me to be proper and reasonable expenses of distribution as explained in N. Y. S. M. 473, by defendants' accountant and I find that they have not been successfully challenged by the complainants by any testimony in the record.

30. So far as the items listed under "Depreciation Account", it is true that there does not appear in the testimony a detailed schedule of the value of the equipment of these foreign subsidiaries upon which the depreciation is based but I agree with the defendants' contention that to submit such detailed schedules in this account when

the items were not specifically attacked during the hearings 3091
would have simply led to an unnecessary and burdensome development of the proof, and accordingly I shall allow this item.

31. The other objections of the complainants are minor in character and may be disregarded.

32. Accordingly, I find that the total distributing expense of the foreign subsidiaries as set forth on Defendants' Exhibits 21-B-1, B-2 and B-3 amounts to $3,046,026.96.

33. The defendants' contention as appears in their Exhibits 21-B-1, B-2 and B-3 is that the proper method for 3092
determining that proportion of the distributing expense which should be borne by the picture LETTY LYNTON is to determine the percentage of the distributing expense of the film rental income in each country by taking the total film rental income in each country and the total distributing expense in that country and determining what percentage of the income the expense represented. I have rejected this theory in the other accounts filed herein and have determined that the fairest method of ascertaining the amount of the distributing expense which should be chargeable against the picture LETTY LYNTON was to divide the total distributing expense by the number of feature pictures (or equivalent of feature pictures) distributed during 3093
the year in question.

34. Adopting this theory, I find that the total distributing expense as set forth in Defendants' Exhibits 21-B-1, B-2 and B-3 amounts to $3,046,026.96 and that the total distributing expense as stated on Defendants' Exhibit 20-A of Culver to be $484,058.15 and that the total distributing expense of Culver and its foreign subsidiaries amounts to the sum of these two figures, that is $3,530,085.11.

3094 35. The evidence in the record as to the number of feature pictures (or the equivalent of feature pictures) distributed by Culver and its foreign subsidiaries is not, it is true, quite as clear as the evidence respecting the number of feature pictures (or equivalent of feature pictures) distributed during the year in question by the defendants domestically, that is, in continental United States. It is true that Culver distributed all of the feature pictures produced by the defendants during the year in question and also the shorts but the news reels were not distributed abroad (N. Y. S. M., 967-8). However, some other outside producers' pictures were distributed (N. Y. S. M., 82). It is true that all of these pictures were not distributed in all of the countries covered by Culver though LETTY LYNTON was distributed in forty of these foreign countries, in other words, in practically all of them for there were forty corporations (N. Y. S. M., 37). As I stated, the evidence is not clear as to just how many feature pictures and the equivalent of feature pictures (shorts and outside producers' pictures) on an average might be said to have been distributed during the year in question by Culver and its subsidiaries. After a careful consideration of what evidence there is, it has seemed to me fair to say that forty-five (45) feature pictures (or the equivalent of feature pictures) were on an average distributed by Culver and its foreign subsidiaries during the year in question, and accordingly in order to determine the amount of the distributing expense properly chargeable against LETTY LYNTON in the accounting filed by the Culver Export Corporation and its subsidiaries the total distributing expense must be divided by 45 resulting in a figure of $78,446.33.

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36. I find, therefore, that since the total distributing expense allocated to LETTY LYNTON claimed by defendants under Exhibits 20 and 21 amounts to $12,536.28 (Exhibit 20) plus $84,260.05 (Exhibit 21) is the sum of approxi-

mately $96,000.00, one-eighth of the sum of $78,446.33 or $9,805.79 should be allowed as the distributing expense in the account of Culver (Exhibit 20) and seven-eighths of the sum of $78,446.33 or $68,640.54 should be allowed as distributing expense in the account of the foreign subsidiaries (Exhibit 21). These amounts, therefore, will take the place and stead of the amounts listed on Defendants' Exhibits 20 and 21. 3097

37. With reference to the claims for Federal income taxes listed as the final item on Defendants' Exhibit 21, I disallow this claim for the reasons hereinafter stated in the closing pages of this report. 3098

38. I shall now restate the first page of Defendants' Exhibit 21, pursuant to the findings heretofore set forth:

Reference to Paragraphs of Findings Numbered		
15	Film Rental Income (Per Schedule)	$414,986.41
15	Less Culver Export Corp. Share (Per Schedule)	272,646.57
15	Net Film Rental Income (Per Schedule)	$142,339.84
19-29 (Both inc.)	Distributing Expense	68,640.54
		$73,699.30
17	Less Minority Interest Share—Sweden	526.52
		$73,172.78

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17	Cost of Prints—England	$6,619.27	
18	Cost of Negative—Spanish Version	7,638.94	
			14,258.21
	Net Income from "Letty Lynton"		$58,914.57

INCOME TAXES.

The defendants in effect claim they should be allowed to deduct from any amount found by me to be due the complainants as profits from "Letty Lynton" an amount which they claim would be the equivalent of Federal income taxes at the rate of 14½% of such profits.

The Circuit Court of Appeals in this Circuit through Judge Chase stated in *Stromberg Motor Devices Co. v. Zenith-Detroit Corporation*, 73 F. (2d), at page 65:

> "We think the defendant's honest belief in its right to manufacture the infringing carburetors was sufficiently shown to entitle it to a deduction for income taxes paid which will leave it accountable to the plaintiff for only the profits of which it actually has had the benefit."

In considering this question of income taxes, it is necessary to keep specifically in mind the difference between the word "profit" and "taxable profit". If there were any evidence before me that the amount of net profit from "Letty Lynton", which I am finding was realized by the defendants in this case and for which I find them accountable to the complainants was "taxable profit" to the defendants, then I should have no difficulty in allowing the defendants to deduct from the amount of profit which I am finding due to the complainants the proper amount of income

axes on that profit if the defendants did not recover back 3103
he amount of such taxes from the taxing authorities. How-
ver, the defendants have not submitted to me evidence from
hich I can in any way find that the profit from "Letty
ynton" which I am finding due these complainants was all
taxable profit" to the defendants. It may be that if the
efendants are within the statutory period of limitations to
le claim for refund from the taxing authorities for the
mount of tax which they might claim was over-paid on the
asis of the deduction from their "taxable profit" of the
mount of profit which I am finding to be "profit" from
he production and distribution of "Letty Lynton", the tax-
ng authorities would be able to show that the specific
mounts which I have found to be "profit" from the produc- 3104
ion and distribution of "Letty Lynton" is not "taxable
rofit" under the revenue statutes. Accordingly, on the
asis of the record before me, I am not able to allow any
eduction at this time by way of credit to these defendants
or taxes upon the profit from the production and distribu-
ion of "Letty Lynton". Believing as I do, however, that
hese defendants should have whatever credit they are en-
itled to so that these complainants may not be unjustly
nriched, I suggest that the court in its decree may set aside
n special escrow, subject to the further order of this Court,
sum equivalent to 14½% of the amount which I have
ound as aggregate profit from the production and distribu- 3105
ion of "Letty Lynton", to be held in said escrow subject
o the following terms and conditions:

(a) Within ninety (90) days from the time when the defendants shall have paid to the complainants the judgment directed by this Court to be paid, the defendants shall file with the complainants' attorneys and with this Court and the aforesaid special escrow depositary a written statement showing

(1) the amount of net taxable profits of the

3106 defendants upon which they paid Federal income taxes for the year or years in which "Letty Lynton" was produced and distributed, itemized so as to properly show the amount of said Federal income taxes paid by each company from which any of the profit which I have found to be profit from the production and distribution of "Letty Lynton" was received by the defendants;

(2) the allocation of the profit which I have found to be profit from the production and distribution of "Letty Lynton" to the respective proper tax-paying sources from which said profit was

3107 realized;

(3) a recapitulation of the net taxable profits upon which the defendants would admit to the Commissioner of Internal Revenue it should be taxed after the deduction of the profit which I have found to be profit from the production and distribution of "Letty Lynton";

(4) how much, if any, of the aforesaid escrow deposit the defendants can properly show to be due them as a result of any change in the net taxable profits of the defendants after the proper calculation thereof when the amount of profit I have found

3108 to be profit from the production and distribution of "Letty Lynton" is deducted and properly allocated as above-mentioned.

Such statement shall be prepared by such individuals or firm as shall customarily prepare the Federal income tax returns of the defendants and shall be certified correct by the auditors of the defendants. In such statement the defendants shall also state whether the Statute of Limitations contained in the appropriate U. S. Internal Revenue Act has run against the filing by the defendants of any claim for

refund for the excess of taxes which the defendants 3109
may claim to have been paid by them as shown by the foregoing calculation and whether the income tax returns of the defendants for the year or years in question have been settled and determined with the Commissioner of Internal Revenue or are still open for final determination.

Upon filing such statement, the defendants may elect therein to accept from said escrow deposit the amount shown by the aforesaid calculations to have been over-paid to the Federal Government on account of said income taxes provided that the defendants deposit with the attorneys for the complainants a 3110
bond in such amount and with such surety as the Court may determine by the terms of which the complainants may be protected so that if the defendants recover at any time in the future from the Federal Government the amount of such over-payment of taxes, such amount shall be paid to these complainants, and upon making such election the Court may order such amount to be paid to the defendants from said escrow deposit and any balance thereof to be paid to these complainants.

(b) If the defendants shall not elect to accept from such escrow deposit the aforesaid amount of alleged excess taxes paid but shall decide to deduct the 3111
amount of any judgment paid to these complainants in this case from their taxable income for the year in which said judgment shall have been paid, the defendants, in lieu of filing the statement referred to in sub-paragraph (a) above, may within said period of ninety (90) days file a statement with the complainants' attorneys and with this Court and the special escrow depositary notifying the addressees that the defendants have so elected to deduct the amount paid to these complainants from the taxable

3112 income of the defendants for the year in which said judgment is paid.

In that event, the sum heretofore prescribed to be set aside in escrow shall be kept in escrow until ninety days after the defendants shall file their Federal income tax return or returns for the year in which the judgment in this case shall be paid. Immediately after filing such return or returns, the defendants shall file with the complainants' attorneys and with this Court and the Special Escrow Depositary a copy of said Federal income tax return or returns, together with a statement showing:

3113 (1) the amount of Federal income taxes actually paid by the defendants for the year or years in which LETTY LYNTON was produced and distributed;

(2) the amount of Federal income taxes which the defendants would have paid if their income tax return or returns were properly adjusted to reflect the deduction from their taxable income for the year or years in which LETTY LYNTON was produced and distributed of so much or all of the amount of the profit from the production and distribution of LETTY LYNTON comprised within the judgment of this Court paid by the defendants (but exclusive of in-
3114 terest thereon) as might be deductible in accordance with the appropriate income tax law and regulations thereunder;

(3) the amount of Federal income taxes actually paid by defendants on income for the taxable year in which the judgment in this case is paid by the defendants to the complainants;

(4) the amount of Federal income taxes which the defendants would have paid for the taxable year within which the judgment in this case is paid by

the defendants to the complainants if their income 3115
tax return or returns were adjusted to exclude therefrom any credit or deduction from the taxable income of the defendants for said taxable year of any amount paid to the complainants upon the judgment in this case.

The amount remaining after deducting number (2) from (1) above represents the amount by which the defendants would be unjustly penalized if the defendants were unable to recover the amount thereof from the Federal income taxing authorities by way of claim for refund, provided that said defendants did not otherwise receive the benefit 3116
of such amount through the deduction of any amount of the judgment which the defendants may pay to these complainants from the taxable income of the defendants for the year in which said judgment may be paid. Accordingly, it is necessary to ascertain the amount by which item 4 above may exceed item 3. If the amount of the difference by which item 4 may exceed item 3 equals or exceeds the amount by which item 1 exceeds the amount of item 2 then the defendants would not be unjustly deprived of any sum because of the payment by the defendants of Federal income taxes on the amount of profit from the production and exhibition of LETTY LYNTON realized by the defendants during the year in which such production and exhibition 3117
was made. Accordingly, on the submission to the Court and to the complainants' attorney of the statement under this paragraph (b) with the four items above mentioned, the Court will be in a position to immediately order so much of the escrow deposit to be paid over to the defendants or to the complainants as may be shown to be due either or both upon the making of the simple calculations I have above stated.

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SUMMARY.

I find that the gains and profits from the use of the picture LETTY LYNTON by the defendant Metro-Goldwyn Pictures Corporation were	$268,861.14
I find that the gains and profits from the use of the picture LETTY LYNTON by the defendant Metro-Goldwyn-Mayer Distributing Corporation were	68,603.42
I find that the gains and profits from the use of the picture LETTY LYNTON by the defendant Loew's, Inc., were	97,466.68
3119 I find that the gains and profits from the use of the picture LETTY LYNTON by the defendant Culver Export Corporation and its subsidiaries were	152,673.13
Total gains and profits from the use of the picture LETTY LYNTON by all defendants	$587,604.37

Respectfully submitted,

GORDON AUCHINCLOSS.

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Defendants' Exceptions to Special Master's Report.

3121

[SAME TITLE.]

ON BEHALF OF THE DEFENDANTS HEREIN, AND IN ACCORDANCE WITH RULE 66 OF THE UNITED STATES EQUITY RULES, WE HEREBY FILE THE FOLLOWING EXCEPTIONS TO THE REPORT OF HON. GORDON AUCHINCLOSS AS SPECIAL MASTER, APPOINTED UNDER DECREE OF HON. JNO C. KNOX, DATED JULY 29, 1936, WHICH REPORT WAS FILED IN THE CLERK'S OFFICE OF THIS COURT ON MAY 9, 1938.

(Numeral references herein, unless otherwise indicated, 3122
are to pages; "S.M.N.Y." refers to New York testimony; "S.M.C.C." refers to Culver City testimony; "P.R." refers to printed record on appeal to Circuit Court of Appeals.)

I.

ON BEHALF OF ALL THE DEFENDANTS, EXCEPTIONS ARE TAKEN TO THE FAILURE OR REFUSAL OF THE SPECIAL MASTER TO MAKE THE FOLLOWING FINDINGS:

1. That the commercial value of the motion picture "Letty Lynton" is not wholly or principally attributable to such use in the preparation or production of such motion 3123
picture as was made by the defendants of any portion of the play "Dishonored Lady", protected by the plaintiffs' copyright in such play.

See Comparative Analyses of Play (Defendants' Exhibit R-3; P.R. 237-494; S.M.N.Y. 985) and picture (Defendants' Exhibit R-4; P.R. 495-622; S.M.N.Y. 987), trial (Defendants' Exhibit R-2; S.M.N.Y. 984, a separate exhibit which was not printed or incorporated in typewritten record) and play, with comparative references to novel "Letty Lynton" (Defendants' Exhibit R-5; S.M.N.Y. 987, a separate exhibit

3124 which was not printed or incorporated in typewritten record); all in connection with actual viewing of the motion picture "Letty Lynton" (S.M.N.Y. 934-938).

See testimony of Studio head and heads of Studio departments as to contributions to film pictures in general, apart from and additional to copyrighted property (references to S.M.C.C.) Mayer, 369-409; Strickling, 410-421; Ohic, 258-271; Gabourie, 276-286; Bucknall, 287-305; Gibbons, 305-311; Finston, 311-317; Keethe, 318-323; Gray, 324-332; Napp, 333-346; Farrell, 346-349; Hendrickson, 350-352; Kolb, 353-362; Spencer, 362-365; Hendry, 365-368; Benneche, 429-436; Arnold, 436-444; Nicholaus, 444-457; 3125 Shearer, 457-477, and (reference to S.M.N.Y.) Rubin, 1117-1129.

See reference under 2. immediately following as to relative drawing power of literary property, stars, producer, director and Metro-Goldwyn-Mayer organization, etc.

2. That at the utmost, not more than 10% of the total net profits made by the defendants from the preparation, production, distribution and exhibition of the motion picture "Letty Lynton", was made because of the infringement by defendants of plaintiffs' copyright in the play "Dishonored Lady".

(References to S.M.C.C.) Mayer, 377-407, Strickling, 411-3126 420; Cohn, 573-596; Zukor, 597-603; (references to S.M.N.Y.) Lichtman, 795-828; Jaycocks, 835-853; Skouras, 853-876; Benas, 878-890; Rinzler, 890-897; Blumberg, 897-910; Notarius, 910-921; Yoost, 921-931; Loew, 999-1009.

3. That prior to the exhibition of the motion picture "Letty Lynton" and starting from May 1, 1931, the defendant Metro-Goldwyn-Mayer Distributing Corporation entered into contracts for its exhibition with individual exhibitors on the printed form of contract which is Defendants' Exhibit No. 16, in which contracts the motion picture,

later designated as "Letty Lynton", was designated simply as "Production Number 208, Joan Crawford No. 2;" such motion picture was not otherwise designated, nor identified in fact by the title "Letty Lynton" until on or about May 7, 1932, when the motion picture so entitled was released; before May 7, 1932, 7315 contracts with individual exhibitors out of a total of 7666 of such contracts as listed on Defendants' Exhibit No. 15 had been made and executed by said defendant Metro-Goldwyn-Mayer Distributing Corporation. 3127

Deesen, S.M.N.Y. 306-313; Mills, S.M.N.Y. 201; and testimony of exhibitors referred to under 2. hereof.

4. That the commercial value of the motion picture "Letty Lynton" is principally attributable to the stars, Joan Crawford and Robert Montgomery, who played the leading roles therein, to the production and direction by persons well known in the industry and to the public, and to the reputation of the Metro-Goldwyn-Mayer organization. 3128

See same references as under 2. hereof.

5. That in a certain agreement made by and between the plaintiffs and others with Metro-Goldwyn-Mayer Corporation, dated April 17, 1931, it was agreed that contingent upon Metro-Goldwyn-Mayer Corporation being able to secure the approval of the Hays' Office of the use of the play "Dishonored Lady" for motion picture purposes within 30 days therefrom, Metro-Goldwyn-Mayer Corporation would purchase from the plaintiffs the moving picture rights in such play "Dishonored Lady", and that upon such purchase the price to be paid for said rights under said agreement would be the sum of $30,000; said Hays' Office refused to give its approval to the use of the play for motion picture purposes after application made to secure such approval. 3129

See Defendants' Exhibit R-1, S.M.N.Y. 978-981 (P.R. "Complainants' Exhibit 8", 788-803); Barnes, S.M.N.Y.

130 978, "I hoped very much we would make the sale and the play would be changed."

6. That the only means open to the plaintiffs for the exploitation of their copyrighted play "Dishonored Lady" by production thereof in motion pictures was by selling the motion picture rights therein to some established motion picture producing organization.

Lichtman, S.M.N.Y. 805-807, 824-826.

7. That the market value of the motion picture rights in the play "Dishonored Lady" in the years 1931 and 1932 was not more than $30,000.

131 See, in addition to references under 5. hereof, Giffen, S.M.N.Y. 1024-1030; Statements of Complainants' Counsel, S.M.N.Y. 1040-1043, 1063-1064; Fleischer, S.M.N.Y. 1044-1048, incorporating Defendants' Exhibits 29-A and 29-B, and Johnson (by stipulation) S.M.N.Y. 1042-1060, incorporating Defendants' Exhibit 30 for Identification.

8. That each of said defendants was organized at a time prior to the plaintiffs' production or copyright of the play "Dishonored Lady" with separate and distinct charters, boards of directors and officers, with separate and distinct purposes and functions, and with no purpose on the part of said defendants, or any of them, that their 132 respective organizations, functions or operations would in any respect affect any acts or transactions of said defendants, or any of them, having anything whatever to do with plaintiffs' play "Dishonored Lady" or any use which might be made by the defendants, or any of them, of said play in the production, distribution or exhibition of the motion picture "Letty Lynton".

Defendants' Exhibit 15; Mills, S.M.N.Y. 198-201, 315; Records and Testimony, in general, showing existence of defendant corporations and their several functions and pur-

poses for years prior to alleged infringement in 1931 or 1932. 313

D. That the acts done or performed by the defendants, or any of them, in the exploitation or handling of the motion picture "Letty Lynton" were done or performed in the same manner and in accordance with the same practice and routine as were followed in the exploitation and handling of other productions of the defendants which involved no questions as to the rights of the defendants, or of any of them, to produce, distribute or exhibit the same.

See same references under 8. hereof.

10. That the defendants, or any of them, in so far as they in the preparation, production, distribution or exhibition of the motion picture "Letty Lynton", made use 3134

of any portion of the play "Dishonored Lady", were not guilty of wilful or deliberate infringement.

See in this connection Special Master's Report, p. 82; opinion of Hand, *J.*, in Circuit Court of Appeals, 81 F. (2d) 49, at p. 54; Judge Woolsey's opinion, 7 Fed. Supp. 837.

See also *Vandenburgh* v. *Concrete Steel Co.* (C.C.A. 2, 1921), 278 Fed. 607, at p. 610. 3135

Thalberg, P.R. 74, 75; Stromberg, P.R. 92; Meehan, P.R. 118, 119; Brown, P.R. 134; Tuchok, P.R. 140-141; all of whose testimony was offered on the accounting, References 9-13, S.M.N.Y. 1048-1050.

11. That the actual damages sustained by plaintiffs because of the infringement by defendants of plaintiffs' copyright in the play "Dishonored Lady" were $30,000.

See references under 5. and 7. hereof.

3136 12. That the damages which in the opinion of the Special Master is just to award plaintiffs, in lieu of actual damages and profits, is $30,000.

This award of "such damages as to the court shall appear to be just" is to be made under all the circumstances of the case, and particularly where the actual damages suffered by the complainants or the actual profits made by the defendants "because of the infringement", and ascribable to the use of the copyrighted property, are difficult or impossible of ascertainment. See *Douglas* v. *Cunningham*, 294 U. S. 207.

3137 WE FURTHER EXCEPT, ON BEHALF OF ALL THE DEFENDANTS, AS FOLLOWS:

13. To the failure or refusal of the Special Master to make any finding as to the actual damages sustained by plaintiffs because of the infringement by defendants of plaintiffs' copyright in the play "Dishonored Lady".

The Special Master in his report (pp. 2, 3) purports to place a very literal interpretation on the "usual formula" language of the decree, defining his duties, among which was one "to ascertain and report the amount of complainants' damages", and yet ignores such language of the decree. He says (p. 3): "Complainants in this case are
3138 asking for profits." Complainants' counsel at p. 1042 of the New York testimony, referring to damages and profits, said: "I want both." Clearly complainants are not entitled to both, any more than under the patent statute (Section 4921 of the Revised Statutes). Defendants claim, as bearing on the equities of the case, that they are entitled to a finding as to the amount of the actual damages, not for the purpose of awarding both damages and profits to the plaintiffs, but solely for the purpose of showing the inequities of the award of profits of $587,604.37 in a case where plaintiffs' ~~maximum~~ damages were $30,000.

Defendants' Exceptions to Special Master's Report.

14. To the introductory portion of the report of the 3139
Special Master (pp. 2, 3) which shows that for the purposes of the proceedings before him he construed the interlocutory decree of July 31, 1936 as limiting his powers thereunder strictly to a determination of the total net profits derived by the defendants from the production, distribution and exhibition of the picture "Letty Lynton", and as precluding him thereunder from making an apportionment as between such amount of the total net profits as were made "because of the infringement" and such amount thereof as are properly ascribable to such portions and features of the literary material of the film play "Letty Lynton" as were not taken from the copyrighted play 3140
"Dishonored Lady", and also such amount thereof as is properly ascribable to the stars, Joan Crawford and Robert Montgomery, who played the leading roles therein, to the production and direction by persons well known in the industry and to the public, and to the reputation of the Metro-Goldwyn-Mayer organization; and to his failure in fact to make such apportionments.

In reversing the lower court, the Circuit Court of Appeals, at the conclusion of its opinion, provided merely for an accounting of damages and profits. All questions as to the amount of the final award, whether dependent on an apportionment of profits or on the substitution of an award "in lieu of actual damages and profits", were to be deter- 3141
mined by the Special Master upon the accounting. As said in *Dam* v. *Kirk La Shelle Co.* (C. C. A. 2, 1910), 175 Fed. 902, "Questions as to the amount of damages or profits ordinarily come up for determination only after the accounting." The language of the decree is that of the customary formula, as pointed out by Judge Denison in *Lawrence-Williams Co.* v. *Societe Enfants Gombault et Vie* (C. C. A. 6, 1931), 52 F. (2d) 774. In this connection, we have examined many decrees in patent cases. They embody the "customary formula" referred to by Judge

3142 Denison, and have never been construed as precluding the Special Master from making an apportionment of profits or from making a "reasonable royalty" award under the 1922 Amendment of Section 4921 of the Revised Statutes.

15. To the introductory portion of the report of the Special Master (pp. 2, 3) which shows that for the purposes of the proceedings before him he construed the interlocutory decree of July 31, 1936, as limiting his powers thereunder strictly to a determination of the total net profits derived by the defendants from the production, distribution and exhibition of the picture "Letty Lynton",
3143 and as precluding him from making an award thereunder, in lieu of actual damages and profits, of such damages as to him appeared to be just; and to his failure in fact to make such an award in lieu of actual damages and profits.

The comment under 14 hereof is equally applicable here: Section 25(b) of the Copyright Act permits an "in lieu" award where proper and the Special Master requires no other authority for making such an award.

Sebring Pottery Co. v. *Steubenville Pottery Co.* (D. C. N. D. Ohio, 1934), 9 F. Supp. 384;
Fleischer Studios v. *Ralph A. Freundlich, Inc.* (D. C. S. D. N. Y., 1936), 14 F. Supp. 401.

3144 16. To the failure or refusal of the Special Master to make any comparison of Defendants' Exhibits R-4, R-3, R-2, R-5 and the motion picture "Letty Lynton" as actually exhibited to the Special Master, with a view to determining the nature and the extent of the infringement by defendants' motion picture "Letty Lynton" of the complainants' copyrighted play "Dishonored Lady" for the purpose either of apportionment of profits or of making an award of such damages as to him appeared to be just in lieu of actual damages and profits; and to his failure in fact to make such a determination.

This comparison is necessary in order to make a determination as to the nature and extent of the infringement for the purpose of making any money award. The opinion of the Circuit Court of Appeals (81 F. (2d) 49) shows that the Court considered that the picture "Letty Lynton" contained much that was not taken from the copyrighted play, in which respect that Court was in agreement with Judge Woolsey. 3145

II.

ON BEHALF OF THE DEFENDANT METRO-GOLDWYN PICTURES CORPORATION (HEREIN CALLED PICTURES CORPORATION), WE RESPECTFULLY EXCEPT TO THOSE PORTIONS OF THE REPORT HAVING TO DO WITH THE ACCOUNTING OF THE PICTURES CORPORATION AS FOLLOWS: 3146

1. To the ruling in Paragraph 2 thereof, which disallows as the Pictures Corporation's share of the distributing expense, which "Letty Lynton" should be charged with, the sum of $12,505.33, based on the relation of costs of distribution to gross receipts, and which allows in place thereof only the sum of $8,517.48, upon the theory that all feature pictures distributed during the fiscal year 1932 should bear an equal share of the total distributing expense of the Pictures Corporation for such year for all pictures, and to the portions of Paragraphs 3-10 under the accounting of the defendant Metro-Goldwyn-Mayer Distributing Corporation, which state the reasons for such allowance, and to the findings in Paragraphs 9 and 10 thereof, that during such fiscal year the defendants Pictures Corporation and Distributing Corporation distributed the equivalent of sixty (60) feature pictures, and accordingly excepts to all changes of figures in such accounting based on the rulings herein specified. 3147

Complainants' counsel (S.M.N.Y. 513) asked Mills: "As common practice in almost any industry it is usual and

148 ordinary to allocate overhead of selling on gross receipts, isn't it, regardless of what it costs to make the thing?" to which Mills replied: "That is right." Under a contract such as Defendants' Exhibit 16, covering all feature pictures licensed for the year, what more practicable or equitable method could be applied than to charge each dollar received under such contract with an equal number of cents as cost of distribution?

The Special Master in his example under Paragraph 7 (p. 47) of his report, in applying the ratio 76.87% to the rental income of the Distributing Corporation, overlooks the fact that this high ratio was applicable to a distributing company, used solely for that purpose, which was per-
149 mitted to receive, to cover this service, only 20% of the total rental income. Under the circumstances, all of the Distributing Company's income might well have been applied to distributing expenses. In the cases stated by the Master, under defendant's corporate set-up, the total net film rental income of picture A would be $5,000. and of picture B would be $1,000,000. If the picture "Letty Lynton" had been less successful, it is easy to see how unfairly the Special Master's division of distributing expenses equally among the pictures would work out.

Abundant authority will be given the Court for the "gross receipts" basis of division of selling or distribut-
150 ing expense.

The Special Master's ruling in Paragraphs 9 and 10 (pp. 48, 49) of his report, that the defendants distributed the equivalent of sixty (60) feature pictures and that the selling overhead should therefore be divided into 60ths, is wholly arbitrary, as neither shorts nor newsreels involve any comparable selling expense such as is involved in the distribution of feature pictures.

2. To the ruling in Paragraph 5 thereof, which disallows as an item of negative cost the sum of $2,500.00 listed as a

departmental overhead charge of the Women's Wardrobe Department, and to the ruling in Paragraph 25 thereof, which purports to compensate for such disallowance merely by adding to General Studio Overhead an overhead charge for this department in the sum of $76,334.90. 3151

The Master states that this item was fixed by "the judgment of the head of the department." It is apparent that the distribution had been made upon the basis of actual knowledge of work done and materials used in the different productions. Had the department head, Mr. Rapf, not been ill from a stroke of apoplexy at the time of the taking of testimony, this item might have been substantiated more accurately than one based upon a percentage of cost of labor and materials. We submit that the proof substantiated this charge as one properly made in the course of business. Craig, S.M.C.C. 59, 60, 134-140, 608-616; Defendants' Exhibit C-28 (S.M.C.C. 614). 3152

3. To the failure of the Special Master, in allowing in Paragraph 5 thereof as an item of negative cost the sum of $610.76, listed as a departmental overhead charge of the Musicians Department on Defendants' Exhibit 18-D4, to include such amount in the total of the negative cost of "Letty Lynton", found in Paragraph 35 thereof as $262,629.61, but instead, to his inclusion of such amount in the General Studio Overhead, found in Paragraph 33 thereof, viz., $3,849,686.58. 3153

This item was entirely overlooked in the Special Master's draft report. The Special Master in correcting the oversight has doubtless failed to include the item as a part of the total negative cost, as was done in the case of the similar items allowed in this same paragraph. The mistake has been discovered by the defendants' auditors. The final amount of the award, on the basis of the report, should be reduced by this amount of $610.76.

3154 4. To the ruling in Paragraph 26 thereof, which disallows as an item of General Studio Overhead the sum of $500,000. as "Addition to Reserve for Continuities" (Defendants' Exhibit 18-D5).

Craig, S.M.C.C. 619; Keating, S.M.N.Y. 520-587; Defendants' Exhibits Nos. 22, 23 and 24.

In order to operate as a motion picture producer making a large number of pictures annually, it was necessary for the defendants to maintain and have in reserve a large amount of literary material. The complainants, in the reduction of costs, had all the benefits of the low costs of a multiple picture producer. This loss is a usual and
3155 necessary one incident to that business.

5. To the ruling in Paragraph 28 thereof, which disallows as an item of General Studio Overhead the sum of $922,141.09 as "Compensation paid to Louis B. Mayer Pictures" (Defendants' Exhibit 18-D5).

Rubin, S.M.N.Y. 1111-1138; Mills, S.M.N.Y. 1101-1105; Defendants' Exhibit 33 "through and including page 51" of the printed paper offered (S.M.N.Y. 1115). The portion of the Exhibit, "The agreement of December 15, 1932, which appears on page 52 of Defendants' Exhibit 33," etc., referred to by the Special Master in the middle of page 32 of his report, is not in evidence. Furthermore, December
3156 15, 1932 came after the accounting period which ended on August 31, 1932.

The amount paid the partnership was a necessary expense of the business. It was additional compensation paid Mayer, Thalberg and Rubin for services actually rendered by them, measured by profits. The contract was a continuation of a contract entered into in 1924. Any of the moneys so paid out could not be regarded as profits to the defendants. The partners dealt with the defendants at arms' length, as their total stock interest in Loew's Inc. did not exceed one per cent. (Rubin, 1130). Under

the authorities this amount should be allowed as a de- 3157
ductible expense of the business.

6. To the ruling in Paragraph 31 thereof, which disallows as an item of General Studio Overhead the sum of $1,559,559.79 as "Interest paid (per Exhibit 10)" (Defendants' Exhibit 18-D5).

Mills, S.M.N.Y. 191-193; 239-246; 1092-1095; Defendants' Exhibit 10.

At pages 191 and 192, Mills says the loan on which this interest was paid "is always comparable with the total inventory of the pictures." The moneys were invested by the defendant producer "in their pictures and processes, 3158
books and rights, pictures completed but not released and in their inventory of pictures which have been released less the amortization written off against them." The maintenance of business as a multiple picture producer required the use of this money as a necessary overhead expense of the business.

7. To the ruling in Paragraph 34 thereof, which disallows the defendants' claim that for the purpose of computing what portion of the General Studio Overhead should be borne by "Letty Lynton," the total amount of such General Studio Overhead should be divided by 36 (approximately), as representing the number of pictures made 3159
at the Culver City Studio during the fiscal year 1932, as shown on Defendants' Exhibit C-25, and which instead apportions such General Studio Overhead on the relation which the costs and labor used in the making of "Letty Lynton" bears to the costs and labor used in the making of all pictures made at the said Studio during such fiscal year, and further excepts to the method adopted by the Special Master in arriving at a ratio on the basis stated by using as a numerator purporting to be the costs and labor used in the making of "Letty Lynton" a figure

3160 eliminating foreign version costs and labor, actually expended or used at the Studio, and by using as a denominator a figure which included not only the costs and labor used in the making of all pictures at the Studio during such fiscal year but also the costs and labor expended and used in the making of all foreign versions, including the "Letty Lynton" foreign versions.

Craig, S.M.C.C. 240-242, 485-509, 545-564, 620-623; Defendants' Exhibits C-25, C-29, C-30, C-31; Mills, S.M.N.Y. 193, 368-370, 504-519, 607-608; Defendants' Exhibit 25; Prager, S.M.N.Y. 1151-1169.

As to *shorts*, 24 shorts worked on during fiscal year
3161 1932 (Defendants' Exhibit C-24; Craig, S.M.C.C. 485, 486, 496); 8 released during year (Craig, 486). Overhead, direct, of $7,000. charged on shorts (Craig, S.M.C.C. 486, 624). Executives gave little supervision to shorts (Mayer, S.M.C.C. 394; Craig, S.M.C.C. 487, 488; Rubin, S.M.N.Y. 1137).

8. To the ruling in Paragraph 36 thereof, which disallows as a credit the sum of $3,630.12 paid to the Motion Picture Producers and Distributors of America, Inc., and to the same ruling in Paragraph 40 thereof, which disallows as a credit the sum of $76.69 listed on Exhibit 18 as having been paid to the same association.

3162 Mills, S.M.N.Y. 165-175, 1108-1109; Defendants' Exhibits 31 and 32. These amounts cannot be recovered for the reason that services had been rendered by the Motion Picture Producers and Distributors of America, Inc.

9. To the findings and to all changes of figures shown in Paragraphs 35, 37, 38 and 40 based on rulings hereinbefore excepted to.

10. To the ruling in Paragraph 41 thereof, which disallows, or imposes conditions upon the allowance of, the claim of the Pictures Corporation for Federal Income

Taxes and to the concluding paragraphs of the report under the heading "Income Taxes." 3163

Mills, S.M.N.Y. 375;
Larson v. *Wrigley*, 277 U. S. 97, 100;
Stromberg Motor Devices Co. v. *Zenith-Detroit Co.* (C. C. A. 2, 1934), 73 F. (2d) 62, 65.

11. To the restatement of the first page of Defendants' Exhibit 18 in so far as the same is based on rulings or findings to which exceptions have already been taken herein on behalf of the defendant Pictures Corporation.

III. 3164

ON BEHALF OF THE DEFENDANT METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION (HEREIN-CALLED DISTRIBUTING CORPORATION), WE RESPECTFULLY EXCEPT TO THOSE PORTIONS OF THE REPORT HAVING TO DO WITH THE ACCOUNTING OF DISTRIBUTING CORPORATION AS FOLLOWS:

1. To the ruling in Paragraphs 8 and 10 thereof, which disallows as the Distributing Corporation's share of the distributing expense, which "Letty Lynton" should be charged with, the sum of $111,777.26, based on the relation of costs of distribution to gross receipts, and to the ruling in Paragraph 15 thereof, which allows in place thereof only 3165
the sum of $76,657.35, upon the theory that all feature pictures distributed during the fiscal year 1932 should bear an equal share of the total distributing expense of the Distributing Corporation for such year for all pictures, and to the portions of Paragraphs 3-10 thereof which state the reasons for such allowance, and to the findings in Paragraphs 9 and 10 thereof, that during such fiscal year the defendants Pictures Corporation and Distributing Corporation distributed the equivalent of sixty (60) feature pictures, and accordingly excepts to all changes of figures in such accounting based on the rulings herein specified.

3166 This exception is based upon the same grounds as exception 1 taken in respect of the same rulings of the Special Master in relation to the accounting of the Pictures Corporation.

2. To the ruling in Paragraph 13 thereof, which disallows the sum of $11,100.00 for "Accounts Receivable Written Off" as an item of general distributing expense.

Mills, S. M. N. Y. 421, 422.

3. To the findings and to all changes of figures shown in Paragraph 15 thereof based on rulings hereinbefore excepted to.

3167

4. To the ruling in Paragraph 16 thereof, which disallows, or imposes conditions upon the allowance of, the claim of the Distributing Corporation for Federal Income Taxes and to the concluding paragraphs of the report under the heading "Income Taxes".

Mills, S. M. N. Y. 425. See authorities under 11 of subdivision II hereof.

5. To the restatement of the first page of Defendants' Exhibit 19 in so far as the same is based on rulings or findings to which exceptions have already been taken herein on behalf of the defendant Distributing Corporation.

3168

IV.

ON BEHALF OF THE DEFENDANT LOEW'S INCORPORATED (HEREIN CALLED LOEW'S), WE RESPECTFULLY EXCEPT TO THOSE PORTIONS OF THE REPORT HAVING TO DO WITH WHAT IS REFERRED TO AS THE ACCOUNTING OF LOEW'S, AS FOLLOWS:

1. To the refusal of the Special Master to rule that Loew's fully discharged its liability to account herein by submitting upon the Accounting Defendants' Exhibit L-1,

whereby it was shown that Loew's received no profits or gains from the exhibition of the film play "Letty Lynton" (its liability to account under such decree being limited to profits or gains from *exhibition only*) and whereby it was shown that all exhibitions of the film play "Letty Lynton" were made by corporations, not parties to this suit, and to the action of the Special Master, over the objections and exceptions stated in the record at various places (including, but without limitation, pp. 626 to 660, S. M. N. Y.), which exceptions are herewith repeated and renewed, in requiring the submission herein of separate accounts on behalf of each corporation which exhibited "Letty Lynton" in which Loew's had a stock interest, regardless of whether such stock interest was in whole of the stock or in only a part, and regardless of whether Loew's owned such stock interest directly or through one or more intermediate corporations and, in the case of the eight theatres listed on Defendants' Exhibit L-12, regardless of the absence of all stock interest; and this exception is hereby renewed and repeated as to each of the corporations whose accounts are set forth on any of the Defendants' Exhibits L-6 to L-13, both inclusive, and as to each and every finding of the Special Master predicated upon said accounts separately or collectively; and to each and every ruling imposing any liability upon Loew's to account to the plaintiffs herein for profits. 3169 3170

2. To the finding in Paragraph 5 thereof, that the defendant Loew's is accountable to the complainants for the gains and profits accruing to it through the exhibition of "Letty Lynton" by the theatres owned by the corporations listed on Defendants' Exhibit L-1, in which Loew's had only a stock interest, and to the finding therein that Loew's, acting through its so-called managing agency, the Marcus Loew Booking Agency, used these corporations as agents for the exhibition of the pictures produced by the production agency of the Loew's organization. 3171

3172 (In fact, these corporations all used the Marcus Loew Booking Agency as their agent to render services to each of them for a rate of compensation much less than each corporation would have had to pay if each of them contracted separately for the rendition of the services performed by such Agency (S. M. N. Y. pp. 1070-1075). The Special Master found in Paragraph 8 thereof that the Booking Agency rendered a *valuable service to the theatre.*)

3. To the ruling in Paragraph 14 thereof, in respect of the theatres which exhibited "Letty Lynton" for a period less than a full week, which disallows the claim of Loew's 3173 that the weekly overhead for each of such theatres, as shown on Exhibits L-7, L-9, L-11 and L-13, should be apportioned in the ratio of the gross receipts during the period when "Letty Lynton" was exhibited to the gross receipts for the entire week, and which allows the claim of the complainants that such total weekly overhead should be divided by seven and multiplied by the number of days during which "Letty Lynton" was exhibited, and to all findings and to all changes in figures in the accounts submitted by defendants based on the ruling in Paragraph 14 of the report.

Mills, S. M. N. Y. 679, 680, 684-700, 706, 707, 728-730.

The Special Master overlooked the generally accepted 3174 principle in the industry that the week is divided into tenths and that to the week-end is ascribable five-tenths, that is, three-tenths for Sunday and two-tenths for Saturday (pages 685, 688) and that to each of the other days of the week is ascribable one-tenth, and that this principle is not limited in its application to profit sharing contracts. The part of the week during which the receipts are at peak (referred to as "preferred playing time") necessarily has to compensate for the intervening period of low receipts. The motion picture "Letty Lynton" was exhibited during "preferred playing time" (page 685), that is, on week-ends, and therefore it should bear a greater percentage of the

weekly expense than a picture which was exhibited during the week. The defendant Loew's' claim is that each dollar of the weekly receipts should bear an equal amount of the weekly overhead, which is more advantageous to the plaintiffs than the division of the week into tenths (pages 690-700). 3175

4. To the ruling in Paragraph 15 thereof, which disallows the claim of Loew's that the net profits of the theatre corporations shown on Defendants' Exhibits L-6, L-8, L-8†, L-10 and the theatres shown on Defendants' Exhibit L-12, should be apportioned on the basis of ascribing one-third thereof to the other attractions which were exhibited at said theatres during the period when "Letty Lynton" was also exhibited, and to the ruling made in favor of the complainants, which makes no apportionment of the net profits but which ascribes all the net profits of such theatres, after allowance only of the actual costs of the other attractions, to the exhibition of the motion picture "Letty Lynton". 3176

Mills, S. M. N. Y. 664-676, 705, 723-726.

At page 726, complainants' counsel, Mr. Driscoll, said: "* * * We contend as a matter of law the profits made that week cannot be divided or allocated in any manner." The Special Master then said: "I understand that. But assuming that their (defendants' counsel) contention was correct, do you make any point of the division?" To this, Mr. Driscoll replied: "No." 3177

We submit that the case clearly calls either for an apportionment of the profits, or if that be difficult or impossible, an award "in lieu of the actual damages and profits".

5. To the ruling in Paragraph 16-a thereof, which disallows, or imposes conditions upon the allowance of, the claim of Loew's for Federal Income Taxes and to the concluding paragraphs of the report under the heading "Income Taxes".

3178 The claim for this deduction in respect of the profits of all the theatre corporations was made apart from Defendants' Exhibits L-6, L-8, L-8†, L-10 and L-12. (See S. M. N. Y. 1240.) See also authorities under 11. of subdivision II hereof.

6. To the restatements of the accounts contained in Paragraph 17 thereof in so far as the same is based on rulings to which exceptions have already been taken herein in behalf of the defendant Loew's and the compilations therein contained made to take the place respectively of Defendants' Exhibits L-6, L-8, L-8†, L-10 and L-12.

3179

V.

ON BEHALF OF THE DEFENDANT CULVER EXPORT CORPORATION (HEREIN CALLED CULVER), WE RESPECTFULLY EXCEPT TO THOSE PORTIONS OF THE REPORT HAVING TO DO WITH THE ACCOUNTING OF CULVER, INCLUDING THE ACCOUNTS OF THE FOREIGN CORPORATIONS IN WHICH CULVER HAD AN INTEREST AS THAT ONLY OF A STOCKHOLDER, AS FOLLOWS:

1. To the refusal of the Special Master to rule that, except as to film rental income in the sum of $2,876.10, shown as "Film Rental Income—Direct" on Defendants'
3180 Exhibit 20 and received "from the United States Navy, or steamship lines which Culver sold direct instead of through a subsidiary" (S. M. N. Y. p. 452), Culver was not accountable in this suit, all receipts by Culver having been realized from distribution of the picture "Letty Lynton" outside of the territory to which the Copyright Laws of the United States extend and through stock interest in corporations engaged in the distribution of "Letty Lynton" outside of such territory, and to the action of the Special Master in overruling the objections and exceptions taken on behalf of Culver (including, but without limitation, pp. 443 to 447,

S. M. N. Y.) to the inclusion of any profits and gains by 3181
Culver in the accounting in this suit and to each and every finding of the Special Master predicated upon the accounts of the corporations in which Culver had a stock interest, and upon said accounts separately and collectively, and to each and every ruling imposing any liability upon Culver to account to the plaintiffs for gains or profits realized by said corporations.

The Copyright Statutes of the United States have no extra-territorial effect.

Ferris v. *Frohman*, 223 U. S. 424;
American Code Co. v. *Bensinger*. (C. C. A. 2, 1922),
282 Fed. 829, 833. 3182

2. To the ruling in Paragraph 4 thereof, that Culver was simply an agency used for the purpose of handling the foreign business of distribution and exhibition of Loew's, Inc. pictures in any such sense as to justify the finding that Culver has not in all respects a corporate entity distinct from that of the defendant Loew's or from that of the other corporations defendants.

Culver was organized in 1925 to handle the marketing of M-G-M pictures in foreign countries. No fraud or other sinister purpose can be imputed to such organization. Loew, S. M. N. Y. 990-992.

3. To the ruling in Paragraph 5 thereof, that the foreign 3183
corporations whose stock was owned by Culver were merely agents used by Culver for the distribution and exhibition of pictures in the various countries in which they were incorporated, and to the Special Master's failure to find that each of said corporations was a separate and distinct entity, and to the failure of the Special Master to rule that the various foreign companies were entitled to retain the full amount payable to them for distribution under their respective contracts with Culver. (Defendants' Exhibit 1 for Identification, S. M. N. Y. 77, 79; Brunet, S. M. N. Y.

3184 82-105; Defendants' Exhibit 3 for Identification, p. 155; Defendants' Exhibits 5 and 6, pp. 38, 79.).

Each of these foreign corporations had its own separate phase of activity, the conditions in one country differing substantially from those in another. Loew, S. M. N. Y. 998. Mr. Blum, secretary of Culver in 1932 and a member of the Bar, was called to testify as to the separate bona fide reasons for organizing each of these foreign corporations, but complainants' counsel, Mr. Driscoll, objected. Blum, S. M. N. Y. 1013-1018. At page 1017, in this connection, the Special Master stated: "I don't think there is any question about that, that they incorporated these corporations because it was the best way they could do business."
3185 to which Mr. Driscoll replied: "I do not think there is any question about that—these incorporated in 1927-1928, long before this play was written."

4. To the ruling in Paragraph 6 thereof, that the central control and direction of these foreign corporations, all organized in such foreign countries, all affected by peculiar conditions varying from those of the American market, all having executives familiar with the separate phase of activity of each of such countries (S. M. N. Y., pp. 998, 1018), rested in the executive offices of Culver located at 1540 Broadway, New York City, that is, in the general New York offices of Loew's, in any such sense as to justify the
3186 finding as to each or any of said corporations that their gains or profits derived wholly from the distribution or exhibition of the picture "Letty Lynton" outside of the United States are in fact those of the defendant Loew's or the defendant Culver or that the defendant Loew's or the defendant Culver is liable by reason of the alleged tortious acts of such corporations committed outside of the United States.

5. To the ruling in Paragraph 7 thereof, that Culver is accountable herein (otherwise than in respect of the sum of $2,876.10, as stated in 1 hereof).

6. To the ruling in Paragraph 15 thereof, which disallows as Culver's share of the distributing expense, which "Letty Lynton" should be charged with, the sum of $12,536.28 based on the relation of costs of distribution to gross receipts, and which allows in place thereof only the sum of $9,805.79 upon the theory that all feature pictures distributed abroad by Culver during the fiscal year 1933 should bear an equal share of the total distributing expense of Culver for such year for all pictures, and to the portions of Paragraphs 33-36, both inclusive, which state the reasons for such allowance, and to the finding in Paragraph 35 thereof that during such fiscal year of 1933 the defendant Culver and the foreign corporations of which it was a stockholder distributed the equivalent of forty-five feature pictures, and accordingly excepts to all changes of figures in such accounting based on the ruling in this paragraph specified. 3187 3188

This exception is based to a large extent upon the same grounds as exception 1 taken in respect of the same rulings of the Special Master in relation both to the accounting of the Pictures Corporation under subdivision II hereof and that of the Distributing Corporation under subdivision III hereof. However, in respect of each of the foreign corporations and of each of the countries where the film play "Letty Lynton" was exhibited, there were great differences in the relation of income to expenses and also in the number of pictures exhibited. 3189

The Special Master's ruling in Paragraph 35 (pp. 79, 80) of his report, that Culver distributed the equivalent of 45 pictures, seems entirely to disregard defendants' counsel's statement (S. M. N. Y. 967, 968) that only 33 pictures on an average were distributed in 1932-1933, and that, in general, no newsreels were distributed abroad. In this connection, Mr. Mills testified that the distribution of the shorts was about in the same reduced proportion as that of the features. If the Master had followed this same pro-

3190 portion in resolving shorts into features on the basis of 9 reels, the total of shorts equivalent to features to be added to 33 would be 10. Since no newsreels were distributed, 43 would be the highest number of pictures distributed abroad under this method of computation, to which method, of course, the defendants have specifically excepted.

7. To the ruling in Paragraph 16 thereof, which disallows the sum of $106,582.09 as the production cost to Culver of the picture "Letty Lynton" and allows in place thereof the sum of $83,967.30, representing 25% of the sum of $335,869.21 found in Paragraph 35 of that part of the report dealing with the accounting of the Picture Corpora-
3191 tion, and herewith repeats and renews all exceptions taken herein to the principles and figures upon which total figure of negative cost is computed; and further excepts to the recommendation of the Special Master that the negative cost or production cost to Culver be increased from 25% to 35.65% of the total production cost in the event that the Court should hold that the complainants are not entitled to recover against Culver.

The agreement that Culver should bear 25% of the negative cost was in existence prior to this litigation (Mills, S. M. N. Y. 370-373, 459; Rubin, S. M. N. Y. 1141, 1142).

3192 8. To the restatement of Exhibit 20-D in Paragraph 19 thereof, in so far as the same is based on rulings to which exceptions have already been taken herein on behalf of the defendant Culver.

9. To the ruling in Paragraph 20 thereof, which disallows, or imposes conditions upon the allowance of, the claim of Culver for Federal Income Taxes and to the concluding paragraphs of the report under the heading "Income Taxes," Mills, S. M. N. Y. 463.

There is no question as to the correctness of the amount of the income tax paid, the claim of the plaintiffs being that

income taxes are not properly deductible (pp. 73, 74, S. M. N. Y.). See also comment under 10, subdivision II hereof. 3193

10. To the restatement of Exhibit 20 in Paragraph 21 thereof, in so far as the same is based on rulings of findings to which exceptions have already been taken herein on behalf of the defendant Culver.

AND WITH RESPECT ONLY TO THE FOREIGN CORPORATIONS IN WHICH CULVER HAD ONLY A STOCK INTEREST:

11. To the ruling in Paragraph 27 thereof, which is the same ruling as in Paragraph 15 thereof, to which exception has already been taken in Paragraph 6 hereof, viz., on the ground that such distributing expenses should be based on the relation of costs of distribution to gross receipts and not upon the theory that all feature pictures distributed abroad by Culver during the fiscal year 1933 should bear an equal share of the total distributing expense for all pictures so distributed, and further excepts to all changes of figures based on such ruling. 3194

This exception is based upon the same grounds as those stated in exception 6 of this subdivision under the Culver accounting. These grounds apply also to the exception taken under 12 immediately following.

12. To the ruling in Paragraphs 33-36 thereof, both inclusive, which disallows as the total foreign corporations' share of the distributing expense, which "Letty Lynton" should be charged with, the sum of $84,260.05, based on the relation of costs of distribution to gross receipts in the case of each of said corporations, and which allows in place thereof only the sum of $68,640.54, based upon the theory that all feature pictures distributed abroad by Culver and the foreign corporations during the fiscal year 1933 should bear an equal share of the total distributing expense of Culver and the foreign corporations for such year for 3195

3196 all pictures, and further excepts to the portions of such Paragraphs 33-36, both inclusive, which state the reasons for such allowance, and to the finding in Paragraph 35 thereof in which the Special Master finds that during such fiscal year of 1933 the defendant Culver and the foreign corporations of which it was a stockholder distributed the equivalent of forty-five (45) feature pictures, and accordingly excepts to all changes of figures in such accounting based on the rulings in Paragraphs 33-36, both inclusive, of the report.

13. To the ruling in Paragraph 37 thereof, which dis-
3197 allows, or imposes conditions upon the allowance of, the claims for Federal Income Taxes listed on Defendants' Exhibit 21 and to the concluding paragraphs of the report under the heading "Income Taxes."

Mills, S. M. N. Y. 477-479. (See comment 9 above.)

14. To the restatement of the first page of Exhibit 21 in Paragraph 38 thereof, in so far as the same is based on rulings to which exceptions have already been taken herein on behalf of the defendant Culver.

Respectfully submitted,

3198

J. ROBERT RUBIN,
Attorney for Defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

LEOPOLD FRIEDMAN,
Attorney for Defendant Loew's, Inc.

SAMUEL D. COHEN,
Attorney for Defendant Culver Export Corporation.

Defendant Metro-Goldwyn-Mayer Distributing Corporation's Waiver of Exception.

3199

[SAME TITLE.]

The defendant Metro-Goldwyn-Mayer Distributing Corporation hereby waives the exception heretofore filed by it to the disallowance by the Special Master of the sum of $11,100.00, "Accounts Receivable Written Off," as an item of general distributing expense, contained in the accounting of the defendant Metro-Goldwyn-Mayer Distributing Corporation.

Dated: New York, October 25, 1938. 3200

J. ROBERT RUBIN,
Attorney for Defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation,
Office & P. O. Address,
1540 Broadway,
Borough of Manhattan,
New York City.

LEOPOLD FRIEDMAN,
Attorney for Defendant Loew's Incorporated,
Office & P. O. Address, 3201
1540 Broadway,
Borough of Manhattan,
New York City.

SAMUEL D. COHEN,
Attorney for Defendant Culver Export Corporation,
Office & P. O. Address,
1540 Broadway,
Borough of Manhattan,
New York City.

3202 To:

O'BRIEN, DRISCOLL & RAFTERY, ESQS.,
Attorneys for Complainants,
152 West 42nd Street,
New York City.

Complainants' Exceptions to Special Master's Report.

[SAME TITLE.]

3203

The complainants above named hereby except to the report of Special Master Gordon Auchincloss, Esq., filed herein in the office of the Clerk of this Court on the 9th day of May, 1938, in the following respects only:

ITEM 2, PAGES 10-11: To the allowance of $8,517.48 as distribution expense to Metro-Goldwyn Pictures Corporation. The testimony is that the picture was *produced* by Metro-Goldwyn-Mayer Corporation. It was *distributed* by the Metro-Goldwyn-Mayer Distributing Corporation. It was *exhibited* by Loew's, Inc.

There are three separate and distinct activities—produc-
3204 tion, distribution and exhibition. Metro-Goldwyn Pictures Corporation was a holding corporation (S.M.N.Y. 200). It took over the negative from the Producing Company and turned it over to the Distributing Company for distribution (S.M.N.Y. 201). Metro-Goldwyn Pictures Corporation served no worthwhile function in the situation, and no item of overhead as a deduction should be allowed.

ITEM 4, PAGES 14-15: To the allowance as a credit $2000, representing salary of Joan Crawford for idle time between the finishing of a previous picture and her actual starting of the picture LETTY LYNTON, and the item of $2500 which

represents the idle time of her co-star Robert Montgomery. 3205
It was admitted by defendants' witnesses that if Miss Crawford and Mr. Montgomery had been idle for six months between pictures, their accumulated salary would be charged against the next picture (S.M.C.C. 110-111, 148).

Since the complainants are not in partnership with the defendants, complainants cannot be charged with the idle time of the stars.

ITEM 5, PAGES 15-16: To the allowance of all departmental overhead proposed to be allowed by the Special Master.

The item of $1,045.17 overhead, Camera Department, should be eliminated. LETTY LYNTON was charged with the 3206
services of twenty-four different camera men. There is nothing in the record to prove that LETTY LYNTON added anything whatever to the expense of the Camera Department beyond the services of the men engaged in the actual shooting of the picture.

An item of $221.57 overhead in the Editors and Cutters Department should be eliminated.

An item of $896.05 overhead of the Stock Talent Department should be eliminated.

The aforesaid item represents the cost of idle time of stock actors (S.M.C.C. 53, 111-112 and 252-254).

An item of $3,310.30 representing overhead of Scenario 3207
Department should be eliminated.

An item of $275.71 allowed as overhead in the Lighting Department should be eliminated.

ITEM 7, PAGE 17: To the allowance of $4,206.10 for Publicity Salaries. The method pursued by the defendants in allocating this charge is unwarranted and unreasonable.

The allowance of $610.76 as overhead in cost of Musicians Department, not specifically mentioned in report.

ITEM 8, PAGE 18: To the allowance of the item of $3,704.65 designated as Construction Supervision which in

3208 reality represents departmental overhead of the Construction, Property and Art Departments. The entire item should be eliminated.

ITEM 9, PAGES 18-20: To the allowance of general studio overhead. Specifically except to any allowance for items making up general studio overhead not specifically set forth in the report.

ITEM 10, PAGES 20-21: To the allowance of the items of $1,047,599.43 and $16,482.79 as part of Studio Overhead, which items are made up of the salaries of executives, assistants, secretaries and stenographers and expenses of the Executive Department.

3209 ITEM 11, PAGES 21-22: To the allowance of $2,745. designated as "Salaries Maintenance". This item represents unassigned salaries of doctors and nurses (S.M.C.C. 210-212). These doctors and nurses were not assigned to any production. The item in question is their compensation for idle time, when not assigned to any production.

ITEM 12, PAGE 22: To the allowance of $2,060.52 alleged to represent legal and other expenses re patent rights, and $30,573.43 alleged to represent legal salaries and expenses. These items have nothing to do with LETTY LYNTON.

ITEM 14, PAGE 22: To the allowance of insurance general—$33,635.91; insurance miscellaneous compensation—$54,051.30, and taxes, city, county and state—$72,461.50.

3210 The record does not show that LETTY LYNTON in any way affected the insurance situation.

ITEM 15, PAGE 23: To the allowance of:

Losses not covered by insurance—	$496.65
Entertainments—	8,440.23
Donations—	6,928.99

An infringer cannot reduce his profits on one job by his losses on another.

Entertainment and gratuities cannot be charged to LETTY LYNTON.

ITEM 16, PAGE 23: To the allowance of Salaries of Directors Unassigned—$27,715.49. This item is in the same category as compensation paid to stars, directors and others during idle time (S.M.C.C. 223, 225). 3211

ITEM 17, PAGE 23: To the allowance of Miscellaneous Unclassified Expense—$19,357.06. This item is made up of a number of smaller items (S.M.C.C. 226-229). All the parts of this item should have been direct charges against other production.

ITEM 18, PAGES 23-24: To the allowance of Rejected Continuity Charges and Songs—$63,996.57, and Rejected Pictures—$151,686.80. The evidence is that the items referred to exactly what their titles indicate, that they represented payments made for rejected charges, continuities, songs and rejected pictures and had nothing to do with LETTY LYNTON. Losses cannot be deducted from profits. 3212

ITEM 20, PAGES 24 AND 25: To the allowance of Home Office Unclassified—$46,081.93. The item in question represents the cost of making tests in the New York office of various people being considered as screen possibilities, and none of them appeared in LETTY LYNTON (S.M.C.C. 232).

ITEM 21, PAGE 25: To the allowance of $24,678.10 for Experimental Work—Trick Cameras. The testimony was that the item represented exactly what its title indicated. It is experimental work that is continually going on from year to year (S. M. C. C. 232). 3213

ITEM 22, PAGE 25: To the allowance of $298,025.47 representing Salaries of Unused or Idle Artists not assigned to any particular picture. Under that the testimony is that LETTY LYNTON was charged directly with wages and compensation of all persons directly involved in the making of the picture, and that the item in question represented entirely unassigned salaries of unused or idle artists (S.M.C.C. 234, 237).

ITEM 23, PAGE 25: To the allowance of all debit items of overhead of the various departments of the company not

absorbed specifically into particular pictures. The above includes Construction Department—$5,211.73. The Construction Department overhead is broken down in Exhibit C-9. It includes an item for unassigned salaries of $3,692.34, which if eliminated would reduce this item to $1,519.30. It also includes Publicity—$101.53. In the direct charges we have suggested a charge against LETTY LYNTON for publicity on the basis of labor and material. Similar charges made against all other pictures would entirely eliminate any item of overhead.

Editorial Department—$11,841.67. This item should be reduced to $4,576.98 (See Exhibit C-2). The following items that go to make up the overhead of the Editorial Department should be eliminated:

Cataloguing test library—	$1,738.84
Unassigned salaries—	5,525.85

To catalogue the test library is valuable for future productions, but LETTY LYNTON ceased to have any interest in the test library after the month of February, 1932, when shooting was completed.

Property Department—$7,708.62 should be reduced to $5,855.30. The breakdown of the overhead of the Property Department is shown in Exhibit C-11.

The item of Unassigned Salaries—$1,873.33 should be eliminated.

Music Department—$21,330.20, should be changed to a credit of $82,183.16. The breakdown of the overhead of the Music Department appears in Exhibit C-7. This exhibit demonstrates the injustice of charging to LETTY LYNTON any part of unassigned salaries. During the fiscal year in question the defendants had on their payrolls a number of music writers who were not assigned to any production. An item of unassigned salaries appears in the aforesaid overhead of $81,725.82, which should be eliminated. There is also the item of library expense—$17,860.99, which was

valuable to defendants for future productions but added no value to LETTY LYNTON. 3217

There is an item of music purchases—$516.08, which had nothing to do with LETTY LYNTON, and an item of unallocated music—$3,410.47, which had nothing to do with LETTY LYNTON.

Eliminating those four items from the overhead, the unabsorbed item becomes an overabsorbed item, and changes from the debtor to the creditor side.

Camera Department—$9,781.52 appearing as a charge should be changed to a credit of $1,638.07. The overhead of the Camera Department is broken down in Exhibit C-1. The following items therein should be eliminated: 3218

Unassigned salaries of first cameraman	$6,162.16
Unassigned salaries of second cameraman	431.78
Unassigned salaries of assistant cameraman	132.77
Unassigned salaries of still cameraman	14.16

In addition to the foregoing there is an item of miscellaneous expenses—$4,678.72. It is admitted that LETTY LYNTON was in no way involved in this item (S.M.C.C. 99-100).

Precision Machine Shop—$141.03. Should be changed to a credit of $80.75. The overhead of the Precision Machine Shop is shown on Exhibit C-17.

If unassigned salaries of $221.78 are eliminated, the charge becomes a credit. 3219

Mechanical Department—$9,379.54. This item should be reduced to $8,196.26. The details of the overhead appear in Exhibit C-5.

Eliminating unassigned salaries would reduce the item $1,183.28.

Art Department—$15,204.64. Should be reduced to $11,501.78. The details appear in Exhibit C-8. The reduction is to be accounted for by eliminating unassigned salaries of $3,702.86.

220 Miniature and Trick Department—$12,280.69. The details of this item appear in Exhibit C-19. The reduction is accounted for by eliminating unassigned salaries of $2,792.49.

Newcombe Department—$1,307.77. Should be changed to a credit of $2,716.48. The details appear in Exhibit C-20. Eliminating unassigned salaries of $4,024.25, the charge will become a credit.

Foreign Department Overhead (unabsorbed)—$17,173.36. Should be changed to a credit of $7,064.02. The details appear in Exhibit C-11.

The following items should be eliminated:

221

Talent tests	$175.94
Experiment on foreign pictures	4,983.82
Unassigned salaries	13,614.39
Trans-foreign employees	5,463.23

None of the said items have anything to do with LETTY LYNTON.

ITEM 24, PAGES 25 AND 26: To the allowance of Overabsorbed Balance Sound Overhead in the amount of $113,249.85 only.

The details of the Sound Department overhead is shown in Exhibit C-12, pages 1 and 2. In that item of overhead there is a charge for "Unassigned Time of Mixers, Stage Men and Recording—$4,337.39", and a charge of "Vacations Only—$10,486.61". These two items are in the same category as unassigned salaries appearing elsewhere throughout the account. It is idle time that cannot be charged against LETTY LYNTON. The elimination of those two items would increase the overabsorption to $128,073.85.

222 To the allowance of "Auto and Trucking—$14,287.16" only. The overhead of the Automotive Department is broken down in Schedule C-14. It includes an item of unassigned salaries of $830.32. If that item were eliminated it would increase the credit to $15,117.48.

To the allowance of "Still Room—$20,573.48" only. The 3223
overhead of the Still Department is broken down in Exhibit C-16. It includes unassigned salaries of $1,015.23. This item if eliminated would increase the credit to $21,588.71.

To the allowance of "Scenario Department—$30,532.41" only. The Scenario Department overhead is broken down in Exhibit C-3. This exhibit, however, is not very accurate.

There was paid directly to writers and charged against specific pictures—$1,759,669.56. There is then charged against each picture 12% of the direct compensation as *departmental overhead.*

The following items charged against the overhead of the Department should be eliminated: 3224

Books and music purchased	$4,741.50
Salaries of readers	33,041.29
Unassigned salaries—Scenario Dept.	69,194.96
Unassigned script salaries	12,149.99
Script expense, original stories	305.85

All of the aforesaid items have nothing whatever to do with LETTY LYNTON. The compensation of all people who worked on LETTY LYNTON, including writers, readers and others, was charged directly to LETTY LYNTON (S.M.C.C. 113-134). The elimination of the above items increases the credit from $30,532.41 to $149,966.

ITEM 30, PAGE [illegible]: To the allowance of an item entitled 3225
"Other Production Executives" aggregating $26,000.

The payments in question were broken down on a statement that was admitted into evidence as Exhibit 13, and showed payments on November 10, 1932 by four checks of consecutive serial numbers to Edward Mannix in the sum of $5000; Bernard Hyman in the sum of $6000; Hunt Stromberg in the sum of $7000, and Charles McArthur in the sum of $8,000, a total of $26,000.

The fact that the four checks were made on the same day and were consecutively numbered would indicate that

they were all part of one transaction, but the facts were never revealed in the record. At S.M.N.Y. 183 the explanation given was "those were payments to four individuals employed at the Coast, these amounts being paid from New York in addition to any amounts that they received at the Coast". At S.M.N.Y. 229 Mills admitted that he did not know of anything the individuals had to do with the making of LETTY LYNTON.

ITEM 31, PAGES 34-36: To the allowance of an item of $9000 as six months' interest on the cost of LETTY LYNTON allowed as a direct cost of the production. There is no evidence in the record to support the conclusion that LETTY LYNTON involved the outlay of $300,000 direct cost for a period of six months. Neither does the item allow for a similar credit of interest upon moneys collected by the defendants on contracts for the exhibition of LETTY LYNTON.

ITEM 32, PAGES 36-38: To the allowance of depreciation either as respects equipment or buildings at Los Angeles Studio or elsewhere and to the method of charging depreciation employed by the Special Master, in that depreciation should be charged on the basis of value rather than cost.

To the allowance of any interest on investment cost and other method employed by the Special Master in arriving at the figure upon which such interest is to be charged, namely, cost rather than value of facilities in use at the time of the making of said picture.

ITEM 33, PAGE 38: Except that complainants claim to be entitled to further allowances as hereinabove indicated, complainants do not object to the reduction of general studio overhead from $5,891,374.57 to $3,847,470.54.

ITEM 35, PAGE 42: To the amount of overhead chargeable to LETTY LYNTON found by the Special Master to be $69,294.36.

The aforesaid objection is based upon the allowance of overhead by the Special Master with which we do not agree, and not to the apportionment of .018 to LETTY LYNTON.

ITEMS 37 AND 38, PAGE 43: To the total production cost of LETTY LYNTON at $317,075.89. 3229

ITEM 40, PAGE 43: To the net income from LETTY LYNTON fixed at $268,861.14. The allowance of other items as hereinabove indicated will increase this net income proportionately.

ITEM 42, PAGE 44: The allowance of further items as hereinabove indicated will affect the following figures given in the restatement of Exhibit 18 by the Special Master:

2-8	Distribution expense	$8,534.15
2-38	Production Cost	317,105.81
	Net income (excluding Canada)	256,003.11
40	Net income from LETTY LYNTON	268,861.14

3230

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION:

Complainants also except to:

ITEM 12, PAGE 50: The allowance of Home Office Expense as listed on Defendants' Exhibit 19-B. Complainants except to the allowance of any part of this home office expense. There is nothing in the record to show that one dollar of expense was added to the home office budget because of LETTY LYNTON. There is nothing to show that a single employee of the home office was there because of the distribution of LETTY LYNTON. Mr. Mills well pointed out that the real expense of distribution is in the field (S. M. N. Y. 528). 3231

The allowance of depreciation as set forth in Exhibit 19-A. Said item of depreciation is broken down in Schedule 19-D. The item is objectionable on two grounds, first, there is no authority for defendants charging depreciation against LETTY LYNTON; there is nothing to show that LETTY LYNTON in any way caused any part of that depreciation, or that the depreciation would not have been just as great had not LETTY LYNTON been distributed. Second, if depreciation is to be charged on LETTY LYNTON; it can only be

3232 charged upon the value of the property at the time that LETTY LYNTON was distributed. The charge made by the defendants is arrived at on a cost basis. It may be that in the preceding years the property in question was purchased at figures out of all proportion to its values in 1932. There is no connection between cost and the value as of 1932.

ITEM 14, PAGE 50: The allowance of "Interest on Investment in Branch Office Equipment" amounting to $20,375.62. The same objections may be made to this item as were made above to the item of depreciation. If defendants were entitled to any interest on investment, which complainants strenuously object to, it would be on the present value of
3233 the properties involved and not on some investment that may have been made years before. The complainants and defendants are not in partnership.

ITEM 15, PAGE 50: Because of the above objections to Items 12 and 14, we except to the allowance of $85,341.50 as distribution cost, and the allowance of $76,807.35 to the Distributing Corporation and the net income from LETTY LYNTON before taxes paid of $68,603.42.

ITEM 17, PAGE 51: The allowance of $76,807.35 for distribution expense for reasons stated supra.

LOEW'S, INC.

3234 Complainants also except to:

ITEM 12, PAGE 57: The allowance of any overhead on theatres during the time the picture LETTY LYNTON was exhibited, on the ground that the exhibition of the picture LETTY LYNTON in no wise contributed to such overhead, and there is no proof that such overhead would not have been incurred in any event despite the exhibition or non-exhibition of said picture.

ITEM 13, PAGES 57-58: The inclusion of proceeds derived from and the expenses incurred in real estate operations alleged to be incidental to the theatre operations on the

ground that the complainant[illegible]e not in partnership with 3235
the defendants; that the proper method of calculation on theatre operations is to segregate the theatre operation from all outside operations and to allocate for theatre overhead a ratio of 21% of the gross receipts; that the method adopted by the Master does not provide a fair basis for the treatment of operations apart from theatre operations in that the sampling submitted by defendants' witness Vogel is confined to theatres constructed by Loew's, Inc., and which sampling is confined to but 20% approximately of the theatres in which this defendant is involved, and such ratio is not adequate to provide a fair basis for determination.

ITEM 16, PAGE 62: The allowance to the defendants of 3236
any losses on the ground that complainants are not in partnership with the defendants.

CULVER ACCOUNTING.

Complainants also except to:

ITEM 15, PAGES 71-72: The allowance of $9,805.79 for distribution expense on the ground that there is no proof that this defendant served any useful purpose in creating any profit. The profit was created as a result of the work done by foreign subsidiaries. There was therefore no justification for a charge of distribution expense by this defend- 3237
ant. The ratio adopted by the Master in allocating to the picture LETTY LYNTON 1/45th of the total distribution expense is erroneous, and if any allocation is to be made it should be on the same ratio as employed in the domestic distribution, to wit, 1/60th rather than 1/45th.

ITEM 16, PAGES 72 AND 73: The proposed allowance of $82,980.89 as cost of production, in that such cost is predicated upon and includes items previously objected to in arriving at the cost of production in the account of Metro-Goldwyn Pictures Corporation.

3238 ITEM 19, PAGES 73 AND 74: Such items and figures in this subdivision of the report as would be changed if the objections hereinabove made were complied with.

ITEM 21, PAGES 74 AND 75: Such items and figures in this subdivision of the report as would be changed if the objections hereinabove made were complied with.

ITEM 28, PAGE 77: The disallowance of the specific objections made by the complainants in regard to the expenses of foreign distribution. Specifically we object to the allowance of an item of $20,714.13, accounts written off. Complainants contend that they should not be charged with losses because of accounts receivable written off, and by the same token they admit that they should not be
3239 credited with recoveries on accounts receivable previously written off but later collected. Specifically we except to the following items going to make up expense of foreign distribution:

New York overhead	$178,538.33
Depreciation	137,810.39
Loss on outside producers' pictures	11,551.86
	$327,900.58

Specifically, we object to any depreciation on branch
3240 office equipment among other reasons because the basis used is not actual value, but depreciated cost.

ITEM 29, PAGE 78: The allowance of "New York Overhead" as expense of foreign distribution.

ITEM 30, PAGE 78: The allowance of "Depreciation Account" as expense of foreign distribution.

ITEM 31, PAGE 78: The overruling of other objections made by complainants.

ITEM 32, PAGE 78: The finding of total distribution expense to be $3,046,026.96, and complainants submit that it should be $2,738,840.51.

Complainants' Exceptions to Special Master's Report.

ITEM 34, PAGE 79: The finding of total distributing expense to be $3,046,026.96, and the total distributing expense as stated in Exhibit 20-A of Culver to be $484,058.15, and the total distributing expense of Culver and its foreign subsidiaries to be $3,530,085.11. 3241

ITEM 35, PAGES 79-80: The adoption of 45 pictures as basis of dividing distribution expense. Complainants submit that the figure ought to be 60. Defendants admit that 41 feature pictures were released during the fiscal year, and two were reissued (S. M. N. Y. 963), making a total of 43 feature pictures. Defendants also distributed 84 shorts and 104 newsreels (S. M. N. Y. 964-5). Eliminating the newsreels which were not distributed abroad, and reducing 84 shorts to the equivalent of feature pictures, it is fair to assume that the shorts were equivalent to 9½ features. This, added to the 43 feature pictures handled, makes a total of 52. This does not take into account pictures produced abroad and released through the foreign exchanges. As the Special Master well points out, the complainants were willing to adopt a basis of 60 for domestic distribution, although they were justified in claiming 68. Complainants submit that the same basis of 60 ought to be adopted in estimating the cost of foreign distribution. Admittedly, the burden was upon the defendants to prove the actual number of pictures distributed. It is only fair to assume that that number would at least exceed the equivalent of 60 feature pictures. The change of the basis of division of expense would further change the resulting figure of $78,446.33. 3242 3243

ITEM 36, PAGE 80: The figures appearing in this item that would be changed if consideration were given to the objections hereinabove contained.

ITEM 38, PAGES 80-81: The figures appearing in this item that would be changed if effect were given to the objections hereinabove contained.

3244 INCOME TAXES.

Complainants also except to:

PAGES 82-87: The allowance of any deductions because of income taxes or the deposit of any part of the profits ascertained in escrow or otherwise. The Special Master has expressly found that the defendants failed to prove "taxable profits" for which they did actually pay income taxes on LETTY LYNTON. Defendants have failed to produce and submit for examination income tax returns showing the income taxes actually paid. Defendants have therefore failed entirely to meet the burden placed upon them
3245 of establishing deductions.

The Special Master can take judicial notice of the fact that corporate income taxes for the year in which said profits were received were less than they are for the present year. Damages paid on infringements are deductible as losses in the year when the amount of damages determined by the Master is confirmed by the court.

Dated, New York, May 17, 1938.

Respectfully submitted,

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants.

3246 ARTHUR F. DRISCOLL
EDWARD J. CLARKE
Of Counsel.

To:

J. ROBERT RUBIN, ESQ.,
Attorney for Defendant
Metro-Goldwyn Pictures Corporation, et al.

LEOPOLD FRIEDMAN, ESQ.,
Attorney for Loew's, Inc.

SAMUEL D. COHEN, ESQ.,
Attorney for Culver Export Corporation.

Complainants' Waiver of Exceptions.

3247

[SAME TITLE.]

Complainants herein, by their attorneys, O'Brien, Driscoll & Raftery, hereby waive the following exceptions filed on behalf of the complainants to the report of the Special Master

This waiver is solely for the purpose of this proceeding to confirm the present report of the Special Master, and is confined strictly to the items involved therein, without intending on the part of the complainants otherwise to admit that the respective deductions from gross receipts 3248 were proper or in accordance with precedent decisions or statutory law.

Exception to item 2, pages 10-11.

Exception to item 5, pages 15-16, except that the waiver shall not apply to the item of $896.05 overhead of the Stock Talent Department, representing the cost of idle time of stock actors.

Exception to item 7, page 17.

Exception to item 8, page 18.

Exception to Item 12, page 22.

Exception to item 14, page 22.

Exception to item 15, page 23. 3249

Exception to item 17, page 23.

Exception to item 20, pages 24-25.

Exception to item 21, page 25.

Exception to item 23, page 25.

Exception to item 24, pages 25-26.

Exception to item 30, page 34.

Exception to item 31, pages 34-36.

METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION:

Exception to item 14, page 50.

Complainants' Waiver of Exceptions.

3250 LOEW'S, INC.:

Exception to item 13, pages 57-58.

CULVER ACCOUNTING:

Exception to item 15, pages 71-72.
Exception to item 16, pages 72-73.
Exception to item 19, pages 73-74.
Exception to item 21, pages 74-75.
Exception to item 31, page 78.
Exception to itenr 35, pages 79-80.

Dated: New York, October 6, 1938.

3251

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants,
Office & P. O. Address,
152 West 42nd Street,
New York, N. Y.,
ARTHUR F. DRISCOLL.

To:

J. ROBERT RUBIN, ESQ.,
Attorney for Respondents Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation,
1540 Broadway,
3252 New York, N. Y.

LEOPOLD FRIEDMAN, ESQ.,
Attorney for Respondent, Loew's, Inc.,
1540 Broadway,
New York, N. Y.

SAMUEL D. COHEN, ESQ.,
Attorney for Respondent, Culver Export Corporation,
1540 Broadway,
New York, N. Y.

Complainants' Additional Waiver of Exception.

3253

[SAME TITLE.]

Complainants hereby waive the following exception, filed on behalf of the complainants, to the report of the Special Master.

This waiver is solely for the purpose of this proceeding to confirm the present report of the Special Master, without intending on the part of the complainants otherwise to admit that the item in question is proper or in accordance with precedent, decisions or statutory law.

Exception to Item 28, Page 77, in so far as the said exception refers to an item of $20,714.13 stated as "accounts written off". 3254

Dated: New York, October 11, 1938.

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants,
Office & P. O. Address,
152 West 42nd Street,
New York, N. Y.,
Arthur F. Driscoll.

To:

J. Robert Rubin, Esq.,
Attorney for Respondents Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, 3255
1540 Broadway,
New York, N. Y.

Leopold Friedman, Esq.,
Attorney for Respondent, Loew's, Inc.,
1540 Broadway,
New York, N. Y.

Samuel D. Cohen, Esq.,
Attorney for Respondent, Culver Export Corporation,
1540 Broadway,
New York, N. Y.

Notice of Motion to Confirm Special Master's Report, etc.

256

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that upon the interlocutory judgment heretofore entered herein, and upon the report of the Special Master, Gordon Auchincloss, filed in the office of the Clerk of this Court on the 9th day of May, 1938, and exceptions thereto filed in said office by the complainants on the 25th day of May, 1938, and exceptions thereto filed by the defendants in the said office on the 31st day of May, 1938, and upon all proceedings heretofore had herein, and upon the affidavit of Arthur F. Driscoll, sworn to the 31st day of May, 1938, and the affidavit of Milton M. Rosenbloom, sworn to the 31st day of May, 1938, we shall move this court at a term thereof held for the hearing of motions in and for the Southern District of New York at the Federal Court House, Foley Square, Borough of Manhattan, City of New York, in Room 506 on the 7th day of June, 1938, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order:

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1. Sustaining the exceptions filed by the complainants herein to the said report of the Special Master.

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2. Overruling the exceptions filed by the defendants herein to the said report of the Special Master.

3. Confirming the said report as modified in accordance with the exceptions filed by the complainants herein.

4. Directing final judgment in favor of complainants and against the defendants, in accordance with the aforesaid report of the Special Master as modified by this court.

5. Fixing the compensation to be paid to the Special Master for the services rendered herein, and directing that the defendants shall pay the same. 3259

6. Fixing a reasonable counsel fee to be allowed to the complainants for services rendered by the attorneys for the complainants in this matter in this court, and directing that the same shall be paid by the defendants.

7. Fixing a reasonable counsel fee to be allowed to the complainants for services rendered by the attorneys for the complainants in this matter in the Circuit Court of Appeals, and directing that the same shall be paid by the defendants. 3260

8. Directing that the complainants shall be entitled to tax their costs and disbursements, and shall have judgment therefor against the defendants.

9. Granting to complainants such other and further relief as to the court may seem just and proper.

Dated: New York, May 31, 1938.

Yours, etc.,

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants,
Office & P. O. Address,
152 West 42nd Street,
Borough of Manhattan,
City of New York. 3261

To:

J. ROBERT RUBIN, ESQ.,
Attorney for Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

LEOPOLD FRIEDMAN, ESQ.,
Attorney for Loew's, Inc.

SAMUEL D. COHEN, ESQ.,
Attorney for Culver Export Corporation.

Affidavit of Milton M. Rosenbloom, Read in Support of Motion.

3262

[SAME TITLE.]

State of New York,
County of New York—ss.:

MILTON M. ROSENBLOOM, being duly sworn, says:

I am an attorney at law; associated with the firm of O'Brien, Driscoll & Raftery, attorneys for the complainants in this action. I am managing clerk in the offices of said attorneys, and I am personally familiar with the proceedings in this matter.

3263

This is an action begun by the complainants above named, Edward Sheldon and Margaret Ayer Barnes, the authors of a play known as DISHONORED LADY, and the owners of the copyright thereon, against the defendants, asking for an injunction and accounting of profits upon a certain motion picture known as LETTY LYNTON, which complainants alleged infringed upon their copyright upon the play DISHONORED LADY.

The action was begun on the 24th of June, 1932, and was tried before Judge Woolsey on April 22nd and 23rd, 1933.

3264

Judge Woolsey dismissed the complaint.

An appeal was taken to the Circuit Court of Appeals, and the judgment entered upon the dismissal by Judge Woolsey was reversed on or about the 17th of January, 1936.

The Circuit Court of Appeals directed that complainants should recover from defendants all profits made upon the picture LETTY LYNTON, and that an accounting should be had, and that complainants should also recover a reasonable attorney's fee in the District Court and in the Circuit Court of Appeals.

The defendants then attempted to take the matter to 3265
the United States Supreme Court and petitioned for a writ of certiorari, which in due course was denied.

The matter then came back to the District Court, and a decree was made by Hon. John C. Knox dated the 29th day of July, 1936, appointing Gordon Auchincloss as Special Master to take and state the account and to report to the Court.

Hearings were thereafter had before the said Special Master, and were concluded on or about March 16, 1938.

On or about the 9th day of May, 1938, Special Master Auchincloss filed his report.

On or about the 25th day of May, 1938, complainants 3266
filed exceptions to the said report.

On or about the 31st day of May, 1938, defendants filed exceptions to the said report.

The complainants now move this court for the following relief:

1. Sustaining the exceptions filed by the complainants herein to the said report of the Special Master.

2. Overruling the exceptions filed by the defendants herein to the said report of the Special Master.

3. Confirming the said report as modified in ac- 3267
cordance with the exceptions filed by the complainants herein.

4. Directing final judgment in favor of complainants and against defendants in accordance with the aforesaid report of the Special Master as modified by this court.

5. Fixing the compensation to be paid to the Special Master for the services rendered herein, and directing that the defendants shall pay the same.

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MATTHEW BENDER & COMPANY
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3268 6. Fixing a reasonable counsel fee to be allowed to the complainants for services rendered by the attorneys for the complainants in this matter in this court, and directing that the same shall be paid by the defendants.

7. Fixing a reasonable counsel fee to be allowed to the complainants for services rendered by the attorneys for the complainants in this matter in the Circuit Court of Appeals, and directing that the same shall be paid by the defendants.

8. Directing that the complainants shall be entitled to tax their costs and disbursements, and 3269 shall have judgment therefor against the defendants.

9. Granting to complainants such other and further relief as to the court may seem just and proper.

MILTON M. ROSENBLOOM.

Sworn to before me this
31st day of May, 1938.

LILLIAN E. McMAHON,
Notary Public.
Queens Co. Clk's No. 1224, Reg. No. 5108.
3270 N. Y. Co. Clk's No. 181, Reg. No. 9Mc46.
Commission Expires March 30, 1939.

Affidavit of Arthur F. Driscoll, Read in Support of Motion.

3271

[SAME TITLE.]

State of New York,
County of New York—ss.:

ARTHUR F. DRISCOLL, being duly sworn, says: I am an attorney at law, a member of the firm of O'Brien, Driscoll & Raftery, attorneys for the complainants in this action. I am personally familiar with this case from its inception, and have been in personal charge for most of the time. 3272

This affidavit is made in support of a motion to confirm the report of the Special Master filed in this court on the 9th day of May, 1938; to fix the allowances to be made to the complainants as counsel fees in this court and in the Circuit Court of Appeals; to fix the allowance to the Special Master for services rendered; to direct the entry of final judgment in favor of the complainants and against the defendants, and for such other and further relief as to the court may seem just and proper.

The Circuit Court of Appeals in its opinion in this case rendered on January 17, 1936, stated: 3273

> "The plaintiffs will be awarded an attorney's fee in this court and in the court below, both to be fixed by the District Court upon the final decree."

This proceeding was begun by the filing of a bill in equity on or about the 24th day of June, 1932, and the services rendered by deponent and his associates for which allowances are asked, cover a period of six years.

At the time that the bill in equity was filed, deponent's

3274 firm was composed of Dennis F. O'Brien, M. L. Malevinsky and deponent, and the said firm was practicing under the name of O'Brien, Malevinsky & Driscoll. Mr. Malevinsky, since deceased, had charge of the proceeding. Mr. Malevinsky continued in charge until his death, which took place four months later, that is, on October 17, 1932. At that time deponent took charge and has been in full and complete charge of the matter since then.

Upon the death of Mr. Malevinsky, Edward C. Raftery became a partner with Mr. O'Brien and deponent, and the firm's name was changed to O'Brien, Driscoll & Raftery, and has continued as such at all times since. The new
3275 firm succeeded to all the rights of the old firm.

It is difficult if not impossible, to completely detail the enormous amount of services rendered in the prosecution of this claim.

I am attaching hereto a transcript from service cards maintained in our offices which show the services from day to day, but not completely. The method of keeping these service cards is that a stenographer or secretary will have the attorneys dictate the work performed by the attorney during the previous day or several days. Those services are then transcribed on to the service cards as charges against the different clients. It is of course true that in such a process many services that are rendered are
3276 not recorded and cannot be detailed, but in the main the said exhibit contains an outline of the services rendered in this matter.

Prior to the filing of the bill of complaint in this matter, services were rendered in consultation with clients, a study of the various documents involved, the reading of the play which constituted the copyrighted work, and an inspection of defendants' infringing motion picture, the securing of scenarios of the said picture and a study thereof, reading of the novel entitled LETTY LYNTON, the preparation of the bill of complaint and other papers, and other services

that it is impossible now to detail, constituting many hours 3277
of work. Defendants appeared in this action through Nathan Burkan and J. Robert Rubin as attorneys.

Interrogatories were prepared and filed, and an application for a preliminary injunction was made. The application for the preliminary injunction was argued before Judge Goddard on the 19th day of July, 1932. Briefs were prepared and submitted, and eventually the said application for a preliminary injunction was denied, but the case was given a preferential position for trial. The various defendants answered, various motions and proceedings were had as to interrogatories, discovery and the like; motion for bill of particulars was argued, and the other usual 3278
preliminary motions were gone through. These various preliminary matters involved several months, and the case was eventually tried before Judge Woolsey on April 22 and 23, 1933. April 22nd was Saturday. Judge Woolsey at the time was engaged in the trial of a long criminal proceeding, and therefore volunteered to try this case beginning Saturday morning at the Bar Association. The case was tried all day Saturday, and was then adjourned to Sunday morning, April 23rd. On Sunday morning court resumed and the trial was completed. Upon the trial defendants were represented by Nathan Burkan as trial counsel and he in turn was assisted by J. Robert Rubin, Louis D. Frohlich and David O. Decker. All parties were 3279
given time to prepare and file briefs. The briefs were prepared, printed and filed. Defendants' brief, supplemental brief and reply brief included the following counsels' signatures: Nathan Burkan, J. Robert Rubin, Louis D. Frohlich, David O. Decker and Samuel D. Cohen.

The court set the matter down for argument at his summer home in Petersham, Mass. on the 14th day of July, 1933. All parties appeared at Petersham, and the argument continued all day of July 14th and the next day, July 15th.

3280 One year thereafter, August 1, 1934, the decision appeared in the Law Journal. Judge Woolsey dismissed the complaint with opinion.

Deponent and his associates prepared immediately for an appeal to the Circuit Court of Appeals. Petition and order allowing an appeal were prepared, assignment of errors was prepared and filed, an undertaking was secured, approved and filed, and the appeal otherwise perfected. The record of the trial was procured, the case on appeal prepared and served upon the other side. After various amendments and other delays the original record on appeal was submitted to the Clerk of this Court on the 9th of July, 1935, and the completed record was filed on the
3281 19th day of August, 1935. Deponent then went to work on appellants' brief, to which he gave much time, thought and study with his associates Edward J. Clarke and Sidney G. Rosenbloom. Appellants' brief was eventually prepared, printed and filed on the 13th day of September, 1935. On the 18th day of October, 1935, deponent received appellees' brief. On that brief appeared the names of Nathan Burkan, J. Robert Rubin, Louis D. Frohlich, David O. Decker, Herman Finkelstein. The appeal was argued in the Circuit Court of Appeals on the 14th day of November, 1935. On the 17th day of January, 1936, the Circuit Court of Appeals handed down its decision reversing the trial court and
3282 ordering and directing that complainants have an accounting of profits and be allowed counsel fees both in the Circuit Court of Appeals and in this court. A petition for a rehearing was filed by the respondents, which was denied.

On or about the 8th day of February, 1936, the mandate of the Circuit Court of Appeals was filed. The decree was prepared, served, settled and signed. About April 4, 1936 defendants served copies of a petition for a writ of certiorari to the United States Supreme Court with a notice of filing.

A brief in support of said petition was filed by amici curiae, consisting of the following corporations: 3283

Twentieth Century-Fox Film Corporation
Paramount Pictures, Inc.
Columbia Pictures Corporation
Liberty Pictures Corporation
B. F. Zeidman Productions, Ltd.
Stage & Screen Productions, Inc.
Academy Pictures Distributing Corporation
Aladdin Pictures Corporation
Warner Bros. Pictures, Inc.
First National Pictures, Inc.
RKO Radio Pictures, Inc. 3284
Republic Pictures Corporation
Resolute Pictures Corporation
Spectrum Pictures Corporation
DuWorld Pictures, Inc.
Talisman Pictures Corporation
Aeolian Pictures Corporation

In the application for writ of certigrari defendants were represented by Hon. Thomas D. Thacher.

On May 4, 1936 the petition for writ of certiorari was denied. Thereafter complainants gave notice of settlement of the decree in the District Court, but before the said decree was signed, defendants caused to be served upon complainants an order to show cause for a rehearing. 3285 The motion for rehearing came on before Judge Woolsey, who denied it, with leave to renew the motion before the Circuit Court of Appeals. Thereafter defendants caused to be served upon complainants order to show cause returnable in the Circuit Court of Appeals asking for a rehearing on June 1st. That motion was heard by the Circuit Court of Appeals and denied from the Bench.

About this time, Nathan Burkan, chief counsel for the defendants, died, and Leopold Friedman appeared as attor-

3286 ney for Loew's, Inc., and Samuel D. Cohen appeared as attorney for Culver Export Corporation. Thereafter a decree was submitted to the District Court for settlement and signature, and on or about July 29, 1936, Judge Knox signed the decree appointing Gordon Auchincloss as Special Master to take and state the profits of the various defendants made from the picture LETTY LYNTON. Thereafter the matter was taken up with the Special Master and he was served with a copy of the decree and notice of entry, and hearings were arranged before the Special Master. The first hearing was held on the 9th of September, 1936. Thereafter hearings were held on October 21, November 19, November 20, December 2, December 11, 1936 and February
3287 1, 1937. There upon it was arranged that the Special Master should go to California to take further testimony. The Special Master, deponent and a certified public accountant, who accompanied deponent, left for California on Thursday, February 25th, reaching Los Angeles on Sunday, February 28th. Hearings began before the Special Master at the Studio of the Metro-Goldwyn-Mayer Corporation on Monday, March 1st. Hearings were held March 1, March 2, March 3, March 4, March 5, March 6, March 8 and 9. On all of those days except March 9, morning and afternoon sessions were had, and on March 8 an evening session was held. Hearings were completed on March 9th and on
3288 March 12th deponent and the said accountant started back to New York, arriving back in New York on March 15th, having been absent for eighteen days.

Upon returning to New York hearings were resumed before the Special Master. Hearings were held on April 20th, April 21st, April 23rd, May 5th, May 6th, May 7th, May 17th, June 28th, June 30th, July 6th (the hearing lasting all day); July 9th, August 11th, September 20th, October 5th, November 22nd, all day, November 23rd and December 6th, 1937, and February 7th and March 16th, 1938.

When the hearings adjourned to California, Mr. Walter 3289
H. Pollak appeared as chief trial counsel for defendants. Upon the hearings had in California, in addition to Mr. Pollak, defendants were represented by J. Robert Rubin and Samuel D. Cohen from New York City, and by Loeb, Walker & Loeb of Los Angeles, by Milton H. Schwartz, Esq. and Walter S. Hilborn, Esq.

Upon returning to New York City for further hearings defendants were represented by Mr. Pollak, Mr. Cohen and Mr. Earle L. Beatty, who appeared for and on behalf of defendants.

The taking of testimony before the Special Master has involved much time and study, not only by deponent, but 3290
by Edward J. Clarke and Sidney G. Rosenbloom, two of deponent's associates, and by others in deponent's office. Twelve hundred and thirty-nine pages of testimony were taken in New York and six hundred thirty-one pages in California.

The services performed by the attorneys for the complainants in this court beginning with the month of May, 1932, and continuing down to May, 1938, or six full years, comprise the beginning of the action herein, the argument of various motions, including the motion for a preliminary injunction and the taking of the account with hearings spread out from September 9, 1936 to March 16, 1938, including a trip to California which meant an absence from 3291
New York City and from deponent's office for a period of eighteen or nineteen days. It is absolutely impossible even to estimate the number of hours or days spent in this matter during the six years in question. Deponent begs leave to submit as part of these motion papers copies of all briefs and printed record prepared and submitted in the Circuit Court of Appeals and this court.

The services rendered in the Circuit Court of Appeals involved the perfecting of the appeal from the decision made by Justice Woolsey, the argument thereof in the

92 Circuit Court of Appeals, and the reversal of the decree and remitting of the matter back to the District Court. Deponent is of the opinion that the services rendered by deponent and his associates and office in the District Court are reasonably of the value of One Hundred Thousand Dollars ($100,000), and that the services rendered in the Circuit Court of Appeals are of the reasonable value of $35,000.

WHEREFORE, this deponent prays that an allowance may be made to the complainants for counsel fees for services rendered in the District Court in the sum of $100,000, and for services rendered in the Circuit Court of Appeals in
93 the sum of $35,000.

ARTHUR F. DRISCOLL.

Sworn to before me this
31st day of May, 1938.

LILLIAN E. McMAHON,
Notary Public.
Queens Co. Clk's No. 1224, Reg. No. 5108.
N. Y. Co. Clk's No. 181, Reg. No. 9Mc46.
Commission Expires March 30, 1939.

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SCHEDULE AS TO SERVICES RENDERED, ANNEXED TO AFFIDAVIT OF ARTHUR F. DRISCOLL.

3295

STATEMENT OF SERVICES RENDERED

by

O'BRIEN, DRISCOLL & RAFTERY

In the Matter of
EDWARD SHELDON and MARGARET AYER BARNES
against
METRO-GOLDWYN PICTURES CORPORATION, et al.

* * * * * * *

3296

In the following entries the individuals rendering the services are designated as follows:

MLM— Mr. Malevinsky
O'B — Mr. O'Brien
AFD — Mr. Driscoll
EJC — Mr. Clarke
BP — Mr. Pepper
SGR — Mr. Sidney G. Rosenbloom
ESC — Mr. Coons
PO'B— Mr. Paul O'Brien
ECR — Mr. Raftery
MMR— Mr. Milton M. Rosenbloom

3297

1932

5/13—Consulted by Mrs. Barnes re copyright infringement by picture LETTY LYNTON. MLM

5/14—"Dishonored Lady" and "Letty Lynton"—prepared lengthy dramatic opinion for Mrs. Barnes and Mr. Sheldon; telegraphed Mrs. Barnes; sent copy to Mr. Sheldon. MLM

5/18—Dictated analysis of book LETTY LYNTON by Mrs. Belloc-Lowndes, 20 pages; sent copy to Mrs. Barnes

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3298

and Mr. Sheldon; two wires to Mrs. Barnes; sent wire to Mr. Sheldon. MLM

5/19—Completed analysis of book LETTY LYNTON. Wire to Mrs. Barnes.
Letter to Jonathan Cape and Harrison Smith asking information re when LETTY LYNTON was first published in England; letter to Philip Guedalla requesting copy of LETTY LYNTON. MLM

5/20—Letter to Mrs. Barnes; received wire from Mrs. Barnes. MLM

5/23—Examined Mr. Malevinsky's synopsis and opinion in re dramatic composition DISHONORED LADY and

3299

the motion picture LETTY LYNTON. O'B

5/24—Examined Mr. Malevinsky's memo; conferred with Mr. O'Brien and Mr. Malevinsky. AFD.
Suggested bringing suit in Chicago. MLM

5/28—Commenced the preparation of affidavit of Margaret Ayer Barnes and dictated all day with Mrs. Barnes present. MLM

5/30—Occupied all day with Mrs. Barnes dictating balance of affidavit. MLM

5/31—Memo to Mr. Malevinsky re papers to be drawn. Letter to Paul R. Reynolds to ascertain when LETTY LYNTON was first published in England; prepared draft of complaint in Southern District

3300

Court; called on Mr. Sheldon and discussed this case with him and the affidavit of Margaret Ayer Barnes. MLM

6/1—Occupied with Mrs. Barnes going over affidavit, paragraph by paragraph, covering 48 pages and making interlineations and changes. MLM

6/2—Occupied with Mrs. Barnes from eleven to one o'clock going over affidavit; studied bill of complaint and made changes therein. Letter to Paul Reynolds to cable to England and find out when

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll

3301

LETTY LYNTON was serialized in Daily Mail. Letter to Mr. Sheldon. MLM

6/3—Mrs. Barnes at office; started redictating redraft of affidavit. MLM

6/4—Mrs. Barnes called at 9:00 A. M. and remained until 2:30 P. M.; completed dictating draft of affidavit. MLM

6/6—Mrs. Barnes at office, discussing phases of case; drafted 47 pages of affidavit ~~of Margaret Ayer~~ Barnes. MLM

6/7—Mrs. Barnes and Mr. Malevinsky considering draft of affidavit and making notes of changes to be made, all day. MLM

3302

6/8—Mrs. Barnes here all day; considering redrafting of affidavit; dictated and copied 21 pages of affidavit. MLM

6/8—Examined draft of affidavit of Mrs. Barnes—2 hrs. O'B

6/9—Took home motion papers; spent evening examining them. AFD

6/9—Mrs. Barnes called at 9:00 A. M. and went over final draft of affidavit; changes made; occupied until 4:00 o'clock; revised 12 pages of affidavit; started dictating interrogatories and had same transcribed. MLM

3303

6/10—Prepared memo for Mr. Malevinsky. AFD

Mrs. Barnes called and considered the revised pages of affidavit and then executed same. Occupied all morning; dictated balance of affidavit; dictated interrogatories. MLM

6/11—Letter to Mr. F. M. Guedalla of London requesting him to send volume. Letter to Gabriel Hess asking him to send opinions on infringement cases. Dictated revised interrogatories. MLM

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3304

6/13—Preparing interrogatories; revised complaint. Considered with Mr. Pepper, after receiving memo from ECR about bringing in Metro-Goldwyn-Mayer Pictures, Metro-Goldwyn-Mayer Distributing Corp., Loew's, Inc. and Culver. Redictated complaint bringing in those corporations. Occupied all morning. Met Mr. Sheldon at his apartment at 2:30 and considered with him Mrs. Barnes' affidavit, etc. MLM

6/14—Occupied all day reading over affidavit and revising same; recopied 14 pages with revisions to Margaret Ayer Barnes' affidavit. MLM

3305

6/15—Memo for Mr. Olbert. Letter to Charles Frohman, Inc. asking for complete file of photographs; letter to Vandamm Studios. Dictated affidavit of Edward Sheldon; sent affidavit by Miss Reilly to Mr. Sheldon for execution. Worked on interrogatories from 10:30 to 11:30 A. M. and again from 2:00 to 4:00 in the afternoon. MLM

6/16—Examined memo from Mr. Malevinsky; wrote reply. AFD

Mr. Giffen called and gave statement of facts concerning the proposed negotiations; drafts of affidavit prepared and had affidavit signed by Mr.

3306

Giffen; continued dictation of interrogatories and making changes in previous interrogatories; redrew five pages of interrogatories. MLM

6/17—Dictated memorandum to Mr. Malevinsky re damages in above case. Examined cases; looked up law. BP

Occupied all day on interrogatories; on reading and dictating same. Had 36 pages of interrogatories transcribed; prepared detailed letter to Mr. Sheldon and sent copy of same to Mrs. Barnes with accompanying letter. MLM

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3307

6/18—Continued dictating of interrogatories; sent letter to Mr. Sheldon; had 14 pages of interrogatories transcribed. MLM

6/19—Revised set of interrogatories; had same transcribed. MLM

6/21—Redictated interrogatories from No. 54; embodying new set-up. Had 36 pages transcribed. MLM

6/22—Telegram to Mrs. Barnes re coming here after 4th of July. Continued dictating interrogatories. MLM

6/23—Continued and finished dictating interrogatories; dictated order to show cause. Had 18 pages of interrogatories transcribed. MLM 3308

6/24—Examined Mr. Malevinsky's interrogatories; prepared memorandum thereon.

Dictated proposed order for interrogatories; at Judge Woolsey's Chambers. BP

Completed papers and put them in final form. MLM.

Subpoena, Complaint, interrogatories and injunction papers served upon Metro-Goldwyn-Mayer Distributing Corporation. AFD

Order to show cause signed by Judge Woolsey, returnable July 5th; letters to Mr. Sheldon and Mrs. Barnes enclosing copy of interrogatories; memorandum to MMR re service of papers on other defendants, commenced making copy of interrogatories; copied 12 pages. MLM 3309

6/25—Letter to Gabriel Hess requesting certain appeal papers. Telegram to Mrs. Barnes; sent copy of same to Mr. Sheldon; letter to Jonathan Cape & Harrison Smith requesting 5 volumes of LETTY LYNTON; letter to F. M. Guedalla; letter to Wylde & Son. Memo re Independent Exhibitors; detailed letter to Mrs. Barnes, and sent copy of that letter

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3310

to Mr. Sheldon. Made extra copy of interrogatories and went over papers. MLM

6/27—Subpoena, complaint, interrogatories and injunction papers served upon Metro-Goldwyn Pictures Corporation, Loew's, Inc. and Culver Export Corporation.

6/27—Completed extra copies of interrogatories (23 pages); commenced dictating authorities on infringement and damages; occupied 5 hours. Memo to Mr. O'Brien. MLM

6/28—Continued dictation of law brief on damages; had 35 pages transcribed. Letter to Burrell Clipping

3311 Bureau for clippings on reviews of LETTY LYNTON on April 30. MLM

6/29—Occupied all day dictating points of various cases; day letter to Mrs. Barnes; working on appendix No. 1 involving cases on infringement. MLM

6/30—Day letter to Mrs. Barnes; letter to Albert Free; preparing heading for appendix No. 1 to brief; working on Appendix No. 1, embodying cases covering infringement. (27 pages) MLM

7/7—Dictated statement to Mr. Malevinsky re report of Washington trip. BP

Dictated Appendix No. 2 covering sections 1 to 5 and dictated part of Section 6; occupied all day on

3312 matter.

7/8—Dictated balance of Section 5; considered Appendix No. 2; and made certain changes; Mr. Frohlich telephoned and requested further extension of one which I gave him; decided to change brief; added another authority to Appendix No. 2 and compared same to our case; transcribed and recopied Section 1 of the brief. MLM

Motion for injunction adjourned to July 19. Defendants' time to answer extended to July 29.

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3313

7/9—Dictated additional case to Appendix No. 1; Mrs. Barnes and Mr. Barnes called at 9:30 and occupied with them going over papers drawn. At 2:30 Mr. Malevinsky, Mr. and Mrs. Barnes went to Mr. Sheldon's apartment for conference. MLM

7/11—Continued redictating from Section 4 to Section 6 inclusive; occupied 6 hours. Transcribed 9 pages. MLM

7/12—Finished dictating Appendix No. 2; transcribed 34 pages; commenced dictating Appendix No. 3, comparing the Madeleine Smith trial. MLM

7/13—Revised and continued dictating Appendix No. 3; comparing the Madeleine Smith trial; had 20 pages transcribed. MLM 3314

Examined Mr. Malevinsky's brief and commented on it. O'B

7/14—Commenced dictating Appendix No. 4 and embodying and covering the novel by Mrs. Lowndes. Had 20 pages of this appendix transcribed. Mrs. Barnes was at the office; conference from 9:30 A. M. to 4:00 P. M. MLM

7/15—Continued dictating Section 7 comparing the novel LETTY LYNTON by Mrs. Lowndes; changed 1 to 6, sections incorporating other interrogatories; transcribed 30 pages of Appendix No. 4. Mrs. Barnes 3315
here from 10:00 to 3:00; in the afternoon Mr. Malevinsky and Mrs. Barnes went over previous continuity and continuity received from Mr. Burkan. MLM

7/16—Worked on Appendix No. 5 dealing with validity of the copyright of complainants' play. Transcribed 14 pages. MLM

7/18—Received objections to interrogatories and received affidavits in opposition to injunction. AFD

Mr. and Mrs. Barnes here; conference practically

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3316

all day; received affidavits from defendants at 8:30 P. M. in the evening; read same; prepared stipulations to make additions to complaint; sent same by hand to Mr. Frohlich with letters. MLM

7/19—Argued motion for preliminary injunction before Judge Goddard. Occupied all day at court house. Mr. and Mrs. Barnes here for conference. MLM

7/20—Mr. and Mrs. Barnes here; long conference; commenced dictating Appendix No. 6 in reply to defendants' affidavits. Had 21 pages transcribed; sent telegram to Mr. Sheldon. MLM

3317 7/21—Received defendants' briefs. Conference Mr. and Mrs. Barnes; redictated Appendix No. 6 after receiving briefs. Had 34 pages transcribed.

7/22—Continued dictating Appendix No. 6; Mrs. Barnes here for conference; had 37 pages transcribed. MLM

Stipulation signed consenting that defendants' objections to interrogatories of complainants as sets forth in their memorandum may be accepted by the court, and the court may make its decision thereon as if a motion had been made. AFD

7/23—Completed Appendix No. 6; had 15 pages transcribed; sent balance to printer and requested briefs

3318 to be in the office at 9 o'clock. MLM

7/25—Sent Mrs. Barnes copies of Appendix No. 6. MLM

Orally consented to submit briefs on the 26th, with consent of Judge Goddard. AFD

7/26—Submitted briefs. AFD

Wrote Judge Goddard correcting Fox Film to Fox Theatre Corp. Sent copies of letters to Mr. Burkan and Mr. Rubin; wrote Mrs. Barnes in detail, and sent her copy of defendants' reply brief. Wrote Mr. Sheldon enclosing copy of defendants' reply brief. MLM

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3319

7/27—Received affidavit of Clarence Brown and examined it. AFD
Wrote Mrs. Barnes in detail after considering defendants' reply brief and reaction to same (8 pages); sent copy of letter to Mr. Sheldon. MLM

7/29—MLM appeared in court at Judge Goddard's request. Court denied motion for injunction but indicated he would order early trial (October) as "complainants were entitled to that" Received and examined answer.

8/1—Dictated stipulation withdrawing portion of order to show cause requiring respondents to answer interrogatories and allowing discovery and inspection of books, records, etc. BP 3320
Received letter from Mrs. Barnes; replied to same; sent Mr. Sheldon copies of letters sent to Mr. and Mrs. Barnes; wrote Mr. Barnes, Mrs. Barnes and Mr. Sheldon giving them opinion rendered by Judge Goddard on the motion. Letter to Mr. O'Brien. MLM

8/2—Received letter from William Brown, acting register of copyrights stating that we take up with E. P. Secker, Inc. the matter of having the manuscripts photostatted; wrote detailed letter to E. P. Secker, Inc. concerning same and asking their prices. MLM 3321

8/5—Letter to E. P. Secker, Inc. requesting them to make the photostatic copies at the prices mentioned in their letter. Detailed letter to Mr. Barnes asking him to look up Judge Brandeis' opinion on infringement (5 pp.); sent copy of letter to Mrs. Barnes and Mr. Sheldon. Commenced dictating Appendix No. 7 re damages. MLM

8/6—Memo to Mr. Pepper on the phrase "in no other case", and requesting him to give his opinion; re-

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

ceived telegram from E. P. Secker requesting authorization; sent day letter to them and letter to Thorvald Solberg, Register of Copyrights, enclosing copy of day letter (3 pp.); sent copy of letter to E. P. Secker; letter to Mrs. Barnes sending her set of affidavits filed by adversaries. MLM

8/8—Worked on Appendix No. 7—12 pages. MLM

8/9—Served proposed order and notice of settlement for Aug. 11. AFD

Worked on appendix No. 7—10 pages. Copied adversaries' affidavits, 11 pages. MLM

8/10—Received letter from Mrs. Barnes; acknowledged receipt.

8/11—Conference with Mr. O'Brien. AFD

Submitted order, AFD. Received motion papers for bill of particulars returnable Aug. 16. AFD

Worked on draft brief of appendix No. 7 on damages. MLM

8/15—Phoned Mr. Frohlich's office and Mr. Rubin's office to obtain their consent to withdraw the demand for a bill of particulars; said they would withdraw provided we furnished them with the particulars; dictated memo in opposition to motion; letter to E. P. Secker, Inc. enclosing check in payment of bill. MLM

8/16—Argued motion re bill of particulars before Judge Patterson. AFD

Commenced dictating preparatory brief. 18 pp. MLM

8/17—Continued dictating preparatory brief. (19 pp.) Wrote Nathan Burkan asking him to prepare order on the particulars granted to them on their motion; otherwise motion was denied. MLM

8/18—Continued dictation of preparatory brief (30 pp.). MLM

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3325

8/19—Continued dictation of preparatory brief from 9:00 to 12:15 and 2:00 to 4:00 (22 pp.). MLM

8/20—Continued dictation of preparatory brief. 12 pp. MLM

8/21—At Westerly. Read affidavits of defense. O'B

8/23—Dictated preparatory brief from 9:00 to 12:30 and 2:00 to 3:30; had 21 pages transcribed. MLM

8/24—Working on three continuities; worked on brief. MLM

8/25—Received motion papers for commission to take testimony of various witnesses in Los Angeles and London, including Marie Adelaide Belloc-Lowndes 3326
and Mabel Christine Broughton. Motion returnable Aug. 30. MLM

Working all day keying the three continuities; 30 pages of preparatory brief. MLM

8/26—Mr. Malevinsky worked all day keying the three continuities and making comparisons; letter to Mr. Sheldon sending him working sheets and printers proof copy of three continuities; also sent the same papers and copy of letter to Mr. Sheldon to Mrs. Barnes, by express. Letter to Nathan Burkan advising him of receipt of motion papers to take depositions of witnesses in London and California, and advising him that we could stipulate and he 3327
should prepare interrogatories and I would cross them within 24 hours. Copy of letter to J. Robert Rubin. MLM

8/27—Stipulation signed withdrawing motion for depositions. AFD

MLM occupied all morning working on three continuities.

9/13—Conference, Mr. O'Brien, Mr. Malevinsky, Mr. Driscoll and Mrs. Barnes—2½ hrs.

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3328

9/21—Served proposed order returnable Sept. 23 to set case down for trial near head of calendar. (The order served on Aug. 9 appears to have been lost in court, and was never signed by Judge Goddard. This is merely a new order covering the same subject matter.)

9/28—Law Journal—order signed by Judge Goddard.

9/29—Prepared memorandum for Mr. Malevinsky re income tax questions involved in suit; preparation of memorandum for Mr. Raffery. ESC

9/30—Served copy of order with notice of entry and notice to produce on J. Robert Rubin and Nathan Burkan. AFD

3329

10/3—Chicago—several telephone communications with Mr. Cecil Barnes; conference at office of Mr. Barnes from 2:30 to 4:00 o'clock with Mrs. Barnes. O'B

10/10—Went to Federal Court with Mr. Frohlich and arranged for adjournment of cases to Dec. 5th. AFD

10/11—Wrote and wired Mr. Barnes re adjournment to Dec. 5. AFD

10/17—MLM died and AFD took charge.

10/20—Took home Mr. Pepper's report re his visit to Washington and studied it. AFD

10/21 to 10/25—Devoted time almost exclusively to studying case. AFD

3330

10/26—Spent entire evening studying case. AFD

10/28—Received letter from Mrs. Barnes; answered it. AFD

10/29—Conference over telephone with Mr. Sheldon. AFD

11/1—All previous evening and all the night before that until midnight studying case. AFD

11/2—Long conference with Mrs. Barnes in the office; conference with Mr. Frohlich over the telephone; he promised to procure and send to me copy of continuity attached to deposition. Worked all eve-

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3331

ning studying manuscript; telephone conference with Mrs. Barnes. AFD

11/4—Conference in the office; spent most of afternoon studying case. AFD

11/5—Conference over telephone with Mrs. Barnes. AFD

11/9—Telephone conference with Mr. Frohlich. AFD

11/11—Gave manuscript to expert for examination and opinion; long conference with him today. Expert strongly of opinion that picture constitutes infringement; spent the evening working on case. AFD

11/18—Received letter re LETTY LYNTON; submitted to Mr. O'Brien. AFD

3332

11/19—Received telegram from Mrs. Barnes; answered it. AFD

11/22—Conference with Mr. Burkan over the telephone; wired Mrs. Barnes. AFD

11/23—Conference over the telephone with Mr. Burkan; recd. telegram from Mrs. Barnes; sent her reply telegram. AFD

11/25—Received wire from Mrs. Barnes; wrote her in reply. Received wire from Mr. Barnes; wrote him long hand letter in reply. AFD

11/29—Conference with Mr. Burkan over the telephone. AFD

3333

12/1—Conference with Mrs. Barnes, Mr. O'Brien and Mr. Driscoll; 1 hr. Made memo for Mr. Schenck to compare director's scenario with one in files of Federal Court. AFD

12/1—Conference with Mrs. Barnes and Mr. Driscoll O'B

12/5—Case on calendar for trial; adjourned to Jan. 16, 1933. AFD

12/29—Telephone conference with Mr. Frohlich. AFD

12/30—Wrote long letter to Mrs. Barnes. AFD

12/31—Conference with Mr. Frohlich over the phone. AFD

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1933

1/3—Wrote Mrs. Barnes long letter. AFD

1/5—Conference with Nathan Burkan regarding request for postponement of trial; telephoned Mr. Driscoll at his home re same. O'B

1/6—Telephone conference with Mr. Frohlich of Burkan's office; conference with Mr. O'Brien; received letter from Mrs. Barnes; answered it. AFD

1/17—Wrote Mrs. Barnes re position of case on calendar. AFD

1/23—Received letter from Mrs. Barnes; answered it. AFD

1/31—Wrote Mrs. Barnes re position on calendar. AFD

2/1—Case appeared on Day Calendar. Wrote Mrs. Barnes. AFD

2/3—Wrote Mrs. Barnes. AFD

2/9—Wrote Mrs. Barnes re position of case on calendar. Working on preparation of case for trial. AFD

2/10—Wrote Mrs. Barnes again re position of case on calendar; suggested she come to New York to begin final preparation for trial. AFD

2/13—Spent entire holiday at Bar Association preparing for trial. AFD

2/14—All day at Bar Association preparing for trial; several phone conversations. AFD

Telephone conference with Mr. Burkan. Went to Bar Association where Mr. Driscoll was working and conferred with him regarding Mr. Burkan's request for postponement of trial. O'B

2/15—All day at Bar Association preparing for trial; prepared affidavits and order to show cause why inspection of film should not be decreed; sent it to court for signature of judge; made service on parties. AFD

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3337

2/16—Working all day on preparation for trial; conference with Mrs. Barnes over the telephone; conference with Mr. O'Brien after an interview with Mr. Burkan; conference with Mr. Frohlich over the telephone; agreed to adjourn motion for inspection to Tuesday. AFD

2/17—Order to show cause and inspection adjourned to Feb. 21. AFD

Prepared long memorandum for Mr. O'Brien re conference with Mr. Frohlich. Conference with Mrs. Barnes over the telephone; conference with Mr. O'Brien in the office in re talk he had with Mr. Burkan; two telephone conferences with Mr. Frohlich; went with Mr. Frohlich to Federal Court and interviewed Judge Knox; arranged to have trial of action adjourned to April 10. AFD 3338

Conference with Mr. Driscoll and Mrs. Barnes, also conferred with Nathan Burkan. O'B

2/18—Accompanied by Mrs. Barnes, Mr. Pepper and Mr. Rosenbloom went to Film Building at 45th St. and 9th Ave. and witnessed screening of LETTY LYNTON; conference with Mr. Frohlich over the telephone. AFD

2/20—Wrote Mr. Sheldon re adjournment of trial. AFD

2/21—Motion for inspection withdrawn. Trial adjourned to April 4 preemptorily. AFD 3339

2/23—Received wire from Mr. Sheldon; telephoned and made appointment to see him Tuesday next. AFD

2/28—Went to Mr. Sheldon's home to confer with him. AFD

3/1—Wrote Mr. Sheldon enclosing copies of interrogatories and cross-interrogatories of witnesses examined in California. AFD

3/29—Wrote to Mrs. Barnes. AFD

4/3—Received letter from Mrs. Barnes; wrote and telegraphed her. AFD

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4/4—Spent evening re-reading and re-studying the book LETTY LYNTON. AFD

4/5—Several communications over telephone with Nicholas Schenck relative to postponement of trial; sent written message to Mr. Driscoll in court on trial of another case. Conferred with Mr. Driscoll at lunch. Long distance telephone communication with Mrs. Barnes from Chicago; communication with Mr. Schenck; later conference with Mr. Rubin; decided to go on with the trial on Monday. O'B

While in court received memo from Mr. O'Brien, delivered to me by Mr. Clarke, of request of Nicholas Schenck to adjourn trial to 19th; returned to the office, conferred with Mr. O'Brien; telephoned to Mrs. Barnes in Chicago and discussed the matter with her; telephoned to Mr. Sheldon and discussed the matter with him; Mr. O'Brien had further conference with Mr. Schenck; Mrs. Barnes called us on the telephone from Chicago and we had a further discussion; later, had conference with Mr. Rubin, respondent finally withdrawing its request for adjournment and advising us that they would be ready for trial on Monday, the 10th. Telegraphed Mrs. Barnes to that effect. Phoned Mr. Sheldon to that effect. AFD

4/6—Spent entire evening reviewing and studying scenario of picture. AFD

4/7—At Bar Association all day with Mr. Clarke and Mr. Rosenbloom preparing for trial. AFD

4/8—Spent all day preparing for trial; conference with Mr. Hess over telephone. AFD

Conference with Mrs. Barnes and Mr. Driscoll. O'B

4/10—At work all day in preparation for trial; took papers home and worked on them in evening. AFD

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3343

4/11—Worked all day preparing for trial; took papers home and spent the evening on it. AFD

4/12—Worked all day in preparation of trial. AFD

4/13—Spent most of the day on the matter; various conferences and telephone calls, including Mr. Burkan's office, Mr. Clarke and Mr. Rosenbloom; visited court; conferred with Judge Woolsey and arranged for trial to start before Judge Woolsey on Friday, April 21, at 4:00 P. M. AFD

4/15—Arranged with Bar Association for use of trial room for Saturday, April 22. AFD

4/17—Received from attorneys copies of defendants' summaries; forwarded one to Mrs. Barnes, one to Mr. Sheldon; took one home and read part of it. AFD

3344

4/19—At 5:00 P. M. at the Loew Building for a screening of the picture LETTY LYNTON for Judge Woolsey, accompanied by Messrs. Clarke and Rosenbloom AFD

4/20—Spent all afternoon preparing for trial. AFD

4/21—Spent large part of day preparing for trial; all afternoon with Mr. and Mrs. Barnes. AFD

4/22—Began trial. Engaged all day till 7:00 P. M. at Bar Association in trial of action. AFD

Conference with Mr. Driscoll at his home regarding trial at Bar Association. O'B

3345

4/23—Sunday—engaged all morning till 1:00 P. M. in trial of action at Bar Association. AFD

Sunday—conference with Mr. Driscoll at his home regarding trial at Bar Association. O'B

4/24—Engaged all day at Bar Association in preparation of brief to be submitted on behalf of complainants. AFD

4/26—Received letter from Judge Woolsey; answered it; wrote Mrs. Barnes enclosing copy of Judge Woolsey's letter; received letter from Mr. Burkan; answered it. AFD

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4/28—Telephone conference with Mrs. Barnes; went to Mr. Sheldon's apartment; conferred with him. AFD

5/1—Spent most of day working on brief. AFD

5/2—All day working on brief; Mrs. Barnes present all afternoon. AFD

5/3—All day in library working on brief; took revised draft home and worked on it. AFD

5/6—Working on brief. AFD

5/8—Spent entire evening till after 11:00 P. M. working on brief. AFD

5/10—Spent practically all day working on brief. AFD

5/12—Working on draft of brief; received letter and telegram and summaries from Mrs. Barnes; took summaries of play and picture home; spent the evening reading, studying and revising them; wrote Mrs. Barnes. AFD

5/13—Worked on brief nearly the entire day. AFD

5/15—Worked on brief all day; received from Mrs. Barnes summaries of trial and novel; wrote long letter to Mrs. Barnes. AFD

5/16—Worked most of day on brief; took papers home and spent part of evening on them; conference with Mr. McQueeney, printer; gave him summaries. AFD

Worked in library with Mr. Driscoll—EJC

5/19—Working on revision of brief. AFD and EJC

5/22—Memo for Mr. Clarke and Mr. Rosenbloom re authorities for reply brief; spent evening revising brief. AFD

5/23—Finished revision of brief and returned to printer. AFD

5/25—Wrote Mr. Sheldon. AFD

5/27—Had briefs and summaries served on Mr. Burkan and Mr. Rubin; mailed copies to Mrs. Barnes and Mr. Sheldon. AFD

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3349

5/31—Received letter from Mr. Sheldon; answered it. AFD

6/5—Conference with Mr. Clarke; received proposed stipulation from Mr. Burkan and drafted letter to him. AFD

6/6—Communication to Mr. Rubin regarding Mr. Driscoll's letter. O'B

6/19—Wrote Mrs. Barnes enclosing copy of letter from Mr. Burkan and copy of letter written Judge Woolsey by Mr. Rubin; copy of letter to Mr. Burkan and copy of letter from Judge Woolsey, all re extending respondents' time to serve brief. AFD

3350

Worked with Mr. Driscoll. EJC

6/22—Received letter from Judge Woolsey; answered it. Wrote Mrs. Barnes and Mr. Sheldon enclosing each copy of Judge Woolsey's letter and our reply. AFD

Worked with Mr. Driscoll. EJC

6/24—Received defendants' answering briefs; examined same. AFD

6/25—Sunday. Worked all evening with Mr. Clarke and Mr. Rosenbloom. AFD

6/26—Working all day and all evening with Mr. Clarke and Mr. Rosenbloom on reply brief at Bar Association. AFD

3351

6/27—Worked all day and all evening with Mr. Clarke and Mr. Rosenbloom on reply brief. AFD

6/28—Worked all day and all evening with Mr. Clarke and Mr. Rosenbloom on reply brief. AFD

Received letter from Mrs. Barnes; answered it. AFD

6/29—Worked all day and all evening with Mr. Clarke and Mr. Rosenbloom on reply brief in library; received letter from Judge Woolsey setting July 13th as date for argument; wrote Mrs. Barnes enclosing

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copy of Judge Woolsey's letter; also similar letter to Mr. Sheldon. AFD

6/30—Engaged all day and till evening on reply brief. AFD

7/1—Engaged all day on reply brief; received letter from Mrs. Barnes; answered it. AFD
Read final proofs of brief; worked all morning. AFD

7/12—Left for Petersham. AFD

7/13—At Petersham—argument before Judge Woolsey; started at 10:00 A. M. and lasted until 6:30; adjourned to July 14. AFD
Spent evening in hotel working on matter. AFD

7/14—At Petersham—argument all day. AFD

7/19—Conference with Mrs. Barnes over telephone. AFD
Received letter from Mr. Decker enclosing copy of letter to Judge Woolsey; wrote letter to Mr. Decker acknowledging receipt of same. AFD

7/20—Long Conference with Mrs. Barnes; visited Mr. Sheldon's home. Received letter from Judge Woolsey; answered it. AFD

8/23—Wrote Mrs. Barnes and Mr. Sheldon. AFD

10/27—Conference with Mrs. Barnes in the office. AFD

11/13—Received letter from Mrs. Barnes enclosing letter written by Mr. X. to her in 1930; answered Mrs. Barnes' letter. AFD

1934.

2/7—Letter to Mrs. Barnes. AFD

2/23—Received a letter from Mrs. Barnes; telephoned Mr. X. AFD

2/27—Received letter from Mrs. Barnes; wrote her at Park Lane Hotel, New York. AFD

3/1—Conference with Mrs. Barnes in the office. AFD

3/2—Conference with Mrs. Barnes over telephone. AFD

3/6—Conference with Mrs. Barnes in the office. AFD

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3355

4/21—Received letter from Mrs. Barnes and answered it. AFD

4/23—Wrote letter to Mr. Sheldon and sent copy to Mrs. Barnes. AFD

4/24—Telephone conference with Mr. Sheldon. AFD

4/26—Attended to telegram from Mrs. Barnes; long distance telephone conference with Mrs. Barnes at my home in Chicago (15 minutes); sent telegram to her. O'B

5/4—Letter to Mrs. Barnes. O'B

5/14—Conferred with Mr. Driscoll and Mr. Raftery; letter Mrs. Barnes. O'B

3356

6/21—Conference with Mrs. Barnes at the office; also conferred with Mr. Driscoll. O'B

6/22—Conference with Mrs. Barnes at the office. O'B

8/1—Law Journal reports "Complaint dismissed; see opinion." Secured copy of opinion and examined it at length. Communicated with Mrs. Barnes; communicated with Mr. Sheldon.

8/3—Received decision and judgment with notice of settlement returnable August 6. Examined them.

8/6—Decision and judgment submitted for signature.

8/13—Received order with notice of filing and decree with notice of filing. Examined them. Sent copies to Mrs. Barnes and Mr. Sheldon.

3357

8/14—Began preparation of petition for appeal and order allowing petition.

8/17—Submitted order allowing petition for appeal for signature.

8/24—Order allowing petition for appeal reported and signed in Law Journal. Secured copy of order.

9/10—Received wire from Mrs. Barnes in Massachusetts; answered it; made appointment for Wednesday. AFD

9/11—Began preparation of assignment of errors.

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9/12—Long conference in the office with Mrs. Barnes—2 hrs. AFD

9/13—Working on assignment of errors.

9/13—Long conference with Mrs. Barnes; discussion of opinion of Judge Woolsey; spent the evening examining Copyright Law and decisions thereunder. AFD

9/14—Long conference with Mrs. Barnes. O'B

Conference in the office with Mrs. Barnes; conferred with Mr. Rosenbloom; working on assignment of errors. AFD

9/19—Wrote letter to Fulton Brylawski in Washington and letter to Mrs. Barnes. AFD

Letter to Mrs. Barnes.

9/20—Prepared petition for appeal; copied assignment of errors. SGR

9/22—Assignment of errors filed. Citation issued. Returnable Oct. 20. Petition for appeal filed.

9/25—Conference with Mr. Sheldon at his home. AFD

9/28—Undertaking submitted and approved.

Sent Mrs. Barnes bond application and indemnity agreements. AFD

10/3—Served assignment of errors, citation of appeal, petition for appeal and undertaking with notice of filing.

10/8—Received letter from Mr. Sheldon; answered it. AFD

10/17—Prepared stipulation extending return of citation to November 19. EJC

10/20—Citation returnable. Stipulation signed and order filed extending time to complete appeal to November 20.

10/24—Received letter from Mr. Barnes; replied to same. AFD

11/2—Conference with Mrs. Barnes over telephone; conference with Mrs. Barnes in the office. AFD

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3361

11/3—Letter to West Publishing Company; letter to Miss Alice Kauser enclosing copy of Judge Woolsey's opinion. AFD

11/9—Conference with Mrs. Barnes over telephone; letter to Mrs. Barnes. AFD

11/10—Long conference with Mrs. Barnes in the office. AFD

11/19—Spent large part of the day working in the library on brief. AFD

11/20—Stipulation and order signed and filed extending time to complete appeal to Dec. 19.

12/5—At Bar Association all day working on brief. AFD

3362

12/19—Stipulation signed and order signed and filed extending time to complete appeal to Jan. 19, 1935.

12/28—In Chicago—conference with Mr. Driscoll and Mr. and Mrs. Barnes at their home regarding proposed appeal. O'B

1935

1/3—Examined letter from Mrs. Barnes; conferred with Mr. Driscoll regarding same; dictated and sent answer to Mrs. Barnes. O'B

1/4—Spent practically all afternoon working on brief. AFD

1/18—Stipulation signed and order signed and filed extending time to complete appeal to Feb. 19.

3363

1/22—Letter to Mrs. Barnes. O'B

1/25—Telephoned to Judge Knox; talked with his law secretary as to procedure. BP

2/19—Stipulation signed and order signed and filed extending time to complete appeal to March 19th.

2/21—At the Bar Association all afternoon working on brief. AFD

3/4—Spent all afternoon at Bar Association. AFD

3/5—Spent all day at Bar Association working on brief. AFD

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3364

3/19—Stipulation signed and order signed and filed extending time to complete appeal to April 19.

4/1—Letter to Nathan Burkan re stipulation and extra copies of transcript of case on appeal. EJC

4/19—Stipulation signed and order signed and filed extending time to complete appeal to May 19.

4/20—Letter to Mrs. Barnes advising that this matter will probably go over to October. AFD

4/24—Letter to Mrs. Barnes. O'B

5/10—Telephone conference with Mrs. Barnes. AFD

5/19—Stipulation signed and order signed and filed extending time to complete appeal to June 20th.

3365

6/20—Stipulation signed and order signed and filed extending time to complete appeal to July 20th.

Letter to Mr. Sheldon explaining delay in appeal of this matter. AFD

7/9—Original record on appeal submitted to Clerk for signature of Judge Woolsey.

7/17—Spent large part of day working on brief. AFD

7/18—Spent large part of day working on brief. AFD

7/19—Stipulation signed and order filed and signed extending time to complete appeal to August 20.

Worked on revision of LETTY LYNTON brief, better part of the day. AFD

3366

7/22—Worked on revision of brief all day Monday. O'B

7/23—Worked on revision of brief ½ day. O'B

7/29—Spent most of the day working on brief. AFD

7/31—Spent entire day working on brief and in the evening. AFD

8/1—Spent all day working on brief. AFD

8/19—Record on appeal filed.

9/3—Worked on brief until 11:00 P. M. AFD

9/4—At Bar Association working on brief all day. AFD

9/6—Redrew brief for printer. AFD

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3367

9/9—Stipulation filed extending time to serve appellants' brief to Sept. 19.

9/13—Working on brief all day. AFD

9/14—Telephone call from Mrs. Barnes; Mrs. Barnes called and had conference with her. AFD

9/17—All day revising proof of brief; returned to printer for another proof; letter to Mr. Sheldon enclosing proof of brief; letter to Mrs. Barnes enclosing proof of brief. AFD

9/19—Spent considerable portion of day revision brief. Letter to Mrs. Barnes enclosing copy of second proof of brief. AFD

3368

Stipulation signed extending time to serve and file appellants' brief to Sept. 23.

9/20—Served appellants' brief on all parties.

9/23—Filed 13 copies of appellants' brief.

10/15—Stipulation signed extending respondents' time to serve and file brief to Oct. 22.

10/18—Received 3 copies of respondents' brief and examined same.

10/24—Letter to Mr. Sheldon; letter to Mrs. Barnes that appeal will be heard next week. AFD

10/26—Letter to Mr. Sheldon advising that case will be argued week of Nov. 3; letter to Mrs. Barnes. AFD

10/29—Letter to Mrs. Barnes.

3369

11/3—Letter to Mrs. Barnes. AFD

11/6—Telegram to Mr. Sheldon. AFD

11/7—Case appeared on Circuit Court calendar; adjourned to Nov. 8.

11/8—Case passed to Nov. 12.

11/11—Telephone conference with Mr. Frohlich. AFD

11/12—In court; appeal on calendar, passed for the day. AFD

Sent telegram to Mr. Sheldon and Mrs. Barnes. AFD

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3370

11/13—In court; appeal on calendar; not reached. AFD
11/14—Argued appeal in Circuit Court of Appeals; letter to Mrs. Barnes reporting on same and letter to Mr. Sheldon AFD.P'OB
12/2—Received call from Mr. Roberts of the Circuit Court of Appeals requesting that LETTY LYNTON be screened for the Court Tuesday; telephoned Mr. Burkan in regard thereto; had further talks with Mr. Roberts and with Mr. Frohlich. AFD
12/3—Attended at Circuit Court of Appeals with attorneys on both sides and the judges and their secretaries; went to the City Hall Theatre across the
3371 street from the Post Office Building, and witnessed the showing of LETTY LYNTON; letter to Mr. Sheldon advising that screening of LETTY LYNTON was had; letter to Mrs. Barnes to the same effect. AFD

1936

1/17—Received decision from Circuit Court of Appeals; examined decision; conference of all the attorneys in the office; telephone conference with Mrs. Barnes in Chicago; telephone conference with Mrs. Malevinsky. Went to Mr. Sheldon's apartment with Mr. O'Brien and read opinion to him. Wrote
3372 letter to Mrs. Barnes enclosing copy of Judge Hand's opinion; telegram to Mr. Sheldon. AFD
1/20—Conference with Mr. Driscoll relative to procedure to be followed in connection with entry of order based on decision of Circuit Court of Appeals (Judge Hand) and other matters. O'B
Looking up law, most of the day. EJC
Trip to Circuit Court of Appeals re taxing costs and other matters. SGR
1/24—Petition for rehearing filed.
1/27—Conference with Mr. Driscoll. O'B
In library all day studying Section 25 of the Copy-

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3373

right Law; long letter to Mrs. Barnes commenting on Judge Hand's opinion. AFD
Spent all morning on question of damages. EJC
1/28—All day on examination of law of various states and other damage questions. EJC
1/29—Spent all morning working on law. EJC
Long letter to Mrs. Barnes. AFD
1/30—Drafted interlocutory decree. EJC
2/3—Letter to Mr. Cecil Barnes; letter to Mrs. Barnes. AFD
2/4—Wrote letter to Mrs. Barnes re latest developments. AFD

3374

2/6—Received notice from Circuit Court that petition for rehearing was denied.
2/8—Received notice from Clerk of District Court that mandate of Circuit Court of Appeals had been filed. Prepared interlocutory decree in final form and had same served. EJC
2/11—Settlement of interlocutory decree adjourned to Feb. 14. Letter to Secty of State re state of incorporation of MGM
2/13—Received order with notice of entry recalling mandate pending application for writ of certiorari. Prepared and dictated bill of costs. EJC
2/14—Interlocutory decree submitted for signature.

3375

Letter to Mr. Sheldon and Mrs. Barnes re developments. AFD
3/9—Letter to Mrs. Barnes. O'B
3/26—Prepared papers in motion to vacate stay.
3/31—Served notice of motion returnable April 6 to vacate stay (Circuit Court).
4/4—Received copy of petition for writ of certiorari and notice of filing of same.
4/6—Withdrew motion to vacate stay.
4/10—Signed consent to filing of brief amici curiae.

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4/8—Conference with Mr. Driscoll and Mr. Raftery in re petition for writ of certiorari; read carefully the moving papers on part of petitioner and forwarded copies of same with letter to Mrs. Barnes. O'B

4/13—Long memorandum to Mr. Clarke re application for writ of certiorari by Metro. AFD

4/16—Worked on brief practically all day. EJC

Letter to Mr. Sheldon; letter to Mrs. Barnes re petition for writ of certiorari. AFD

4/17—Worked on brief to Supreme Court with Mr. Clarke. SGR

377

Entire day spent at Bar Association looking up English law. SGR

Working on brief, all day. EJC

4/18—Examined draft of reply brief to the petition to the United States Supreme Court and had long conference with Mr. Clarke regarding same. Examined opinion of Mr. Justice Swan of U. S. Circuit Court of Appeals re "Captain January". Conferred with Mr. Clarke regarding same. O'B

4/21—Worked all evening at home on brief. AFD

4/22—Letter to Clerk of U. S. Supreme Court enclosing check for $5. for filing of respondents' brief. Prepared proof of service on attorney for appellants. EJC

378

Forwarded copies of answering brief in re petition to U. S. Supreme Court by Metro-Goldwyn-Mayer and others to Mrs. Barnes; also copy to Mr. Sheldon. O'B

5/4—Telephone conference with Mr. Keough. Received telegram from Clerk of Supreme Court that petition for certiorari had been denied; communicated with Dr. Myerson; letter to Mrs. Malevinsky. Telegram to Mrs. Barnes and Mr. Sheldon; letter to Mr. Barnes. AFD

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3379

5/5—Long letter to Mrs. Barnes advising her of present procedure. AFD

5/7—Visited Mr. Sheldon's home and conferred with him. AFD

5/8—Prepared decree. EJC

5/14—Long conference with Mrs. Barnes in the office. AFD

Served interlocutory decree with notice of settlement returnable May 16 before Judge Woolsey.

5/15—Conference with Mrs. Barnes. O'B

5/16—Settlement of decree adjourned to May 20.

5/20—Conference in my office with Mr. X regarding proposal of adjustment of case; informed Mr. Driscoll and Mr. Raftery of this information. O'B 3380

Received cross decree and memorandum in support thereof. Decree submitted for signature.

5/21—Received order to show cause returnable May 22 for rehearing in District Court.

5/22—Motion denied from Bench with leave to renew before Circuit Court.

Attended on motion re settlement of decree and striking out three defendants; referred by Judge Goddard to Judge Woolsey; argued before Judge Woolsey until 1:30. AFD

5/25—Received order with notice of settlement returnable May 26. 3381

5/26—No cross order submitted.

5/27—Received order with notice of entry.

Letter to Mr. Sheldon enclosing copy of letter from Judge Woolsey to the effect that he has withdrawn from further connection with the case; copy of Judge Woolsey's letter to Mrs. Barnes. AFD

5/28—Received order to show cause returnable June 1 in Circuit Court for rehearing of appeal. AFD

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5/29—With Mr. Clarke prepared answer to petition; prepared memorandum on behalf of complainants in opposition to petition returnable before the Circuit Court of Appeals; spent considerable time looking up law; occupied most of the day on the matter. AFD

6/1—Conf. Mr. X re proposed settlement; letter to Mr. X. O'B

6/1—Argued motion in Circuit Court of Appeals. Denied from the Bench. Returned to office and prepared decree with notice of settlement. Served decree with notice of settlement returnable June 3. AFD With Mr. Driscoll occupied 2 hours redrawing decree. EJC

6/2—Received cross decree.
Dictated detailed report to Mr. Sheldon and Mrs. Barnes jointly re letter received from Judge Woolsey withdrawing from case, and motion before Circuit Court on June 1st. Drew memorandum submitted by complainants upon the settlement of the interlocutory decree. AFD

6/3—Submitted proposed decree for signature.

6/9—Letter to Mrs. Barnes; letter to Mr. Sheldon; rewrote letter to Mr. Sheldon. AFD

6/10—Conference with Mr. X in my office regarding proposed adjustment of litigation. O'B

6/11—Letter to Mrs. Barnes. AFD

6/17—Letter to Mrs. Barnes making appointment of June 25. AFD

6/25—Long conference in the office, Mr. and Mrs. Barnes, Mr. O'Brien and Mr. Driscoll.
Prepared notice to appoint new attorney and served it upon Loew's and Culver.

6/26—Conference with motion picture expert re cost of negative. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3385

6/30—Made copies of statement of gross rentals of LETTY LYNTON by Miller, Donaldson & Co., C. P. A. AFD

7/24—Attended before Judge Knox with Milton Rosenbloom; after conference worked on revising of decree. AFD

Received notice of appointment of Leopold Friedman as attorney for Loew's, Inc. Received notice of appointment of Samuel D. Cohen as attorney for Culver Export Corporation.

7/27—At the Bar Association for one hour looking up law. PO'B

Served decree with notice of settlement returnable July 29. 3386

7/28—Received cross decree.

7/29—Submitted decree.

Sent Mrs. Barnes and Mr. Sheldon memorandum re July 24th appearance before Judge Knox. AFD

7/30—Received letter from Fidelity & Deposit Co. of Maryland; wrote them re termination of appeal bond. AFD

7/31—Letter to Mr. Sheldon. AFD

8/3—Law Journal reported decree signed.

8/5—Served decree with notice of entry on attorneys for defendants.

8/12—Memorandum for Mr. Sheldon and Mrs. Barnes enclosing copy of decree made by Judge Knox. AFD 3387

8/13—Telephone conference with Mr. Auchincloss' secretary; letter to Mr. Auchincloss enclosing copy of order with notice of entry made by Judge Knox; memo to Mr. Sheldon and Mrs. Barnes advising that I have been in communication with office of Mr. Auchincloss, Special Master. AFD

8/20—Memorandum to M. M. Rosenbloom to prepare memorandum of law on procedure in this matter. AFD

8/24—Served decree with notice of entry on Special Master, Mr. Auchincloss.

Procured certified copy of decree. SGR

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3388

8/26—Received letter from Mr. Auchincloss; making appointment for Thursday; conference with Mr. Clarke and Milton M. Rosenbloom re method of procedure; examined several cases and discussed same. AFD

8/27—Visited the office of Gordon Auchincloss; discussed hearings; memorandum to Mr. Sheldon and Mrs. Barnes re hearing on Sept. 9th. AFD

9/1—Prepared memorandum re procedure to be followed in proving accounting before Special Master in copyright infringement action. MMR

9/5—Memorandum to Mr. Clarke. AFD

3389

9/8—First hearing before Special Master. AFD

9/9—Memorandum to Mr. Sheldon and Mrs. Barnes reporting on hearing; letter to Mr. Sheldon. AFD

Memorandum to Mr. Driscoll re provision in Securities Act for securing name of subsidiaries of Loew's Inc. PO'B

9/11—Letter to Mr. Sheldon re developments. Memorandum to S. G. Rosenbloom. AFD

9/14—Conference in the office with Mr. and Mrs. Barnes. AFD

9/15—Telephone conference with Mr. Cohen of Mr. Rubin's office; letter to J. Robert Rubin advising him to change motion date to the 22nd. AFD

3390

9/16—Letter to Securities & Exchange Commission re cost of securing photostatic copy of registration statement of Loew's Inc.

Dictated memorandum. SGR

9/21—Letter to Securities and Exchange Commission re photostatic copies of exhibits on file with them. EJC

9/23—Conference with Mr. X. O'B

9/24—Conference with Mr. X; conferred with Mr. Driscoll. O'B

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3391

9/30—Memorandum to Cecil Barnes for his ideas re accounting. AFD

10/3—Letter to Mrs. Barnes re trial of this case.

10/5—Telephone conference with Mr. Cohen. AFD

10/6—Memorandum to Mr. O'Brien. AFD

10/6—Conference with Mr. X regarding appointment with J. Robert Rubin; communicated by telephone with Mr. Rubin; made appointment to discuss settlement. O'B

10/8—Letter to Mr. Sheldon. AFD

Telephone conference with Mr. Rubin. O'B

10/13—Conference with Miss Browning, secretary to Mr. Rubin, regarding postponement of appointment with Mr. Rubin from 11:00 until 2:45. In conference with Mr. Raftery from 2:45 to 4:15 P. M. Reported long conference with him to Mr. Driscoll and Mr. Raftery. Long conference Mr. Driscoll, Mr. Raftery and Mr. O'Brien in preparation of letter to be sent to J. Robert Rubin by Mr. O'Brien requesting details of statement of specific expenses and receipts mentioned in letter. O'B

3392

10/14—Drafted letter to J. Robert Rubin re accounting (5 pages); long memorandum to complainants attaching copy of Mr. Rubin's letter. O'B

10/20—Received accounting in debtor-creditor form.

3393

10/21—Attended hearing in the office of the Special Master with Mr. Clarke and Mr. Rosenbloom; dictated memorandum reporting on hearing; sent copies to Mr. Sheldon and Mrs. Barnes, together with copies of accounting. Sent letter to expert enclosing copy of account. AFD

Attended with Mr. Driscoll and Mr. Clarke before Special Master Auchincloss at 50 Broadway; hearing adjourned to Nov. 5 at 10:30. SGR

10/22—Telephone conference. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

10/23—Conference with Mr. X over the telephone; had forwarded to Mr. X photostatic copy of receipts and expenditures of motion picture LETTY LYNTON and also copy of affidavit of Mills filed in connection with preliminary injunction. O'B

11/5—Hearing adjourned to November 6.
Telephone conference with Mr. Cohen of Metro. ECR

11/6—Hearing adjourned to November 19.

11/11—Telephone conference with Mr. Cohen of Metro. ECR

11/19—Conference with Mr. Clarke re LETTY LYNTON. Mr. Clarke and Mr. Raftery spent considerable time in preparation for hearing. ECR
Hearing adjourned to November 20th.

11/20—All morning at hearing before Special Master. ECR

12/2—All morning at hearing before Special Master. ECR and EJC

12/10—Hearing adjourned to December 11.

12/11—All morning at hearing before Special Master; completed complainants' case and rested. ECR

12/14—Telephone conference; conferred with Mr. Paul O'Brien re same. ECR

12/15—Mr. Paul O'Brien and Miss Monahan attended at Metro's office to take extracts from foreign contracts; occupied 2 hrs. PO'B

12/16—Attended at Metro-Goldwyn's office for 2½ hrs. examining foreign contracts and making digests and schedule. PO'B

12/16—Long telephone conference with Mr. J. Robert Rubin relative to proposed settlement and urging us to submit a figure on behalf of plaintiffs. Prepared and sent letter to Mrs. Barnes regarding this matter; also communicated with Mr. Driscoll who was in hospital. Conferred with Mr. Raftery. O'B

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3397

12/18—Hearing adjourned to January 5, 1937.
12/20—Worked on schedule of foreign distribution. PO'B
12/23—Telephone conference with Mr. Cohen; letter to Mr. Driscoll regarding same. ECR

1937

1/6—Hearing adjourned to January 13.
1/13—Hearing adjourned to February 1.
1/15—Long conference with Mrs. Barnes at this office. ECR
Telephone conference with Mrs. Barnes. Long conference with her in the office re accounting proceeding. AFD
1/16—Long conference with Mrs. Barnes and Mr. Driscoll; telephone conference with J. Robert Rubin. ECR 3398
1/19—Went to Mr. Sheldon's apartment and conferred with Mr. Sheldon and Mrs. Barnes re accounting proceeding. AFD
1/20—Long conference with Mr. and Mrs. Barnes and Mr. Driscoll. ECR
Conference with Mr. and Mrs. Barnes and Mr. Driscoll. O'B
1/21—Long conference with Mr. Prager; spent most of the day working in the library on law. AFD
1/22—Conference with Mr. Cohen over telephone; working in the library nearly all day; long memorandum to Mr. Sheldon and Mrs. Barnes reporting on conference with Mr. Cohen. AFD 3399
1/25—Examination of law on accounting profits, etc. SGR
Conference with Mr. Cohen and Mr. Rubin at Mr. Rubin's office from 4:00 to 6:00. AFD
1/26—In conference with Sam Cohen of Metro and Mr. Driscoll at this office. ECR
Conference with Mr. Cohen in the office. Redrew part of stipulation. Prepared memorandum to Mr.

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3400

Sheldon and Mrs. Barnes re interview with Messrs. Rubin and Cohen. AFD

Long conference with Mr. Driscoll regarding his conference with J. Robert Rubin, general counsel for the defendants. Conference with Sam Cohen of Legal Department of Metro at our office. O'B

1/27—Long conference with Mr. Driscoll and Sam Cohen. ECR

Conference most of the afternoon with Mr. Cohen at this office. AFD

1/28—Two telephone conferences with Mr. Cohen; letter to Mr. Gordon Auchincloss, Special Master, to resume hearings immediately; copy to J. Robert Rubin. Memorandum to Mr. Sheldon and Mr. Barnes re postponement of trip to California. AFD

3401

1/29—Telephone conference with Mr. Cohen; long conference in the office with Mr. Cohen. Telegram to Mr. Barnes re postponement of trip to California; telephone conference with Mr. Prager. AFD

Rec'd notice of motion returnable Feb. 1, 1937 to have commission issue for the taking of testimony in California.

1/30—Telephone call from Mrs. Barnes followed by conference in the office with Mr. and Mrs. Barnes;

3402

telephone conference with Mr. Cohen of Metro; followed by long conference in the office lasting practically all afternoon. AFD

2/1—Hearing before Special Master. Arranged to take depositions March 1st. AFD

2/2—Telephone conference with Mr. Auchincloss. AFD

2/5—Order entered on stipulation for the taking of depositions in California; depositions to start March 1st.

2/6—Telephone conference with Mr. Cohen. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3403

2/8—Memorandum to Mrs. Barnes and Mr. Sheldon re trip to California; memorandum to Miss McMahon re tickets. AFD

2/11—Memorandum to Mr. Sheldon and Mrs. Barnes with copy to Mr. O'Brien; letter to Mr. Prager re trip to California. AFD

2/19—Two telephone calls with Miss Z, Miss Z called; long conference with her in my office. AFD

2/23—Conference with Mr. Clancy of Mr. Auchincloss' office over the telephone; conference with Walter Pollak, special counsel for Metro. Letter to Mr. X enclosing amended accounts asking for his suggestions. AFD

3404

2/25—Conference in the office with Mrs. Barnes; left for California to take depositions in re accounts. AFD

CALIFORNIA TRIP

to Left New York Thursday, Feb. 25, accompanied by Max Prager, accountant. Reached Los Angeles, Sunday, Feb. 28; began hearings before Special Master Auchincloss at the Studio of Metro-Goldwyn-Mayer, Monday,

3/15—March 1st. Hearings held March 1, 2, 3, 4, 5 and 6 and all day and evening of the 8th. On Tuesday, March 9 completed hearings and started back to New York with Mr. Prager. On Friday, March 12, between trains in Chicago saw Mr. and Mrs. Barnes at breakfast and reported to them fully on the matter. AFD

3405

3/8—Prepared and sent telegram to Mr. Driscoll in California. O'B

3/9—Letter to Mr. Sheldon and forwarded copy of same to Mrs. Barnes. O'B

3/15—Telephone conference with Mr. Sheldon; reported to him on Los Angeles Trip; telephone conference with Mr. Cohen of the Rubin office. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3406

3/16—Working in library on this matter.

3/17—Working in library; dictated memorandum re references to changes made by complainants in the amended account of MGM Pictures Corp. (20 pages). AFD

3/18—Letter to Mr. Sheldon re developments. AFD

3/19—Conference with Mr. Sheldon at his home; reported to him developments in California; telephone conference with Mr. Prager; spent large part of day working on account. AFD

3/22—Telephone conference with Mr. Auchincloss; telephone conference with Mr. Cohen; spent large part of day working on account. AFD

3407

3/23—Telephone conference with Mr. Cohen; memo to Mr. Sheldon and Mrs. Barnes. AFD

3/25—Telephone conference with Mr. Cohen; letter to Mr. Auchincloss re resuming hearings. AFD

3/31—Letter to J. Robert Rubin enclosing statement of information required at hearing and made copy of statement. EJC

4/6—Phone from Mr. Pollak requesting that hearings be adjourned from April 12th to April 19th. AFD

4/9—Letter to Max Prager that hearings have been postponed. AFD

3408

4/16—Memorandum to Milton M. Rosenbloom. AFD

4/20—Attended hearing all morning accompanied by Mr. Clarke and Mr. Prager. AFD

Prepared memorandum re testimony of Mills, etc. by Mr. Prager. EJC

4/21—Attended hearing before Special Master with Mr. Clarke and Mr. Prager; memorandum to Mrs. Barnes and Mr. Sheldon. AFD

4/22—Telephone conference with Mr. Pollak. AFD

4/23—Attended hearing before Special Master, Mr. Clarke and Mr. Prager. Memo to Mr. Sheldon and Mrs.

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3409

Barnes re hearing. AFD
Letter to Mr. Sheldon. AFD

5/4—Received letter from Special Master; conference in the office with Mr. Prager all afternoon preparing for hearing next day. AFD

5/5—Attended hearing before Special Master with Mr. Clarke and Mr. Prager. AFD

5/6—Hearing before Special Master; spent rest of the day with Mr. Prager and Mr. Clarke; phone from Mr. Beatty, of counsel for defendants. AFD

5/7—Hearing before Special Master with Mr. Prager and Mr. Clarke; returned to office and all spent rest of day on case. Memorandum to Mr. Sheldon and Mrs. Barnes re hearings. AFD

3410

5/10—Received call from Mr. Auchincloss informing me of further request to adjourn hearing. AFD

5/11—Memorandum to Mrs. Barnes and Mr. Sheldon. AFD

5/12—Conference with Mr. Prager in the office. AFD

5/14—Long conference with Mr. Prager in the office preparing for hearing. AFD

5/17—Conference with Mr. Clarke and Mr. Prager; attended hearing at Special Master's office all morning; with Mr. Clarke and Mr. Prager all afternoon discussing various phases of the matter. AFD

3411

5/18—Conference in the office with Mrs. Barnes. AFD

5/19—Two telephone conferences with Mr. Cohen of Metro. AFD

5/24—Attended hearing before Special Master Auchincloss; spent the rest of the day with Mr. Prager working on matter; prepared memorandum to Mrs. Barnes and Mr. Sheldon. AFD

5/25—Worked with Mr. Prager on accounts for about 2 hrs. Memorandum to Mr. Clarke and M. M. Rosenbloom re Loew's as a tort feasor. Letter to Mrs. Barnes and Mr. Sheldon. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3412

5/26—Looked up law, all morning. AFD

5/27—Revised brief; two telephone conferences with Mr. Pollak. AFD

5/28—Worked on brief; all day. AFD

6/2—Telephone conference with Mr. Pollak. AFD

6/3—Telephone conference with Mr. Auchincloss and Mr. Cohen. AFD

6/4—Telephone conference with Mr. Auchincloss. Telephone conference with Mr. Pollak and Mr. Cohen. AFD

6/9—Conference in the office—Mr. Driscoll, Mr. Raftery,
3413 Mr. Cohen and Mr. Mills; telephone conference with Mr. Pollak over telephone with Mr. Clancy of Mr. Auchincloss' office. AFD

6/10—Telephone conference with Mr. Auchincloss; letter to Max Prager re hearings. Telephone conference with S. D. Cohen. AFD

6/11—Conference with Mr. Pollak over telephone. AFD

6/15—Telephone conference with Mr. Clancy of Mr. Auchincloss' office. AFD

6/16—Attended hearings before Special Master. AFD

6/17—Conference in the office with Mr. and Mrs. Barnes. AFD

6/18—Conference with Mr. Pollak over telephone; con-
3414 ference with Mr. Cohen. AFD.

6/25—Worked with Mr. Prager on preparation of brief. AFD

6/28—Hearing before Referee with Mr. Clarke and Mr. Prager; telephone conference with Mr. Prager. AFD

6/29—Working all day with Mr. Clarke and Mr. Prager on brief. AFD

6/30—Worked all morning with Mr. Clarke and Mr. Prager on brief; attended hearing in the afternoon, lasted until after 6:30. AFD

Schedule as to Services Rendered; Annexed to Affidavit of Arthur F. Driscoll.

3415

7/1—Conference with Mr. Prager in the office; working with Mr. Prager and Mr. Clarke on account. Memo to Mrs. Barnes and Mr. Sheldon re hearings to date; continued with draft of brief. Telephone conference with S. D. Cohen. AFD

7/2—Telephone conference with Mr. Prager; telephone conference with Mr. Cohen; working with Mr. Prager and Mr. Clarke all day. AFD

7/6—Spent entire day on matter with Mr. Clarke and Mr. Prager. Hearings started at 10:00 A. M. at 50 Broadway; continued all morning; adjourned for lunch; continued after lunch; at four o'clock left the hearing room for 1540 Broadway for screening of the picture; screening completed about 6:00 o'clock. AFD 3416

7/7—All day with Mr. Prager and Mr. Clarke at Bar Association; long memorandum to Mrs. Barnes and Mr. Sheldon re developments; letter to Mr. Auchincloss citing cases; copy to Mr. Cohen and Mr. Pollak; continued with draft of brief. AFD

7/8—All day working on brief at Bar Association. AFD

7/9—Attended at hearing with Mr. Clarke and Mr. Prager at Mr. Auchincloss' office; continued work on draft of brief. AFD

7/12—Drew memorandum re foreign subsidiaries. EJC 3417

7/14—Working on draft of brief. AFD

7/15—Telephone conference with Mr. Cohen; working all day on brief with Mr. Prager. AFD

7/16—Working on draft of brief; memorandum to Mrs. Barnes and Mr. Sheldon. AFD

7/26—Completed and served brief, findings and corrected account; received defendants' brief and findings; took them home and spent the evening examining them. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3418

7/27—Worked in library all day with Mr. Prager; 2 telephone calls from Mr. Auchincloss; 1 telephone conference with Mr. Cohen of Metro; drafting reply memorandum. AFD

7/28—Worked on reply brief. AFD
Worked on brief. EJC

7/29—Letter to Mrs. Barnes enclosing copy of brief and accounting; drafted reply brief. AFD

8/2—Prepared draft of brief re Loew's liability for profits made by its subsidiaries on LETTY LYNTON. EJC

8/10—Working on brief; telephone conference with Mr. Sheldon; telephone conference with Sam Cohen. AFD

3419

8/11—Attended hearing before Special Master, 10:00 to 1:00. Mr. Clarke and Mr. Prager also present. AFD

8/12—Two telephone conferences with Mr. Prager; memo to Mr. Sheldon and Mrs. Barnes reporting on recent hearing. AFD

7/16—Working on brief. AFD

8/17—Working on reply brief. AFD

8/18—Working on reply brief. AFD

8/19—Reading brief. AFD

8/20—Served reply brief. Received respondent's reply brief. AFD

3423

8/23—Submitted complainants' reply brief.

8/24—Received by mail at my camp in Southwick defendants' reply brief; spent considerable time studying it. AFD

9/7—Letter to enclosing statements of Loew Theatres which played LETTY LYNTON asking comments; listed theatres. ECR

9/21—Telephone conference with Mr. Cohen asking for an adjournment of the hearings set for this week; after considerable discussion consented to adjourn them. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3421

9/22—Telephone conference with S. D. Cohen. AFD

9/27—Telegram to Mrs. Barnes making appointment for Thursday. AFD

9/28—Telephone conference with Sam Cohen. AFD

9/30—Hearing before Referee Auchincloss; attended by Mr. Barnes, Mr. Prager, Mr. Clarke and AFD

Conference with Mr. and Mrs. Barnes in the office later in the day; conference with Mr. Prager in the office. AFD

Conference with Mr. and Mrs. Barnes; also conferred with Mr. Driscoll. O'B

10/1—Prepared memo to Edward Sheldon re latest hearing. AFD 3422

Conference with Mr. and Mrs. Barnes; also with Mr. Driscoll. ECR

10/2—Conference in the office with Mr. Prager. AFD

10/5—At hearing before Special Master with Mr. Clarke and Mr. Prager. AFD

10/6—Conferred with over the telephone; conference with Mr. Driscoll. ECR

10/7—Telephone conference with ; long conference at his office; conferred with Mr. Driscoll. ECR

Long memorandum to Mrs. Barnes and Mr. Sheldon re last hearing. AFD 3423

11/4—Phone from Mr. Clancy of Mr. Auchincloss' office informing me that Mr. Pollak would be unable to go on with the hearing Nov. 8; agreed to Nov. 19. AFD

11/9—Telephone conference with Mr. Auchincloss requesting that we compute the percentage of cost represented by various overhead charges. Conferred with Mr. Prager in regard thereto. Later in the day long conference with Mr. Prager and Mr. Clarke preparing statement to be submitted to Mr. Auchincloss. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

11/10—Drafted letter to Mr. Auchincloss. AFD

11/11—Working on statement re overhead; conference with Mr. Clarke; telephone conference with Mr. Cohen; letter to Mr. Auchincloss with copy to Mr. Rubin, Leopold Friedman and Walter Pollak re defendants' filing of "Comparative Analysis of the Play and Picture, Trial and Play." Letter to Mr. Auchincloss enclosing our computation of labor and materials and total negative cost; letter to S. D. Cohen enclosing same. AFD

11/15—Prepared memorandum to Mrs. Barnes and Mr. Sheldon; made copies of my letter to Mr. Auchincloss re comparative analysis of play and picture, trial and play and Mr. Auchincloss' reply thereto. AFD

11/18—Long letter to Mr. Sheldon; telephone conference with Walter Pollak. AFD

11/19—Telephone conference with Mr. Auchincloss.

11/22—All day at hearing before Special Master with Mr. Prager and Mr. Clarke. AFD

11/23—Hearing all afternoon before Special Master with Mr. Prager and Mr. Clarke; returned to office and examined records and authorities. AFD

11/24—Hearing at Mr. Auchincloss' office all day; morning and afternoon. Dictated memorandum for Mr. Sheldon and Mrs. Barnes. AFD
Attended hearing. EJC
Letter to Mrs. Barnes. AFD

11/26—Hearing at Mr. Auchincloss' office; drafted letter to Special Master; revised same. AFD and EJC

11/27—Prepared long letter to Mr. Auchincloss in final form, with copies to Mr. Pollak, Leopold Friedman and J. Robert Rubin; revised memorandum on proposed allocation of production overhead. Memo to Mrs. Barnes and letter to Mr. Sheldon enclosing copy of letter to Mr. Auchincloss. AFD

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3427

11/30—Conference with Mr. Auchincloss over telephone; conference with Mr. Prager and Mr. Clarke in the office; prepared memorandum for the file. AFD

12/1—Conference with Mr. Prager. AFD

12/2—Revised 6 pages of memorandum (main brief); letter to Mr. Auchincloss enclosing same for substitution in his copy of main brief; sent copies to Mr. Rubin, Mr. Pollak and Mr. Friedman; also enclosing photostats showing recomputations of accounting of foreign subsidiaries. AFD

12/6—Working on case; phone from Mr. Auchincloss; conference with Mr. Prager. AFD

3428

12/7—Telephone conference with Mr. Auchincloss. AFD

12/8—Phone from Mr. Pollak's office requesting adjournment of hearing set for 9th. AFD

12/9—Three telephone conferences with Mr. Auchincloss; conferences with Mrs. Barnes and Mr. Prager in the office; answered certain questions asked by Mr. Auchincloss as to the record. AFD

12/10—Phone from Mr. Auchincloss for information in regard to certain parts of the account. Studied it out with Mr. Prager and telephoned Mr. Auchincloss. Dictated memo for the files. AFD

12/16—Attended hearing before Special Master with Mr. Clarke and Mr. Prager. AFD

3429

12/30—Two telephone conferences with Mr. Auchincloss; looked up certain information asked for by him and reported back to him. AFD

1938

1/3—Received phone from Mr. Auchincloss regarding overhead of Loew Theatres; began work with Mr. Clarke in estimating the overhead. AFD

1/4—Prepared long memorandum for Mr. Driscoll re procedure after filing of report by Special Master. MMR

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

30

Spent all day and until 11:00 o'clock in the evening working with Mr. Prager and Mr. Clarke in preparation of new schedules having to do with overhead on Loew Theatres; two telephone conferences with Mr. Auchincloss. AFD

1/5—Long conference with Mr. Prager in the office; long letter to Hon. Gordon Auchincloss enclosing certain schedules re Loew Theatres; sent copy to Mr. Rubin and Mr. Pollak. AFD

1/14—Four telephone conferences with Mr. Auchincloss; spent some time looking over records re overhead charges on foreign versions. Sent copy of memo- 31 randum of MMR re. procedure re report to Mr. Auchincloss. AFD

1/17—Two telephone conferences with Mr. Auchincloss; two telephone conferences with Samuel D. Cohen. AFD

1/18—Three telephone conferences with Mr. Auchincloss; looked up information asked for by him and advised him of it. Long memorandum to Mrs. Barnes and Mr. Sheldon bringing them up to date on proceedings. AFD

1/19—Telephone conference with Mr. Auchincloss' secretary; gave him certain information that we had 32 culled out of the record. AFD

1/24—Letter to Mr. Sheldon. AFD

1/26—Telephone conference with Mr. Cohen. Mr. Cohen sent to office new schedules re Loew Theatres; examined them and turned them over to Mr. Clarke for his examination. AFD

2/3—Telephone conference with Mr. Auchincloss. AFD

2/7—Conference at Mr. Auchincloss' office; accompanied by Mr. Clarke and Mr. Prager. AFD

2/8—Prepared memorandum for Mrs. Barnes and Mr. Sheldon. AFD

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3433

2/10—Conference with Mr. Prager and Mr. Clarke studying box office statements of vaudeville theatres, and preparing new schedules for Special Master. Dictated long letter to Mr. Auchincloss enclosing new schedules, with copy to Mr. Rubin and Mr. Pollak. AFD

2/11—Working with Mr. Prager and Mr. Clarke studying box office statements of vaudeville theatres; and preparing new schedules for Special Master. Dictated long letter to Mr. Auchincloss enclosing new schedules, with copy to Mr. Rubin and Mr. Pollak. AFD

2/14—Dictated further memorandum opposing defendants' proposal to divide all Loew profits in 101 theatres, 1/3 to vaudeville and 2/3 to LETTY LYNTON 15 pages. AFD 3434

2/15—Worked with Mr. Prager and Mr. Clarke re new schedules to be submitted to Special Master. Revised and redrew several pages of memorandum. AFD

2/16—Completed revision of memorandum (18 pages); sent same to Mr. Auchincloss with letter, and copies to Mr. Rubin and Mr. Pollak. AFD

2/18—Conference in the office with Mrs. Barnes. AFD

3/1—Telephone conference with Earle Beatty. AFD

3/10—Telephone conference with Mr. Auchincloss; memo for Mr. Clarke and Mr. Prager and M. M. Rosenbloom re hearing on March 16. AFD 3435

3/14—Telephone conference with Mr. Auchincloss asking for references to testimony in re Federal Tax. Telephoned Mr. Prager; asked him to examine minutes and report. AFD

3/15—Telephone conference with Mr. Auchincloss. AFD

3/16—Hearing before Special Master; attended by Mr. Driscoll, Mr. Clarke and Mr. Prager, 10:30 to 1:00. Letter to Mr. Pollak enclosing Milton Rosenbloom's

Schedule as to Services Rendered, Annexed to Affidavit of Arthur F. Driscoll.

3436

memorandum re procedure with regard to report of Special Master; memorandum to Mrs. Barnes and Mr. Sheldon reporting on hearing. AFD

3/21—Letter to Mr. Auchincloss re memorandum of defendants re Exhibit L-14 and testimony of Vogel. Letter to Mr. Barnes. AFD

4/1—Letter to Mr. Auchincloss protesting that 20 days is too long a time in which to file objections to draft report; copy to Mr. Pollak. AFD

4/7—Conference with Mr. Prager in the office; telephone conference with Mr. Prager; telephone conference with S. D. Cohen. AFD

3437

4/8—Long conference with Mr. S. D. Cohen in the office; telephone conference with Mr. Auchincloss. AFD

4/11—Telephone conference with Mr. Auchincloss; telephone conference with Mr. Prager. AFD

4/14—Went to office at 8:00 A. M.; received copy of Special Master's report; telephoned Mrs. Barnes in Chicago; telephoned Mr. Sheldon. Spent several hours during the day reading the report. Cable to Mr. Raftery. Letter to Mrs. Barnes and Mr. Sheldon enclosing draft of Master's report. AFD Drafted objections to Master's report with M. Prager. EJC

3438

4/15—Telephone conference with Mr. Auchincloss; with S. D. Cohen. AFD

4/18—Telephone conference with Mr. Prager; telephone conference with Mr. Pollak; telephone conference with Mr. Auchincloss. AFD

4/19—Received letter from Special Master extending time to file suggestions to May 2, 1938. AFD

4/21—Conference in the office with Mr. Prager. AFD

4/22—With Mr. Prager and Mr. Clarke worked on objections to report of Special Master, all morning. AFD

4/25—With Mr. Prager and Mr. Clarke worked on objections to report of Special Master, all afternoon. AFD 3439

4/29—Served objections and suggestions to draft report of Special Master.

5/2—Filed objections and suggestions to draft report of Special Master.

Affidavit of Jesse T. Mills, Read in Opposition to Motion.

3440

[SAME TITLE.]

State of New York,
City of New York,
County of New York—ss.:

JESSE T. MILLS, being duly sworn, deposes and says:

I am the Assistant-Secretary of Loew's Incorporated and submit this affidavit in behalf of the defendant Loew's Incorporated as well as in behalf of the other defendants in this action, in opposition to the plaintiffs' motion for attorneys' fees and in opposition to the plaintiffs' motion to confirm the report of the Special Master. 3441

AS TO THE REPORT OF THE SPECIAL MASTER:

The opposition of the defendants to the plaintiffs' motion to confirm the report of the Special Master and the grounds therefor are set forth in the exceptions which have been filed, which will be amplified by a brief to be submitted to the Court upon the argument of this motion.

3442 AS TO THE FIXING OF A COUNSEL FEE TO BE ALLOWED TO THE ATTORNEYS FOR THE PLAINTIFFS:

The defendants have no objection to the fixation of a *reasonable* counsel fee, but the defendants object, and object strenuously, to the suggestion of the plaintiffs that the services of plaintiffs' counsel in this matter are reasonably worth $135,000 or any sum approximating that amount. The reason for the defendants' objections will be set forth hereafter.

The plaintiffs brought suit for an infringement of copyright, claiming that their play "Dishonored Lady" was infringed by the motion picture "Letty Lynton," pro-
3443 duced by the defendant Metro-Goldwyn Pictures Corporation and distributed by the defendant Metro-Goldwyn-Mayer Distributing Corporation.

The trial was had before Judge Woolsey and was a comparatively simple one, the trial lasting in its entirety one and a half days in New York and two days were taken up by oral argument before Judge Woolsey in Petersham, Mass.

The only witnesses produced by the plaintiffs were one of the plaintiffs, Margaret Ayer Barnes, and J. Robert Rubin. Mr. Rubin's examination was very short. His entire examination, direct, cross and re-direct, is set forth
3444 on pages 19 to 34 of the case on appeal. The witnesses produced by the defendants were examined on written interrogatories, the only witnesses examined in New York orally being Harrison R. Steeves, an expert produced by the defendants, and Gabriel L. Hess, the general attorney for the Motion Picture Producers & Distributors of America, Inc. Mr. Hess' entire examination, direct, cross and re-direct, covers less than twelve pages of the printed case on appeal.

The trial resulted in a judgment dismissing the plaintiffs' complaint on the merits.

After the dismissal, plaintiffs appealed to the Circuit 3445
Court of Appeals, which reversed the judgment of Judge Woolsey. The argument of the appeal took but the allotted time.

The subject involved was a play which the plaintiffs offered to sell to the defendants for $30,000 as a motion picture vehicle. The contract for the sale of the motion picture rights in "Dishonored Lady" contained this provision:

> "Our assignments are therefore delivered to Mr. Bickerton with this understanding, which is that Metro, if it obtains this approval within thirty (30) days, will on its part then sign the contracts and 3446
> pay Mr. Bickerton the Thirty Thousand Dollars ($30,000) therein provided, but Metro is not obligated to take the rights unless in thirty (30) days it secures such approval of the Hays' Office, and if it does not so secure such approval then the contracts now signed by us and deposited with Mr. Bickerton will be returned to us by Mr. Bickerton."

The consent of the Motion Picture Producers & Distributors of America, Inc. (the Hays' Office) was not forthcoming for the reason that the play "Dishonored Lady" was considered too lewd and lascivious to be produced in motion pictures. 3447

The motion picture "Letty Lynton" was based upon the novel "Letty Lynton" written by Marie Belloc Lowndes, which the defendant Metro-Goldwyn Pictures Corporation purchased. This novel was founded on the old Madeline Smith Trial in Glasgow, Scotland, in the year 1857, upon which trial plaintiffs' play likewise was based.

The Circuit Court of Appeals, nevertheless, felt that in writing the motion picture scenario, the writers were unable to divorce entirely from their minds the play which some of them had read or which one or more of

3448 them had seen on the West Coast. As Judge Hand put it:

> "With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions; memory and fancy merge even in adults."

Of the 600 odd items appearing in the schedule attached to the affidavit of Arthur E. Driscoll in support of his motion for an allowance of counsel fees, approximately 150 of them relate to the sending and receiving of letters, the making and receiving of telephone calls, and the sending
3449 and receiving of telegrams, 30 prior to the trial and about 120 after the trial. Many of the items relate to the mere signing of stipulations and clerical service with reference to the answering of calendars and the performance of duties with respect to calendar practice and the noticing of Law Journal decisions.

A dozen or more entries relate to letters received from and letters sent to a certain Mr. X and conferences with Mr. X, whose identity is undisclosed, and telephone talks with a Miss Z, whose identity likewise remains a mystery.

Many of the items prior to the trial relate to the preparation of affidavits, an order to show cause for an injunction pendente lite and voluminous briefs for use on the
3450 motion for a preliminary injunction, which the plaintiffs should have known, under the authorities, would not be granted in a case of this kind, where the facts were disputed. The motion for a temporary injunction was denied by Judge Goddard.

A goodly number of the enumerated items have to do with the preparation of affidavits in opposition to a motion for a bill of particulars and the preparation of motion papers requiring defendants to answer certain interrogatories propounded by plaintiffs, which motion plaintiffs subsequently withdrew.

After the appeal the only work that the defendants should reasonably be charged with is the preparation of a memorandum in opposition to the defendants' motion for a writ of certiorari to the Supreme Court of the United States, which was denied. The plaintiffs' memorandum consisted of 21 pages and the defendants' application consisted of 25 pages. 3451

In the main, the enumerated items are of the same category as items of services rendered daily by law offices in goods sold and delivered actions and in actions generally based on contract violations and by and large it can be safely asserted that neither the trial nor the appeal—aside from the amount of profits found to have been earned by the Special Master—involved questions of law or of fact more complicated than the general run of cases usually encountered in a law office. 3452

The travail which plaintiffs' counsel so graphically describe in their moving papers as having been experienced by them during the conduct of the litigation, upon scrutiny, will be found to be the run of the mill variety of vicissitudes which lawyers engaged in court work have to cope with daily.

After the appeal was decided in favor of the plaintiffs, an order was entered appointing Gordon Auchincloss, Esq., Special Master.

Almost from the very beginning of the hearings before the Special Master the defendants, realizing the tremendous task which they were called upon to meet in order to prove their costs and receipts and a proper allocation thereof, urged that their books of account and records be examined by a reputable public accounting firm such as Price, Waterhouse & Company, Touche, Nevin & Co. or Haskins & Sells. This offer was consistently rejected by the plaintiffs who insisted upon an examination of the defendants' books and records by their own accountant, Mr. Max Prager. This the defendants would not accede to. Thus we find at page 3453

3454 63 of the minutes adduced at the hearing before the Special Master in New York the following:

> "Mr. Cohen: I would like to have this record indicate that we are ready and willing to have an accountant to come into our organization to examine our books and records, which cover tons of material. It is physically impossible to bring all the records down here at any session. I shall endeavor to bring down all the records we can at one time; but if they will designate an accountant of reputation and integrity who is recognized in the industry, who can produce a worth while accounting, we will be the
3455 first one to recognize him and use him.
>
> "Mr. Raftery: We are past making any offers of any kind. We now rest on the million dollars gross and we are going to ask you to go forward and make your proof."

The rejection of the defendants' offer to have the books and records examined by a reputable accounting firm necessitated the calling of many witnesses and the production of voluminous documents.

It soon became apparent that even with this the defendants would be unable to prove the accounting in New York because of the many objections interposed by plaintiffs'
3456 counsel as to the competency of the proof adduced. Plaintiffs' counsel well knew that the motion picture was produced in California; that the books and records of original entry were kept in California, and that the persons who would be competent to testify with respect to the entries contained in the books and records were all stationed in California at the studios of the Metro-Goldwyn-Mayer Corporation. Thus we find plaintiffs' counsel objecting at page 25 of the testimony adduced before the Special Master in New York as follows:

> "It (the accounting) is attacked. All we have to

do is to object; he has to prove it. The statute so provides." 3457

And at page 54:

"Mr. Raftery: As to the production cost, Mr. Berry has no knowledge of it whatever other than what information was sent him from the Coast. The accountants at the Coast are the ones who made the items entered here. The only way I can cross examine and find out about these overhead charges is to examine the same people whom you bring for these other hearings. They are the ones who kept them." 3458

And at pages 60 and 61:

"Mr. Raftery: Now, Mr. Special Master, we have been down here five times and we are going back to the original proposition that we reached on the first hearing. During the five meetings so far we finally succeeded in getting the gross sales. The gross sales as shown by the amended account of the Metro-Goldwyn Pictures Corporation, domestic sales, $733,732.62; the gross sales in the foreign field shown in the last hearing amount to $435,266.64, or a total of $1,168,999.26. We accept both those figures as admissions against interest, and that is our prima facie case, and we rest on those totals, in accordance with section 25 of the Copyright Act which states that the plaintiff shall be required to prove sales only. Then the Act says that the defendant shall be required to prove every element of cost which he claims. So, therefore, instead of our worrying about figures or witnesses or accepting statements backed up only by totals or a slip of paper which a witness produces, we are going to 3459

3160 insist that the defendants come forward with competent evidence to prove their items of expense.

"Our damage as proven so far by their own records is $1,168,999.26. Now, it is up to the defendants to go forward and prove their cost. If they have any deductions they must prove them and must prove them by competent evidence.

"That is the plaintiffs' or complainants' prima facie case of damage and amount of damage."

And at pages 62 and 63:

"By Mr. Cohen (examining Mr. Berry):

3161

Q. You were to let us have some breakdown of some figures now at this hearing. You will recall you let us have the totals at the last hearing.

"Mr. Raftery: We are going to object to evidence of this character as not the best evidence. It is not the proper way to prove the account.

"The Special Master: It may not be the best evidence, but if he wants to let him put it in.

"Mr. Raftery: So that I may not interrupt Mr. Cohen in his examination, may I have a general objection to the whole line of testimony?

3162 "The Special Master: You may reserve your right to object to its competency."

And at pages 68, 69, 70 and 71:

"Mr. Raftery: I reserve my motion to strike out Mr. Berry's testimony as not the best evidence.

"The Special Master: May I ask counsel how they construe Equity Rule 62 with reference to the powers of a master, where it reads that the master has power also to direct the mode in which the

matters requiring evidence shall be proved before him"; what does that mean? 3163

"Mr. Cohen: I think you have the full power——

"Mr. Raftery: Subject to the statute——

"Mr. Clarke: I think the section of the Copyright Act is a special exception to the rule, in view of the fact that the accounting party has the burden of justifying his deductions.

"The Special Master: Frankly, the thing I am particularly interested in getting light on in this case is not the kind of charges that have just been read off by the accountant, which I suppose there is no question about; but the propriety of some of the other charges which bulk up into large amounts, 3164
retained by the foreign companies, and then, in the domestic operations, that large item.

"I don't see how in the world I am ever going to get any information on that unless I have the advice of someone who has examined these books, that I can have complete confidence in, who will tell me his opinion with reference to the propriety of these charges. Now, have I got any right to designate an accountant of my own to assist me in this thing, to present these matters to me?"

"Mr. Cohen: Before your Honor debates that may I say this: I intend to present at subsequent 3165
hearings our own accountants, Miller, Donaldson & Co., people who have made an examination and audit of our books and who are authorities on motion picture accounting. Of course, they will testify, not so much as advocates of the defendants, but as experts in their profession.

"We expect to have Mr. Craig, the accountant at the studio, here to testify from the standpoint of the Metro-Goldwyn Pictures Corporation and from the standpoint of the Culver Export Corporation, in an endeavor to justify all of the items which appear

in the accounting; but Miller, Donaldson & Co. can testify not only from what they observed in the studios in the examination of our books, but also as writers on the subject, and people who are well versed in the accounting field, in so far as it pertains to motion pictures, and that will be fortified, I dare say, by other certified public accountants who are well recognized.

"Mr. Raftery: We are not interested in opinion evidence of any character. We are interested in one thing, the actual cost. All you are entitled to prove is actual cost.

"Miller, Donaldson & Co. are your paid employees who audit your books regularly and who do all your work. I am not going to tell you whether to bring them or not to bring them, but the only thing we are interested in here is actual cost. That means, actual cost of production, and not fictitious cost.

"Mr. Cohen: Mr. Special Master, I just want to give you an idea of what papers are involved. These reports (producing bundle of papers) refer to one foreign country relating to the picture 'Letty Lynton'. There are approximately 1500 like bundles.

"Mr. Raftery: I am surprised there are so few.

"Mr. Cohen: That is of the Culver Export Corporation alone.

"The Special Master: You will have to go ahead."

And at pages 145 and 146:

"The Special Master: I do not see how you are, over the plaintiffs' objection going to prove your deductions by secondary evidence. I think, if they object to your secondary evidence, you have got to prove it by primary evidence. So far I do not see any proper evidence that has gone in here which will be valuable to me in passing on these de-

ductions from the gross. We had an admitted gross 3469
of something over $1,000,000 and then we have got an accountant's list of what you claim to be deductions, but we most certainly can't say that those items have been satisfactorily proved as proper deductions in this case. That is the way I feel about it.

"I am not going to issue an order, over objection, for a general taking of depositions. You may go and get it from the Court, if you can. But that practice puts me in a position of trying this entire case by deposition. If that is done with the entire approval of both sides I will probably ask for instructions from the Court, but over the objection of 3470
one side I am not going to order it."

Before long it ceased being debatable that because of the plaintiffs' objection to the evidence produced in New York, the only safe course to pursue was the taking of testimony in California as to the cost of producing the motion picture.

A motion was thereupon duly made before the Special Master, on affidavit and notice of motion, for the taking of the testimony of certain witnesses in California who would be in a position to give competent testimony with reference to the cost of producing the motion picture "Letty Lynton," and the following colloquy took place with ref- 3471
erence to the said motion:

"Mr. Cohen: What will your Honor do under the circumstances?

"The Special Master: I will be glad to have your suggestions as to how to continue this case without delay.

"Mr. Cohen: My suggestion is my motion.

"The Special Master: That has been objected to. I am not going to order the taking of depositions three thousand miles away.

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3472 "Mr. Cohen: How can we do it?

"The Special Master: That is your worry.

"Mr. Cohen: A way must be found in law and equity how best we can prove our case.

"The Special Master: It has either got to be proved here or on the Coast. I do not believe Mr. Driscoll is going to take the position that you can't prove this case on the Coast." (Page 146).

And at pages 148 and 149:

"The Special Master: Irrespective of that, whether it has been solely the responsibility of one
3473 side or whether both sides have been responsible for the—I would not say, stalling; I will say, delay—whatever the reason for the delay was, I do not see any reason for the delay's continuing. Since I feel that way, and since I am unwilling to issue an order here whereby there will be depositions taken which will be practically the entire case, and since there is objection to that proceeding, you have either got to agree among yourselves to prove this case here, that means bringing on your witnesses such as he requires for the primary evidence——

"Mr. Cohen: As I require, you mean?

3474 "The Special Master: As he requires. You have got to bring on your witnesses.

"Mr. Cohen: He has got his gross. I have got to prove my deductions.

"The Special Master: If he is going to interpose objections on the ground that the evidence you have produced is not primary evidence, you have got to meet that objection by producing such proof as is not objectionable.

"Mr. Cohen: The purpose of asking for this order is to produce that primary evidence."

As to the cost of the taking of the California testimony, 3475
the only reference thereto in the record is the following:

> "Mr. Driscoll: I had stipulated that if he would pay my car fare and hotel bills I would go out and take the depositions.
>
> "Mr. Cohen: That is a reasonable request; we had agreed to it."

And at pages 150 and 151:

> "The Special Master: Just a minute. I do not know whether I want to commit myself on this—or if Judge Knox tells me that he would prefer that I 3476
> should go to California myself and take this testimony, I might consider doing that; but I am certainly not going to do it and impose a charge on this thing for my services—I mean, I practically have to do it on the basis of a vacation, that is practically what I would have to do it on. I mean, I do not think it would be fair to impose a charge for my time as Special Master. I would practically have to do it on the same basis Mr. Driscoll suggests. I am not so sure I want to do that."

And at pages 152 and 153: 3477

> "The Special Master: I think you ought to let me know this afternoon whether this course of procedure will be followed or not, in other words, whether we are going to have these hearings in California or whether we are going to sit right here and do it here.
>
> "Mr. Cohen: We will have to have it held in California.
>
> "The Special Master: Then, have your clients agreed on this proposition?

178 "Mr. Cohen: As to the expenses?

"The Special Master: The proposition to proceed in California, to proceed daily until completed, with the expenses of the Referee and the expenses of plaintiffs' counsel, that his accountant will be paid, and that approval of Judge Knox to the procedure will also be obtained.

"Mr. Cohen: As to counsel, we have agreed to pay expenses. As to his accountant, that is something different.

"Mr. Driscoll: Let us drop everything, then, and proceed with your case here.

179 "Mr. Cohen: Why drop it? We have a motion pending.

"The Special Master: Instead of depriving the Special Master of the opportunity to see the witnesses and have the testimony adduced before him in the usual course, we are going out to California."

Thereafter a written stipulation was entered into with plaintiffs' attorneys covering the taking of the testimony in California, as follows:

180 "IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties that the testimony of such witnesses as may be called by any party hereto shall be taken at the studios of defendant Metro-Goldwyn Pictures Corporation, Culver City, California, before the Special Master Gordon Auchincloss, beginning Monday, March 1, 1937, at 10:30 A. M. and continuing daily until completed, and to the end that such testimony may be procured as aforesaid the defendants stipulate and agree to pay to the complainants' counsel the sum of Eight Hundred Dollars ($800.00) to cover plaintiffs' expenses in full in connection with the taking of such testimony, and further stipulate and agree

to pay the reasonable expenses of Special Master 3481
Gordon Auchincloss in connection with the said taking of testimony.

"IT IS FURTHER STIPULATED AND AGREED that the defendants shall furnish a competent stenographer or reporter to transcribe the taking of said testimony, and that a copy thereof shall be furnished for the use of the Special Master and a copy thereof shall be furnished for the use of counsel for plaintiffs at defendants' expense.

"IT IS FURTHER STIPULATED AND AGREED that photo- 3482
static copies of any exhibits that are admitted into evidence may be substituted for the originals and returned with the depositions to New York.

"IT IS FURTHER STIPULATED AND AGREED that an order to that effect may be made and entered herein without further notice."

A check for $800. was delivered to Mr. Driscoll in accordance with said stipulation and a check for $182.30 was delivered to Mr. Auchincloss on account of his railroad expenses, and subsequently a further check was delivered to Mr. Auchincloss for $270.30 covering the bal- 3483
ance of his expenses while in California.

In fixing counsel fees for the attorneys for the plaintiffs, the Court should always have in mind that in cases of this kind in all probability the attorneys for the plaintiffs have an agreement with the plaintiffs whereby the attorneys agree to prosecute the case based upon a percentage—usually 33⅓% and in some cases even higher—of the amount awarded, and as to the amount awarded, it should not be lost sight of that the plaintiffs are not responsible for the huge sum which the Special Master found to be the gains and profits from the motion picture

3484 "Letty Lynton". The business ability of the defendants, with the vast producing and distributing organizations at their command, is solely responsible for these profits. The decree which the plaintiffs' counsel succeeded in obtaining in the Circuit Court of Appeals merely provided for an accounting of profits. The defendants themselves introduced every bit of evidence showing gross receipts from all sources and the cost of producing and distributing the motion picture. The labor on the part of counsel for the plaintiffs would have been the same had the profits been meager or even had there been no profits at all. The statute provides, and plaintiffs' counsel were not at all
3485 hesitant in insisting, that "the defendant shall be required to prove every element of cost which he claims." Said Mr. Raftery: "All we have to do is to object; he has to prove it. The statute so provides."

The work of counsel before the Special Master and of the Special Master himself would have been in large measure avoided and the hearings considerably lessened had the suggestion of counsel for the defendants been adopted, that the defendants' books and records be examined by an accounting firm of outstanding ability and recognized standing, who would make an impartial audit and report back to the Special Master. But the plaintiffs spurned such an offer and elected to proceed before the
3486 Special Master where the defendants were put to the task of proving "every element of cost" claimed by the defendants. By pugnaciously insisting upon their strict legal rights, they, and they alone, are responsible for the "swollen" record adduced before the Special Master.

Because of their unjustifiable and "I stay here on my bond" attitude, it is submitted that plaintiffs have disentitled themselves to equitable consideration. Surely, in such circumstances, plaintiffs should not be permitted to add to the already heavy and expensive burdens cast upon the defendants.

As an aid to the Court in the fixation of counsel fees 3487
in this case, we have culled from the reports what we believe to be all of the copyright infringement cases in which attorneys' fees were awarded. These cases are set forth below:

Bearing in mind that the award of attorneys' fees must be reasonable and is discretionary with the Court, no fees were allowed in *Buck* v. *Bilke* (C. C. A. 9th Circuit), 63 Fed. (2d) 447.

In *Schellberg* v. *Empringham*, 36 Fed. (2d) 991, in view of the difficulties encountered in the suit, and because of the difficult questions involved, necessitating two trials, 3488
Judge Knox awarded a counsel fee of $2500.00 to the successful plaintiff, $1500.00 payable by the main defendant, $250.00 payable by the defendant The Health Education Society and $750.00 payable by the defendant Mathew Bender & Co.

In *General Drafting Co. Inc.* v. *Andrews*, 37 Fed. (2d) 54 (C. C. A. 2nd) an award of $4000.00 counsel fees was allowed because of the labor involved in preparing for trial and upon appeal.

In *Cory* v. *Physical Culture Hotel Co.*, 14 Fed. Supp. 977, and 14 Fed. Supp. 986, a counsel fee of $2500. was allowed for services rendered in District Court and in the Circuit Court of Appeals even though the court found 3489
the services to be worth much more than the sum allowed. There the defendant used the photograph over 1,700,000 times and although the court might have given damages for $35,000. it nevertheless awarded but $5000. The court pointed out that if plaintiff were to pay his attorney out of the $5000. judgment it would have had little, if anything, for itself. The court therefore allowed a counsel fee of $2500. so that something should be left to the plaintiff after paying his attorney for his services. The award of counsel fee was affirmed by the Circuit Court of Appeals,

3490 Second Circuit (88 Fed. (2d) 411) and an award of an additional counsel fee in the Circuit Court of Appeals denied, the court saying: "we find the attorney's fee allowed below sufficient in amount to include a reasonable fee in this court also, and so affirm that without making an additional award".

In *M. Witmark & Sons* v. *Calloway*, 22 Fed. (2d) 412, the court awarded $250, as a counsel fee to the successful plaintiff in a music copyright infringement suit.

In *Cohan* v. *Richmond*, 86 Fed. (2d) 680 (C. C. A. 2), the attorney for the defendant asked for a counsel fee of $3500. This was denied by Judge Patterson without prejudice. The application was renewed and referred to a Special
3491 Master who awarded a counsel fee of $3000. This was reduced by the District Court to $2000., which assessed the cost of the reference amounting to $297.50 to the plaintiff. The Circuit Court of Appeals by Judge Learned Hand reduced the award of counsel fee to the attorney for the defendant to $400. and assessed the cost of the reference against the defendant instead of against the plaintiff holding also that if the cost of the reference had been paid by the plaintiff, then he was entitled to recoup himself for that amount out of the counsel fee of $400.

In *Sebring Pottery Co.* v. *Steubenville Pottery Co.*, 9 Fed. Supp. 384, the Special Master reported that plain-
3492 tiff had paid or had obligated itself to pay to its attorney $2152.81 before the case reached the Special Master. Under the circumstances the Special Master recommended an allowance of $2500. as an attorney's fee. The exceptions to the report of the Special Master were overruled except as to the allowance of the counsel fee, the Court saying: "The recommended allowance for a case of the proportions of this one seems to be in excess of an amount which the court might reasonably allow", and reduced the allowance to $1800.

In *F. A. Mills* v. *Standard Music Roll Co.*, 223 Fed.

849, aff'd 241 Fed. 360, the counsel fee awarded to the successful plaintiff was $150. 3493

In *S. E. Hendricks Co.* v. *Thomas Publishing Co.* (C. C. A. 2), 242 Fed. 37, an allowance of a $2500. counsel fee was affirmed on appeal.

In *Universal Film Manufacturing Company* v. *Coppeman*, 218 Fed. 577, a counsel fee awarded by Judge Hough of $250. was affirmed.

In *Stodart* v. *Mutual Film Corporation*, 249 Fed. 507, aff'd 249 Fed. 513, Judge Learned Hand awarded a counsel fee of $300.

In *Haas* v. *Leo Feist Inc.*, 234 Fed. 105, Judge Learned Hand decreed an accounting and costs "since the statute requires it". He made, however, no allowance for attorney's fees "for that rests in discretion". 3494

Lewys v. *O'Neill*, 49 Fed. (2d) 603, was an infringement suit in which it was claimed that defendant's successful play "Strange Interlude" infringed plaintiff's play. There plaintiff claimed damages of $1,250,000. and an accounting of profits of over $1,000.000. That case was as involved as, if not more so than, the case at bar. Judge Woolsey allowed a counsel fee to O'Neill, the principal defendant, of $7500; to Boni & Liveright, Inc. and Horace Liveright, Inc. he awarded a counsel fee together of $5000, and to the Theatre Guild, Inc. a counsel fee of $5000 was awarded, the said defendants being represented by separate counsel. 3495

In *Anne Nichols* v. *Universal Pictures Corporation*, 34 Fed. (2d) 145, the trial commenced December 20, 1928 and continued until January 11, 1929, a trial lasting 15 actual court days. Prior to the trial the attorneys for defendants put in three full years of work. The defendant's counsel were headed by Ex-Governor Nathan L. Miller who defended the suit. The facts and the law involved in the Nichols case were much more complicated than the present case and the trial infinitely more difficult.

96 The defendant proved that its outlay for legal services alone exceeded $100,000. Judge Goddard awarded a counsel fee of $10,000.

In *M. Witmark & Sons* v. *Pastime Amusement Co.*, 298 F. 470; aff'd 2 F. (2d) 1020, the Court allowed a full bill of costs because it was mandatory and in its discretion awarded plaintiff a fee of $100. for its attorneys.

In *Fred Fisher Inc.* v. *Dillingham*, 298 F. 145, Judge Learned Hand, though awarding judgment to the plaintiff for $250. and a full bill of costs, nevertheless, in his discretion, refused an attorney's allowance, remarking "Such victories I may properly enough make a luxury to the winner".

97 In *Marks* v. *Leo Feist Inc.*, 8 F. (2d) 460, the Circuit Court of Appeals for the Second Circuit modified the decree allowing an attorney's fee by reducing it from $1500. to $500.

In the case of *Darilla* v. *The Brunswick-Balke-Collender Co. of New York*, 19 F. Supp. 819, aff'd 94 F. (2d) 567, the attorney prayed for an allowance of $20,000. for 904 hours of his time. The District Court awarded him $2,000. which the Circuit Court of Appeals cut down to $1,000.

What the plaintiffs here seek is the equivalent of thirteen and one-half (13½) years pay of a judge of
98 this Court, and their purpose seems to us to ask for everything imaginable in the hope that by asking for a great deal they will be sure to receive something.

The award of counsel fees lies wholly in the discretion of the Court and what was intended as an appeal to the heart and conscience of the Chancellor should not be converted into a plundering expedition.

Bearing in mind what has been said, we believe that the Court in its discretion, without the slightest torment, could very well deny an award of counsel fee; but if the Court should feel that in the exercise of its discretion a

counsel fee should be awarded to the plaintiffs' attorneys, 3499
we respectfully submit that such an award of $5,000. would be fair and reasonable in the circumstances and. that a sum in excess of that amount should not be granted.

JESSE T. MILLS.

Sworn to before me this
6th day of July, 1938.

JAY M. EISENBERG,
Notary Public,
Kings County.
Kings Co. Clk. No. 156, Reg. No. 9057.
N. Y. Co. Clks. No. 145, Reg. 9-E-103. 3500
Bronx Co. Clks. No. 5, Reg. No. 38-E-39.
Queens Co. Clk. No. 1590, Reg. 6339.
Commission Expires March 30, 1939.

Reply Affidavit of Edward C. Raftery, Read in Support of Motion.

E 69-218.

[SAME TITLE.] 3501

State of New York,
County of New York,
City of New York—ss.:

EDWARD C. RAFTERY, being duly sworn, says:

I am an attorney and counsellor at law and a member of the firm of O'Brien, Driscoll & Raftery, attorneys for the above named complainants.

witness had a small slip of paper in his vest pocket and when asked a question would examine this slip of paper and testify accordingly.

Realizing we were getting nowhere due to the dilatory tactics of the defendants, we made a suggestion to the defendants that instead of wasting all this time on hearings that we have our accountant make an examination of the books and records used to substantiate the accounts that were filed. This was flatly refused by the defendants. Their counter-proposition was that we select Price, Waterhouse Company to make the audit. They not only refused to have our accountant do it, but they tried to select the accountant that we were to use to make our own audit, at our own expense.

After stalling around for about 7 months, defendants retained Walter Pollak, Esq. to try the accounting on behalf of all the defendants. Mr. Pollak's first appearance in the action was at a hearing on the 31st day of March, 1937, which was the sixth hearing had before the Master. From that time on the hearings proceeded and were eventually finished. The stalling tactics of defendants counsel were abandoned with the entry of Mr. Pollak into the litigation, and without in any way agreeing with the unique, and sometimes fanciful theories that Mr. Pollak had about the Copyright Law, he exhausted every effort to minimize and cut down the recovery in this case.

The colloquy between counsel, cited in Mr. Mills affidavit, occurred prior to Mr. Pollak's entry into the litigation. It occurred during the time that the defendants were either seeking to adjourn hearings or produce witnesses who had no knowledge of the facts. It occurred at the time of the rejection of plaintiffs offer to place their own accountant in and make the necessary audit.

The first hearing was held before the Master on September 9, 1936, although he had been appointed on July 29, 1936. The next hearing was held on October 21, 1936 and on the night before it, to-wit: October 20, 1936 the

first accounts were served by Metro-Goldwyn Pictures Corporation and Culver Export Corporation. They were filed as Exhibits at the hearing held on October 21, 1936. It was stated at this hearing by defendants counsel that the books of original entry were at the Studio in California. The hearing was adjourned for 10 days to give defendants an opportunity to furnish further figures and also to give the plaintiffs an opportunity to examine the figures. 3511

On November 5, 1936 the hearing was adjourned to November 6; on November 6 the hearing was adjourned to November 17; on November 17 to November 19; on November 19 to November 20.

Mr. Driscoll who had been in charge of the hearing was not able to be present on November 20, 1936 so I attended the hearing with Mr. Clarke. It was at this hearing that amended accounts were filed. Needless to say these amended accounts reduced the profit on "Letty Lynton" considerably. No books or records, of any kind or character, were produced at any time up to and including this hearing of November 20, 1936. So without getting any books, records or witnesses, the hearing was adjourned to December 2, 1936, and Mr. Berry, an accountant, was produced. 3512

Mr. Berry testified entirely from the filed account, without producing a book or record, except a slip of paper which he had in his vest pocket. No original records, not even secondary records were produced, although the witness testified repeatedly that original records were in existence which could be examined at any time, if they were produced. At any rate, the hearing was adjourned to December 11, 1936 and at this meeting there occurred the colloquy which is found in Mr. Mills affidavit. He has failed entirely, however, to insert what is found on page 60 of the minutes: 3513

"Mr. Raftery: Now, Mr. Special Master, we have been down here five times and we are going back

Reply Affidavit of Edward C. Raftery.

I have read the affidavit of Jesse T. Mills, submitted, apparently, in opposition to the application of complainants counsel to fix a reasonable counsel fee, in accordance with the decision of the Circuit Court of Appeals, as embodied in the decree of Judge Knox. The affidavit is not made by an attorney, nor by any of the important officers of the defendant corporations, but rather by one of its paid accountants. The affidavit is highly argumentative and is in reality a supplemental brief.

Mr. Mills, the accountant, swears that the trial was "a comparatively simple one" and that the argument of the appeal took but the allotted time. He then attempts to make a detailed analysis of the work done by my partner, Arthur F. Driscoll and his associates and the daily record attached to the application for counsel fee. In connection with the application for a preliminary injunction this same accountant states "that plaintiffs should have known, under the authorities, would not be granted in a case of this kind, where the facts were disputed." Thus intimating to this court that the application should never have been made. As a matter of fact, what happened was that the application was made for a temporary injunction, and in line with a general practice where the facts were disputed, the application for a temporary injunction was denied, but the case was set for immediate trial on the merits.

This same accountant then minimizes the work done by the attorneys in connection with the certiorari application. The detailed daily statements show the tremendous amount of work done by our firm in the 6 years history of this litigation and it is submitted, that it is not proper for a paid employee, lacking entirely the qualification, to criticize or minimize the work done in this case.

It is submitted, therefore, that Mr. Mills' affidavit should be disregarded by this court in connection with the fixation of counsel fees. The duty of this court to fix counsel fees was imposed by the decision of the Circuit Court of Appeals.

On page 6 of the affidavit, this same expert—Mills the

accountant—states the difficulties experienced by plaintiffs 3505
counsel "will be found to be the run of the mill variety of vicissitudes which lawyers engaged in court work have to cope with daily."

He then goes in to the hearings before the Special Master. Gordon H. Auchincloss, Esq. was appointed Special Master by Judge Knox on the 29th day of July, 1936. Shortly after his appointment and qualification, plaintiffs counsel pressed for an early hearing. It is safe to say—without fear of contradiction—that every time a hearing was set by the Master, counsel for the defendants asked for an adjournment.

In the early stages of the hearings a familiar trick re- 3506
sorted to was to produce a witness who had no knowledge of the facts, and as a result thereof, the hearing would have to be adjourned. At the outset they agreed to prepare written accounts fully accounting for all the profits of "Letty Lynton" from all sources. A set of accounts was prepared for the producing and distributing company and a set for the export company (Culver). It was then the theory of the hearings that plaintiffs counsel could examine these accounts and defendants would furnish the necessary witnesses to support the accounts, so that plaintiffs counsel could examine fully into the items in the accounts. These accounts were submitted to the Master and copies were furnished to counsel. Suddenly, these 3507
accounts were withdrawn and a new set of accounts submitted for each of these defendants.

In the early stages of the hearings, a witness would be produced who was supposed to have personal knowledge of the matters contained in a particular account. For example—a witness named Van Straten was produced to substantiate the cost of the Spanish version of the photoplay, which was made in Spain. This witness had never been to Spain; knew nothing about the production of the picture and based a statement which he had prepared on some reports he had received from Spain. This same

to the original proposition that we reached on the first hearing. During the five meetings so far we finally succeeded in getting the gross sales. The gross sales as shown by the amended account of the Metro-Goldwyn Pictures Corporation, domestic sales, $733,732.62; the gross sales in the foreign field shown in the last hearing amount to $435,266.64, or a total of $1,168,999.26. We accept both those figures as admissions against interest, and that is our prima facie case, and we rest on those totals, in accordance with Section 25 of the Copyright Act which states that the plaintiff shall be required to prove sales only. Then the Act says that the defendant shall be required to prove every element of cost which he claims. So, therefore, instead of worrying about figures or witnesses or accepting statements backed up only by totals or a slip of paper which a witness produces, we are going to insist that the defendants come forward with competent evidence to prove their items of expense.

"Our damage as proven so far by their own records is $1,168,999.26. Now, it is up to the defendants to go forward and prove their cost. If they have any deductions they must prove them and must prove them by competent evidence.

"That is the plaintiffs' or complainants' prima facie case of damage and amount of damage."

At the same hearing Mr. Cohen, of counsel for the defendants stated that he intended to have their accountants, Miller, Donaldson & Co. present to testify, and also Mr. Craig, counsel for the Studio. At the close of this hearing it developed that all these accountants of the foreign department were present without books and upon inquiry we were advised the books were in Barcelona, and the hearing then adjourned to December 18, 1936; then to January 6, 1937; then to January 13, 1937; then to January

27, 1937 and finally the hearings resumed on February 1, 1937. So far as the hearings were concerned—from July until February—all that was elicited, in reality, were a few figures grudgingly given and without books or records to support them. I suppose these are the ordinary run of the mill vicissitudes that the expert Mills refers to in his affidavit. 3517

Thereupon, defendants' counsel abandoned the idea of bringing witnesses from California, and made a motion before the Master to take depositions in California. The parties stipulated to take these depositions as set forth in the stipulation.

Mr. Mills very improperly in his affidavit states that in cases of this kind, in all probability, the attorneys for the plaintiffs have a contingent agreement with the plaintiffs. Whatever arrangement exists, if any, between plaintiffs and their counsel has no bearing on this application. The mandate of the Circuit Court of Appeals requires the fixation of reasonable counsel fees in the Circuit Court and in the District Court. 3518

Then Mr. Mills goes on to state glibly that it is the business ability of the defendants that made the profits possible, and the labor on the part of counsel for plaintiffs would have been the same had the profits been meager, or if there had been no profits at all.

As regards the first statement—Mr. Mills overlooks the proposition that the defendants appropriated plaintiffs' literary property to make the picture. Hence, the profits. 3519

As regards the second suggestion—it took seven months of protracted delays on the part of plaintiffs counsel to get the gross receipts and the remaining balance of the 2 year period to eliminate the wheat from the chaff in the synthetic deductions built up by the defendants and their counsel in order to minimize their profits.

There will be submitted with this affidavit a resumé of authorities showing the elements to be taken into consideration in fixing counsel fees, and in none of these authorities

3520 do any of Mr. Mills' suggestions or guides appear, but rather the importance of the litigation, the size of the recovery, the length of time and the extent of the effort put into the litigation, the eminence of opposing counsel, the obstacles put in the path by opposing counsel, the eminence of counsel seeking the allowance, but above all, the results secured in the litigation, is the all determining factor. The size of the recovery, therefore, in this case warrants the allowance of $135,000., irrespective of the opinion of Mr. Mills.

Mr. Mills on page 15 of his affidavit states: "By pugnaciously insisting upon their strict legal rights, they, and they alone, are responsible for the 'swollen' record adduced before the Special Master." Counsel for the plaintiffs had
3521 nothing to do with Mr. Pollak's fanciful ideas of the Copyright Law. These unique ideas of apportionment, all of which were rejected by the Special Master, and rightly so, were not built up by plaintiffs counsel. On the contrary, they had to be torn down by plaintiffs' counsel. Plaintiffs' counsel did not seek to deduct as an item of expense nine hundred some odd thousand dollars paid to Messrs Rubin, Mayer and Thalberg as their share of the operation of Loew's, Inc. This likewise had to be exploded by plaintiffs' counsel.

The $1,500,000. interest charges paid to Loew's, Inc. by the subsidiaries of Metro was not injected as an expense by
3522 plaintiffs' counsel. It had to be eliminated, however.

The labor and materials theory which Mr. Davis became so confused about on the argument on production and the numerical basis on distribution, was another brain child of the defendants and had to be destroyed, likewise by plaintiffs' counsel and which ultimately were both destroyed by the Master.

Mr. Mills, at page 15 of his affidavit, steps out of his character as an accountant, and to quote him: "We have culled from the reports what we believe to be all of the copyright infringement cases in which attorneys' fees were awarded." In each of the cases cited by Mr. Mills the

court examined the circumstances and made an award accordingly. That is what plaintiffs' counsel asks this court to do in this case. The mandate of the Circuit Court requires this court to fix a reasonable counsel fee. Each case where a counsel fee is to be awarded must of necessity stand on its own peculiar set of facts and the circumstances surrounding said peculiar set of facts. 3523

In my opinion, this is the most extraordinary plagiarism suit that has ever been tried or decided in the United States courts. It is the first case of its kind where a plaintiff has been successful. In the run of the mill cases (Mills' affidavit) the defendants have always succeeded and the award of counsel fee has been made accordingly. There is no discretion in this case as to whether there will be a counsel fee or not. That discretion was exercised by the Circuit Court of Appeals. There must be an award and the award must be commensurate with the work done if it is to be a reasonable award. 3524

In the case of *Rankin* v. *Associated Bill Posters* (cited in our brief), which was tried in this court by the late Nathan Burkan, who tried this case before Judge Woolsey, for the defendants, Mr. Burkan's clients recovered judgments, which when multiplied by 3, totalled $300,000. The trial court fixed a counsel fee of $50,000.

In *Straus* v. *Victor* (likewise in our brief) the judgments totalled $184,000 and the court awarded $35,000 counsel fee. 3525

In *American Can* v. *Ledoga Canning,* tried in the District Court in Indiana, the judgment was in the amount of $90,000 and the court awarded $15,000 counsel fee.

These cases all were under the Sherman Act, but the statute is very similar to the copyright statute in that it permits the award of a reasonable counsel fee to a successful plaintiff—the amount to rest in the discretion of the trial court.

These are the only precedents that a court may look to in awarding a counsel fee in this case. A recovery of $5,000.

and an award of $2,500 counsel fee, as suggested in Mr. Mills' affidavit is not a fair basis, as plaintiffs herein are not asking 50% of the recovery as a counsel fee (*Cory* v. *Physical Culture Hotel*, page 16 of Mills' affidavit). The other cases are all small in nature or cases in which the defendants have succeeded.

We resent very much the suggestion on page 20 of Mr. Mills' affidavit that we are seeking to convert this application for a reasonable counsel fee into a "plundering expedition".

We, therefore, pray this court that, in view of the importance of the litigation and the result that we have secured for our clients, that our clients be awarded a reasonable attorneys' fee against all of the defendants and we suggest, therefore, the amount of $135,000.

EDWARD C. RAFTERY.

Sworn to before me this
12th day of July, 1938.

LILLIAN E. McMAHON,
Notary Public.
Queens Co. Clk's No. 1224, Reg. No. 5108.
N. Y. Co. Clk's No. 121, Reg. No. 9-M-46.
Commission Expires March 30, 1939.

Affidavit of Jesse T. Mills.

3529

[SAME TITLE.]

State of New York,
City of New York,
County of New York—ss.:

JESSE T. MILLS, being duly sworn, deposes and says:

I am Assistant Secretary and Comptroller of Loew's Incorporated, and have occupied these positions since prior to the year 1932, and since which time all income tax returns of Loew's Incorporated were prepared under my supervision. 3530

Loew's Incorporated and the other defendants in this suit operate, and since prior to the year 1932 have operated, on a fiscal year basis.

For the fiscal year September 1, 1931 to and including August 31, 1932, Loew's Incorporated and its subsidiary companies filed a consolidated income tax return for its operations during that fiscal year. In that consolidated income tax return, Loew's Incorporated showed a consolidated net taxable income for the said fiscal year of $7,531,466.85. The Federal income tax showed on the return as originally filed was $1,021,979.50 (before credit for foreign taxes), 3531 which was at the rate of 13.68%.

Thereafter, the Federal Government successfully maintained that Loew's Incorporated was liable for an additional taxable income of $209,033.97, which made a total adjusted taxable income of $7,740,500.82, and assessed a tax on the additional income found to be due of $28,566.61, making a total adjusted tax of $1,050,546.11 (before credit for foreign taxes). This additional tax was figured at the rate of 13⅔%.

Against this total adjusted tax of $1,050,546.11, Loew's

3562 The decree also enjoined defendants from exhibiting the motion picture, directed that the defendants recover their costs and disbursements and that this Court retain jurisdiction for various purposes and to determine the amount to be awarded the complainants for attorney's fees.

This motion brings up for consideration the report of the special master and the exceptions filed thereto, the application of the special master for compensation for his services and the request of the complainants that they be allowed a reasonable counsel fee for services rendered by their attorneys.

On the hearings before the special master the complainants offered no proof of damages but sought an accounting 3563 of all the profits the defendants made from the infringement (Copyright Act, 17 U. S. C. A. sec. 25). The special master's report is a volume of eighty-seven printed pages. It is an excellent report. He sets forth the gross sum ($1,655,269.15), realized from the sales and exhibition of the motion picture and the various elements of cost of production, distribution and exhibition, totaling $1,067,664.78, which he found to be proper as deductions in determining the net profits of $587,604.37, the defendants made from the infringement.

The special master in his report states:

3564 "1. Apparently, from the testimony before me, the motion picture business divides itself into three distinct parts or operations;

(a) Production, or making of the picture, including hiring of cast and securing of sets, costumes, literary material, the actual photography, (generally referred to as 'shooting' the picture), and the development of the picture.

(b) Distribution, which includes the leasing of positive prints of the picture to theatre owners

or operators (generally referred to as exhibitors), 3565
for exhibition in their respective theatres. Distribution is generally made through a corporation maintaining branches (referred to as exchanges) in the different key cities throughout the country; and

(c) Exhibition, or the actual showing of the picture on the screen to the public by the owner or operators of a theatre.

2. The motion picture LETTY LYNTON was produced by Metro-Goldwyn-Mayer Corporation. It was thereafter turned over to Metro-Goldwyn Pictures Corporation at cost. Metro-Goldwyn Pictures Corporation turned over the picture to Metro-Goldwyn-Mayer Distributing Corporation for domestic distribution, upon an arrangement whereby the Distributing Company was to pay to the Pictures Corporation 80% of the gross receipts or proceeds received from the rental of said picture to exhibitors (Defendants' Exhibits 17, 18, 19). 3566

Thereafter the Distributing Company rented the picture to exhibitors throughout the United States and its possessions, and paid to Metro-Goldwyn Pictures Corporation 80% of the gross receipts (Defendants' Exhibit 19).

The picture was also turned over by Metro-Goldwyn Pictures Corporation to Culver Export Company for foreign distribution, and to Regal Films, Ltd., for Canadian distribution. Culver Export Corporation in turn distributed it abroad (excepting Canada) through wholly owned foreign subsidiaries (except in Sweden), which in turn paid to Culver Export Corporation a percentage of the gross receipts varying with the different foreign subsidiaries (Defendants' Exhibits 17, 20, 21). 3567

3568 3. The picture was distributed in Canada through a contract with the Regal Films, Ltd., a Canadian corporation, not owned or controlled by any of the defendants, and the proceeds received by the Pictures Corporation from said Regal Films, Ltd., are accounted for by the Pictures Corporation (Defendants' Exhibits 18, N. Y. S. M., 375).

4. A separate account has been filed by each defendant named in this action.

An account was filed by Metro-Goldwyn Pictures Corporation which included the 80% of the rentals received by Metro-Goldwyn Pictures Corporation
3569 from the Metro-Goldwyn-Mayer Distributing Corporation, and took as a deduction against said rentals, the cost of the making of the picture by the Producing Company (Defendants' Exhibit 18).

An account was filed by Metro-Goldwyn-Mayer Distributing Corporation which accounted for the 20% of the gross rentals retained by the Distributing Corporation (Defendants' Exhibit 19).

An account was filed by the Culver Export Corporation which accounted for the part of the proceeds derived from foreign distribution received by Culver Export Corporation from its foreign subsidiaries (Defendants' Exhibit 20).

3570 An account was filed on behalf of the foreign subsidiaries which accounted for the portion of the gross receipts from foreign rentals retained by those foreign subsidiaries (Defendants' Exhibit 21).

An account was filed by Loew's Inc., which accounted for the profits of all of the Loew Theatres in which the said picture was exhibited (Defendants' Exhibits L-6—L-13, both inclusive).

5. The corporation organization chart as of August 31, 1932, appears as Defendants' Exhibit

17. This shows that Loew's, Inc., owned at that time 100% of the stock of the MGM Company, Inc., and that the MGM Company, Inc., owned 100% of the common stock of Metro-Goldwyn Pictures Corporation. The Metro-Goldwyn Pictures Corporation preferred stock was listed on the New York Stock Exchange and about 10% of it was owned by Loew's Inc. Metro-Goldwyn Pictures Corporation in turn owned all of the capital stock of the Metro-Goldwyn-Mayer Distributing Corporation (domestic distributor), Metro-Goldwyn-Mayer Corporation (producer) and the Culver Export Corporation. 3571

6. The decree above quoted instructs the Special Master to 'report separately the amount of such gains and profits of the defendants obtained from all sources outside of the United States'. This, in effect, means that the account of the defendant, Culver Export Corporation and the account of its foreign subsidiaries are to be separately examined." 3572

The report then considers separately the accounting made by the defendants, discusses the various items involved therein, lists those items concerning which there was no controversy and states the special master's reasons for disallowing other items. The accounts filed by the defendants are restated by the special master in accordance with his rulings on the contested items contained therein. 3573

Rule 61½ of the old Equity Rules, promulgated by the United States Supreme Court, provides that "the report of the master shall be treated as presumptively correct". Under Rule 1 of the Rules of Practice in copyright proceedings, effective July 1, 1909, "the rules of equity practice, so far as they may be applicable shall be enforced in proceedings instituted under section 25" of the Copyright Act. The new Federal Rules of Civil Procedure do not apply because, under Rule 81 (a) (1) thereof, they have

Opinion of Leibell, *D. J.*

No. E 69-218.

O'Brien, Driscoll & Raftery, Esqs., Attorneys for Complainants, 152 West 42nd Street, New York City (Arthur F. Driscoll, Esq., Edward C. Raftery, Esq., Edward J. Clarke, Esq., T. Newman Lawler, Esq., and Sidney G. Rosenbloom, Esq., of Counsel).

J. Robert Rubin, Esq., Attorney for defendants, Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, 1540 Broadway, New York City.

Leopold Friedman, Esq., Attorney for defendant, Loew's Inc., 1540 Broadway, New York City.

Samuel D. Cohen, Esq., Attorney for defendant, Culver Export Corporation, 1540 Broadway, New York City (John W. Davis, Esq., Samuel D. Cohen, Esq., Earle L. Beatty, Esq., and J. Paschall Davis, Esq., of Counsel).

Leibell, *D. J.*

Complainants, Edward Sheldon and Margaret Ayer Barnes, instituted this suit against the defendants, Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Loew's Inc. and Culver Export Corporation alleging that the defendants in making, distributing and exhibiting their motion picture "Letty Lynton" appropriated and infringed upon complainants' dramatic composition "Dishonored Lady". The case was tried and the complaint dismissed (7 Fed. Supp. 837). The decree of the District Court was reversed on appeal (81 Fed. (2d) 49). The concluding paragraph of the appelate court's opinion provides:

> "The decree will be reversed and an injunction will go against the picture together with a decree

for damages and an accounting. The plaintiffs will 3559
be awarded an attorney's fee in this court and in the court below, both to be fixed by the District Court upon the final decree."

On the mandate of the Circuit Court of Appeals an interlocutory decree was entered in this Court wherein it was adjudged that the defendants had infringed complainants' copyright by copying complainants' dramatic composition, by manufacturing therefrom the motion picture "Letty Lynton", by distributing the motion picture and by exhibiting it for profit. The decree directed:

"4. That the complainants recover of the de- 3560
fendants and each of them all damages sustained by them and that the complainants recover of the defendants and each of them all gains and profits made by the defendants and each of them because of the said infringement upon complainants' copyright by copying said dramatic composition or by making the said motion picture 'LETTY LYNTON' and and by their use and trafficking in, or in any manner dealing with the said motion picture 'LETTY LYNTON', or in any rights thereto or by giving public performances thereof, or causing, licensing, aiding and abetting or in any other manner assisting in the giving of public performances thereof, or in any 3561
other way, form or manner whatsoever."

A special master was named in the decree

"to ascertain and report the amount of complainants' damages herein and the amount of such gains and profits of the defendants and each of them and in addition, the said Special Master shall report separately the amount of such gains and profits of the defendants, obtained from all sources outside of the United States."

3532 Incorporated was allowed a credit for foreign taxes paid by Culver Export Corporation, because of its income from foreign countries, of $307,905.31 and its subsidiaries of $829.15, a total of $308,734.46, which amount deducted from $1,050,546.11 left $741,811.65 duly paid the Federal Government.

I give below the allocation of the taxable income, the allocated tax and the name of the Company against which the income and tax were allocated:

Name	Taxable Income	Tax Paid
Loew's Incorporated	$4,469,800.98	$610,872.81
3533 Metro-Goldwyn Pictures Corporation	128,102.35	17,507.32
Metro-Goldwyn-Mayer Distributing Corporation	268,221.88	36,656.99

The above tax of $741,811.65, plus the taxes paid foreign governments of $308,734.46, made the total tax of Loew's Incorporated and its subsidiaries, for the fiscal year ended August 31, 1932, $1,050,546.11.

The Federal income tax of Loew's Incorporated and of its affiliated corporations for the said fiscal year ended August 31, 1932, was paid in installments on the following dates:

3534

November	15, 1932	$250,000.00
February	15, 1932	150,000.00
May	15, 1932	133,654.01
August	15, 1933	177,884.67
August	18, 1934	30,272.97
Total		$741,811.65

The accounting of the defendant Culver Export Corporation was based on 1933 figures, the receipt of Culver Export

Corporation from the picture "Letty Lynton" having come in principally during the fiscal year ended August 31, 1933 and the expenses incurred by Culver Export Corporation involving the motion picture "Letty Lynton" having occurred during said fiscal year. 3535

For the fiscal year September 1, 1932 to and including August 31, 1933, Loew's Incorporated and its subsidiary corporations filed a consolidated income tax return for its operations during that fiscal year. In the consolidated income tax return, Loew's Incorporated showed a consolidated net taxable income for the said fiscal year of $5,576,871.09. The Federal income tax shown on the said return as so filed (before credit for foreign taxes) was $808,646.31, which was at the rate of 14½%. 3536

The portion of the taxable income included in the said consolidated income tax return so filed by Loew's Incorporated for the fiscal year ended August 31, 1933, which was applicable to Culver Export Corporation, amounted to $4,653,895.88, and the income tax so applicable to the said Culver Export Corporation, figured in accordance with Revenue Act of 1932 at the rate of 14½%, was $674,814.90.

Against the total consolidated Loew's Incorporated income tax, the Government allowed a credit of $435,479.65, for foreign income taxes paid by Culver Export Corporation because of its income from foreign countries. An additional credit was allowed by the Federal Government for foreign income taxes paid by subsidiary companies of Culver Export Corporation, because of their receipt of income from foreign countries, of $5,571.89, making a total credit allowed by the Federal Government of $441,051.54, which sum, deducted from $808,646.31 shown on the consolidated income tax return of Loew's Incorporated (before the foreign tax credit) made a net income tax payable by Loew's Incorporated for the fiscal year ended August 31, 1933, of $367,594.77. 3537

The above tax of $367,594.77 and the taxes paid to the

foreign governments of $441,051.54 made the total taxes of Loew's Incorporated and its subsidiaries, for the fiscal year ended August 31, 1933, $808,646.31.

The Federal income tax for the said fiscal year was paid on the following dates:

November	11, 1933	$95,000.00
February	15, 1934	95,000.00
May	15, 1934	85,696.08
August	15, 1934	91,898.69
Total		$367,594.77

The Statute of Limitations has barred Loew's Incorporated and its subsidiary corporations from filing any claim for refund of taxes paid for either the fiscal year ended August 31, 1932 or the fiscal year ended August 31, 1933.

J. T. MILLS.

Sworn to before me this
14th day of October, 1938.

BERTHA FRIED,
Notary Public,
Bronx County.
Bronx Co. Clk's No. 82, Reg. No. 67F39.
Certificate filed in New York County.
N. Y. Co. Clk's No. 309, Reg. No. 9E226.
Term Expires March 30, 1939.

Stipulation as to Federal Income Taxes of Defendants. 3541

E 69-218.

[SAME TITLE.]

FEDERAL INCOME TAXES.

The Special Master found that the profits made by Metro-Goldwyn Pictures Corporation through the manufacture and sale and distribution of the motion picture LETTY LYNTON were $268,861.14. 3542

The total amount of profits upon which the said corporation paid tax during the same year was less than said amount, or $124,902.35.

From the foregoing it is apparent that the corporate taxable profit for that year was less than the profit made on the picture LETTY LYNTON. Assuming the profits to have been the amount found by the Special Master and stated above, the maximum rate through which to ascertain the deduction to which the defendants are entitled is 13-1/6% on $124,902.35, or $16,445.48.

The Special Master found that the profits made by the Distributing Company were $68,603.42. 3543

The said Distributing Company had corporate taxable profit for the same period of $268,221.88. Therefore, the maximum rate through which to ascertain the deduction to which the respondents are entitled is 13-1/6% on $68,603.42, or a tax of $9,032.79.

The Special Master has found that the profits of Loew's, Inc. and its subsidiaries as exhibitors of the said picture were $97,466.68. Allowing for the instances where the profit on the exhibition of the picture LETTY LYNTON exceeded the gross corporate profit, the total amount of

3544 profit upon which the said Loew's Inc. would be taxable was $85,593.42.

The maximum rate through which to ascertain the deduction to which the respondents are entitled is 13-1/6% on $85,593.42, or a tax of $11,269.80.

The Special Master has found the profits of the foreign subsidiaries in the distribution of said picture to be $58,914.57.

The total profit made by the foreign subsidiaries was $1,432,486.43.

The rate of tax is arrived at in the following manner:

3545 (a) The full American tax at the American corporation rates is ascertained.

(b) There is deducted from that figure the taxes paid Abroad, which under the American income tax law, are allowed as a credit.

(c) The balance left to be paid in this country establishes a rate of 3.37 of the net profits. Applying that rate to $58,914.57, would give a tax of $1,987.57.

The Special Master found the profit of the Culver Export Company to be $93,758.56.

3546 The total corporate profits of the said company are $4,662,687.99.

The rate to be applied in this instance is arrived at as follows:

(a) The American corporate tax return for that fiscal year was 13.75. The tax is ascertained by applying that return to the income.

(b) There is deducted from the tax thus ascertained foreign taxes paid.

(c) This establishes a rate of 13.22 of the taxable income. Applying this rate to $93,758.56, gives a tax of $12,394.88. 3547

IT IS STIPULATED AND CONCEDED that if income taxes are to be allowed to the respondents as deductions, the foregoing constitutes the correct method of arriving at the rates, and the amounts set forth are the maximum amount of taxes to be allowed as deductions on the amounts of profits ascertained by the Special Master.

Recapitulating the above: 3548

	Loew's Share of LETTY LYNTON Profits	Corporate Taxable Profit	Loew's Share Profit on Which Tax is Calculated	Effective Tax Rate	Federal Tax
etro-Goldwyn Pictures Corp.	$268,861.14	$124,902.35	$124,902.35	13-1/6	$16,445.48
etro-Goldwyn-Mayer Dist.	68,603.42	268,221.88	68,603.42	13-1/6	9,032.79
ew's Inc. Theatres	97,466.68	—	85,593.42	13-1/6	11,269.80
oreign Sub-sidiaries	58,914.57	1,432,486.43	58,914.57	3.37	1,987.37
ulver Export	93,758.56	4,662,687.99	93,758.56	13.22	12,394.88
	$587,604.37				$51,130.32

The foregoing is without prejudice to the right of the complainants to contest the allowance of any deductions because of income taxes. 3549

The foregoing is also without prejudice to the claim of the defendants that Loew's Incorporated is not liable for an accounting herein because of the exhibition of the picture LETTY LYNTON by corporations whose stock is held, in whole or in part, by Loew's Incorporated whether directly or through intermediate corporations; nor to the claim of Culver Export Corporation that it is not liable for an accounting herein because of the distribution of the

picture LETTY LYNTON in foreign countries by separate and distinct foreign corporations.

Dated, New York, November 14, 1938.

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants.

J. ROBERT RUBIN,
Attorney for Respondents Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

LEOPOLD FRIEDMAN,
Attorney for Respondent Loew's, Inc.

SAMUEL D. COHEN,
Attorney for Respondent
Culver Export Corporation.

Additional Stipulation as to Federal Income Taxes.

3553

E 69-218.

[SAME TITLE.]

In respect to the stipulation dated November 14, 1938, filed with the Court November 23, 1938, dealing with income taxes the defendants claimed as a deduction in their accounting herein, IT IS AGREED that there be added to the said stipulation the following paragraph, to wit:

The only issue pending with the tax authorities in respect to the income tax returns of the defendants for the 3554
years mentioned in the stipulation is whether the government has the right to assess additional taxes. No claim for refund of any part of the taxes covered by this stipulation has been made by any of the defendants.

Dated, December 21st, 1938.

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants.

J. ROBERT RUBIN, by S. D. COHEN,
Attorney for Respondents Metro-Goldwyn
Pictures Corporation and Metro-Goldwyn- 3555
Mayer Distributing Corporation.

LEOPOLD FRIEDMAN, by S. D. COHEN,
Attorney for Respondent Loew's, Inc.

SAMUEL D. COHEN,
Attorney for Respondent
Culver Export Corporation.

3586 within brackets were added to this section in 1912. Under the decisions of the Supreme Court and of the Circuit Court of Appeals in this circuit, as hereinafter discussed, the trial court may not award statutory damages "in lieu of actual damages and profits" where there is satisfactory proof of the copyright owner's actual damages or of the infringer's actual profits.

Defendants argue in effect that "an award of all the profits resulting from an infringement", although the only money relief on which complainants submitted any proof (there was no proof of complainants' damages) "may be so disproportionate to the injury to complainant and so
3587 excessive in amount as to be inequitable and unjust". (See, dissenting opinion of Judge McCormick in *Harold Lloyd Corporation* v. *Witmer*, 65 F. (2d) 1, 45.) The majority opinion in the *Harold Lloyd* case did not disagree with this proposition as indicated by the following quotation:

> "We are assuming * * * that the copyright owner is entitled to all the profits derived from the infringing play. We do not wish to be understood as approving that doctrine which is one of the main issues in the case at bar, if infringement is found."

3588 Much of Judge McCormick's opinion in the *Harold Lloyd* case is based upon his interpretation of the words "in lieu thereof" in Section 25 of the Copyright Act, as indicating that Congress intended "to enable the court to meet the exigencies of each case by the exercise of sound judicial discretion in awarding pecuniary redress to the copyright proprietor in addition to injunctive relief".

The *Harold Lloyd* case was decided by the Ninth Circuit in 1933. In 1935 the Supreme Court of the United States had before it the case of *Douglas* v. *Cunningham*, 294 U. S. 207.

I am of the opinion that the only cases in which the 3589
"in lieu thereof" provision ap s are those

> "where the rules of law render difficult or impossible proof of damages or discovery of profits."

as was stated by Mr. Justice Roberts in the *Douglas* case, *supra*.

In the case at bar there has been discovery of the profits made by defendants from the picture. So there appears to be no discretion resting with the trial court, on the present state of the law, to substitute its own views of what should be the amount of plaintiffs' judgment in lieu of the actual net profits made by the defendants. 3590

The Court of Appeals in the Second Circuit in the case of *Davilla* v. *Brunswick Balke Collender Co.*, 94 F. (2d) 567, cites the case of *Douglas* v. *Cunningham* and states "Whether profits shall be awarded or statutory damages allowed is not a matter of choice with a plaintiff." Nor did the appellate court leave it as a matter of choice with the trial court. The decree of the lower court awarding statutory damages of $5,000 was modified because the appellate court held that the proof before the special master was sufficient to establish the infringers' profits at $1,057.53.

In the case of *Dam* v. *Kirk La Shelle Co.*, 175 Fed. 903, 3591
at page 908, Judge Noyes writing for the Circuit Court of Appeals in this Circuit in 1910, stated:

> "It is equally impossible for him to show the proportion of the profits accruing to a theatrical company from the use of a copyrighted theme or plot and the proportion accruing from the use of the scenery, the employment of favorite actors, and other sources."

3592 I am bound by that decision, even though I believe it "runs counter to the course later followed by that Court in apportioning profits in patent infringement cases and to the arguments therein expressed". Further Judge Noyes wrote the above quoted sentence in a copyright case some years prior to Judge Van Devanter's opinion in the *Dowagiac* (patent) case (*infra*) in which, while admitting the impossibility of mathematical exactness the Justice expressed his satisfaction with such reasonable approximation as could be obtained through the testimony of experts and informed persons.

In the present case defendants asked the special master
3593 to make the apportionment declared impossible in the case of *Dam* v. *Kirk La Shelle Co.* This phase of the evidence and these contentions of the defendants for an apportionment of the profits are not mentioned in the special master's report. He probably took the testimony on this point so that it could be made part of the record herein, for such consideration as an appellate court might deem warranted by the facts of this case. The interlocutory decree naming the special master provided:

> "that the complainants recover of the defendants and each of them all gains and profits made by the defendants and each of them because of the said
3594 infringement"

and he determined that the profits from the picture were the profits from the infringement and awarded all those profits to the plaintiff. The only damages recoverable under the final decree in a suit for copyright infringement are such as the interlocutory decree adjudged. *Russell & Stoll Co.* v. *Oceanic Elec. Supply Co.*, 80 F. (2d) 864.

Defendants urge that this court should apply to the case of copyright infringement the principle of apportioning profits based on a royalty to be fixed by the Court, as is frequently done in patent cases where a machine in one of

its parts infringes a patent relating to that part only. 3595
It was manifestly unjust to award all the profits from the sale of the machine to the owner of a patent that was infringed by only a part of the machine. Because of the unjust results under the provisions of the Patent Law, prior to their amendment (See §70) the Courts applied a rule of their own as expressed in *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.* (1915), 235 U. S. 641, 646:

> "In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the 3596
> defendants. But as the drills were sold in completed and operative form, the profits resulting from the several parts were necessarily commingled. It was essential, therefore, that they be separated or apportioned between what was covered by the patent and what was not covered by it; for, as was said in *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric & Mfg. Co., supra* (p. 615): 'In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains.' In the nature of things the profits pertaining to the patented improvements had to be ascertained before they could be recovered by the plaintiff, and therefore it was required to take the imitative in presenting evidence looking to an apportionment. 3597
> Referring to a like situation, it was said in the case just cited (p. 617): 'The burden of apportionment was then logically with the plaintiff, since it was only entitled to recover such part of the commingled profits as was attributable to the use of its invention.' But the plaintiff did not conform to this rule. It neither submitted evidence calculated to effect an apportionment, nor attempted to show that

3580 themes, motives, or ideas in which there could be no copyright, matters in the public demesne. The Circuit Court of Appeals in its opinion states (81 F. (2d) 49) at page 54:

> "In the case at bar there are then two questions: First, whether the defendants actually used the play; second, if so, whether theirs was a 'fair use.' The judge did not make any finding upon the first question, as we said at the outset, because he thought the defendants were in any case justified; in this following our decision in *Nicholas* v. *Universal Pictures Corporation*, 45 F. (2d) 119."

3581 The Circuit Court of Appeals found that the defendants did use a substantial part of plaintiffs' play and that it was not a fair use, and stated (p. 56):

> "True, much of the picture owes nothing to the play; some of it is plainly drawn from the novel; but that is entirely immaterial; it is enough that substantial parts were lifted; no plagiarist can excuse the wrong by showing how much of his work he did not pirate. We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue."

3582 There can be no apportionment of the profits of the infringing composition based upon a comparison of what was plagiarized with what was not. As we stated by Mr. Justice Blatchford in *Callahan* v. *Myers*, 128 U. S. 617 at page 666:

> "If the volume contains matter to which a copyright could not properly extend, incorporated with matter proper to be covered by a copyright, the two necessarily going together when the volume is sold, as a unit, and it being impossible to separate the

profits on the one from the profits on the other, and 3583
the lawful matter being useless without the unlawful it is the defendants who are responsible for having blended the lawful with the unlawful, and they must abide the consequences, on the same principle that he who has wrongfully produced a confusion of goods must alone suffer."

Further, in an accounting of the infringers' profits "the value which the plaintiff put upon its rights in incompleted negotiations with the defendants will be wholly immaterial". *L. C. Page & Co.* v. *Fox Film Corporation*, 83 F. (2d) 196, 199.

The pertinent provisions of Section 25 of the Copyright 3584
Act are printed in a footnote.* The parts thereof enclosed

* "§25. INFRINGEMENT. If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * * * * * * * *

(b) DAMAGES AND PROFITS; AMOUNT; OTHER REMEDIES. (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, but in case of a newspaper reproduction of a copyrighted photograph such damages shall not exceed the sum of $200 nor be less than the sum of $50, (and in the case of the infringement of an undramatized or nondramatic work by means of motion pictures, where the infringer shall show that he was not 3585
aware that he was infringing, and that such infringement could not have been reasonably foreseen, such damages shall not exceed the sum of $100; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of such damages recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of $5,000 nor be less than $250,) and such damages shall in no other case exceed the sum of $5,000 nor be less than the sum of $250, and shall not be regarded as a penalty. (But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.)"

610 the infringing carburetors was sufficiently shown to entitle it to a deduction for income taxes paid which will leave it accountable to the plaintiff for only the profits of which it acutally has had the benefit. *Stromberg Motor Devices Co.* v. *Detroit Trust Co., supra; Macbeth-Evans Glass Co.* v. *L. E. Smith Glass Co.* (C. C. A.) 23 F. (2d) 459. See, also, *Straus* v. *Notaseme Hosiery Co.*, 240 U. S. 179, 36 S. Ct. 288, 60 L. Ed. 590."

In the present case the District Judge dismissed the bill and his ruling was reversed by the Circuit Court of Appeals. The District Judge certainly believed that the issues
611 raised by the defendants had merit. The Circuit Court of Appeals in its opinion stated that in dismissing the complaint the District Judge was following the Circuit Court's decision in *Nicholas* v. *Universal Pictures Corp.* (*supra*). To refuse to permit the defendants to deduct the corporate income taxes they paid on the profits of "Letty Lynton" would be in effect the imposition of a penalty, super-imposed on the judgment for profits herein.

Because he felt that the then state of the proof in respect to the actual payment of these taxes was unsatisfactory, the special master suggested that the court in its decree set aside in special escrow subject to the further order of the
612 Court a sum equal to the 14½% corporate income tax on the net profits, subject to certain terms and conditions with which neither side to the controversy seemed satisfied, as their exception to that part of the report indicate. On the arguments before me on the various subdivisions of the report, it was agreed that it would be better to dispose of the income tax issue now than to leave it open for future consideration under the escrow plan. The accountants for both sides have conferred and after an examination of the defendants' income tax returns and the present status thereof, counsel have entered into a stipulation, dated November 14, 1938, in which the rate of the tax and the

amount thereof in dollars as paid by the defendants on the 3613
taxable profits of "Letty Lynton" are set forth in detail. This stipulation was supplemented by a rider on December 21, 1938, which declared that the only issue pending before the tax authorities in respect to defendants' income tax returns for the relevant years is whether the government shall assess additional taxes, and that no claim for a refund of any part of the taxes covered by the stipulation has been made by any of the defendants. The statute of limitations would now bar any such claim for refund.

Complainants have raised a new point in opposition to the allowance of a deduction of the defendants' income taxes from the profits of "Letty Lynton". They assert 3614
that the defendants will be entitled to deduct as a loss the amount of any judgment herein in the year in which it is put in judgment or paid (*Central Trust Co.* v. *Burnet*, 45 F. (2d) 922; *Lucas* v. *American Code Co.*, 280 U. S. 445) and that since corporation income tax rates are higher now than when defendants received the "Letty Lynton" profits the defendants will benefit thereby. If defendants are permitted on this accounting to deduct the corporate income taxes actually paid on the "Letty Lynton" profits the amount of the judgment herein will be so much less, and the amount defendants will be entitled to deduct later as a tax loss will be correspondingly less, and the amount on which the complainants will pay an income tax will also 3615
be less. In my opinion whatever tax advantage defendants may gain when they pay or settle complainants' judgment herein is irrelevant to the issue, just as is the effect the receipt by complainants of this large sum may have on complainants' tax situation.

As to the Culver Corporation's accounting, defendants contend that the Culver Corporation should not be charged with profits derived from the sale or leasing of the picture "Letty Lynton" outside the United States, that all of Culver's profits were made in foreign countries except

3574 not as yet been made applicable to proceedings in copyright by any rule promulgated by the Supreme Court of the United States. In *Callaghan* v. *Myers*, 128 U. S. 617, Mr. Justice Blatchford, in a case involving a copyright infringement, wrote:

> "In considering the exceptions of the defendants to the masters' reports in matters of fact, questioning the accuracy of their conclusions in respect to the amount of the defendants' profits, we have observed the rule recognized and affirmed in *Tilghman* v. *Proctor*, 125 U. S. 136, 139 (31:664, 668), that, in dealing with such exceptions, 'The conclusions of the
3575 master, depending upon the weighing of conflicting testimony, have every reasonable presumption in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part.'"

It may be noted that the concluding statement in the above quotation is very similar to Rule 53 (e) (2) of the new Federal Rules of Civil Procedure.

Before considering the exceptions filed by the parties to specific items of the account, I will discuss a general exception of the defendants, raising a fundamental issue, as to the nature and extent of the profits to be accounted for
3576 by the defendants.

Defendants contend that under Section 25 (b) of the Copyright Act they are required to pay complainants only the profits defendants realized from the infringement, which they interpret as meaning the profits realized from the use made of complainants' play as distinguished from profits attributable to other elements that made the motion picture a financial success. Defendants argue that the complainants should not receive all the net profits realized from the sale, leasing and exhibition of the picture, but only so much thereof as may justly be considered as the play's contribu-

tion thereto. In support of this contention defendants 3577
show that the picture, when released to exhibitors under a block-booking arrangement, was listed only as "Production No. 208, Joan Crawford No. 2", and that the box-office drawing powers of the screen stars, Joan Crawford and Robert Montgomery actually produced the profits.

There was submitted to the special master an analysis "to show the limited nature and extent of the infringement as bearing on the quantum of the award to be made by the master". Evidence from experts and other sources was presented to establish that the "maximum average contribution of a play such as Dishonored Lady to the moving picture Letty Lynton could not possibly amount to more 3578
than 10% of the net domestic profits of the picture". Proof was offered through well-known producers of the royalties paid to authors whose works were used as the basis for motion pictures, such as "Peter Pan". For the motion-picture rights to that play and its title, Sir James Barrie received 7% of the gross receipts. The motion-picture rights of "Gone with the Wind" were sold for $50,000. In the present case complainants had entered into a contract for a sale of their play to one of the defendants for $30,000, subject to the approval of the Will Hays group of censors who refused to pass it. The net profits the master has awarded to complainants are $587,604.37, almost twenty times that price. 3579

Complainants' play was based upon the celebrated murder trial of Madeleine Smith in Scotland in 1857. The defendants, instead of buying the motion picture rights to the play, after it was barred by the censors, purchased for $3,500 the rights to a novel, "Letty Lynton", written about the same time by Mrs. Belloc Lowndes and based on the same theme.

On the trial of the infringement issue in this case the complaint was dismissed because the trial court held in effect that the defendants had used only those general

one was impossible; and this, although the evidence upon the accounting went far towards showing that there was no real obstacle to a fair apportionment. Certainly no obstacle was interposed by the defendants. It well may be that mathematical exactness was not possible, but, as is shown in *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric & Mfg. Co.*, *supra* (pp. 617, 620-622), that degree of accuracy is not required, but only reasonable approximation, which usually may be attained through the testimony of experts and persons informed by observation and experience. Testimony of this character is generally helpful and at times indispensable in the solution of such problems. Of course, the result to be accomplished is a rational separation of the net profits so that neither party may have what rightfully belongs to the other, and it is important that the accounting be so conducted as to secure this result, if it be reasonably possible."

See, also, opinions by Judge Learned Hand in *Page Machine Co.* v. *Dow Jones & Co.* (1916), 238 F. 369, and *Cincinnati Car Co.* v. *New York Rapid Transit Corp.*, 66 F. (2d) 592.

In my opinion it is punitive and unjust to award all the net profits of the motion picture "Letty Lynton" to the complainants in this case. Yet under the wording of the Copyright Act (§25) as interpreted by the decisions of the appellate courts, I can do nothing less. The rule for apportioning profits, followed in patent infringement cases, should not be difficult of application to copyright infringement cases. The courts overcame the difficulty in patent cases by awarding something in the nature of a royalty, that would represent "a point or sum where it is demonstrable that to go beyond that point or exceed that sum is to set over to plaintiff profits to which the infringing elements

make no contribution". *Standard Scale & Supply Co.* v. 3601
Cropp Concrete Mach. Co., 6 F. (2d) 447, 455.

If complainants get all the profits of the picture they are receiving the profits that Joan Crawford and Robert Montgomery made for the picture by their dramatic talent and the drawing power of their reputations as motion picture stars. The directors who supervised the production of the picture and the experts who filmed it also contributed in piling up these tremendous net profits. Complainants' counsel refers to defendants' contribution to the success of the picture as "labor and material". Deducting the salaries of these personages from the gross receipts merely reimburses the defendants for their actual costs and expenses, 3602
but gives to the complainants all of the profits the defendants' stars and directors and filming experts made for the picture. The testimony of experts should be received on the question of how much the use of complainants' play contributed to the profits of the picture, just as similar expert testimony is now received in patent infringement cases under Section 70 of the Patent Law, from which the following is quoted:

> If on the proofs it shall appear that the complainant suffered damage from the infringement or that the defendant has realized profits therefrom to which the complainant is justly entitled, but that 3603
> such damages or profits are not susceptible of calculation and determination with reasonable certainty, the court may, on evidence tending to establish the same, in its discretion, receive opinion or expert testimony; which is hereby declared to be competent and admissible, subject to the general rules of evidence, applicable to this character of testimony; and upon such evidence and all other evidence in the record the court may adjudge and decree the payment by the defendant to the complainant of a reasonable sum as profits or general damages for the infringements.

604 The above paragraph was added to Section 70 in 1922 sometime after the Supreme Court in the Dowagiac case suggested the use of experts, in the opinion hereinabove quoted.

An allowance to complainants of 25% of the net profits, as restated, or about $133,000 would be such a sum as could be justly fixed as a limit beyond which complainants would be receiving profits in no way attributable to the use of their play in the production of the picture. Sir James Barrie received 7% of the gross receipts from the motion picture based on "Peter Pan". For that he assigned the motion picture rights to his famous play and the right to
605 use the name as the title of the picture. The gross receipts in the case at bar from the picture "Letty Lynton" were $1,655,269.15, of which 8% would be about $132,500. In my opinion the testimony before the special master would justify a finding in this case that the profits these defendants made from their use of complainants' play "Dishonored Lady" did not exceed 25% of the net profits from the picture, as hereinafter fixed, or, if a royalty basis should be used, 8% of the gross receipts. It requires no expert testimony to show that the use of complainants' play "Dishonored Lady" did not contribute the entire 100% of the net profits realized from the picture "Letty Lynton". Yet that is what this judgment gives the complainants.

606 If we are "to avoid instances of grotesque injustice" then "we must adopt some working rule" similar to that employed in patent infringement cases. *Page Machine Co.* v. *Dow Jones & Co., supra.* A result such as we have in the present case may lead to the adoption of such a rule, either through the decision of an appellate court, giving a more reasonable interpretation of Section 25 of the Copyright Act, or by Congress amending the Act. *Jewell-LaSalle Realty Co.* v. *Buck*, 283 U. S. 202, 208.

At the hearings before the special master defendants claimed that "they should be allowed to deduct from any amount found * * * due the complainants as profits from

"Letty Lynton" an amount which they claimed would be 3607
the equivalent of Federal income taxes at the rate of 14½% of such profits". The special master reported that there was not sufficient evidence before him from which he could find that the profits from the picture were "taxable profits" on which the defendants had actually paid a tax. He reported that if this issue had been satisfactorily met he would "have no difficulty in allowing the defendants * * * to deduct * * * the proper amount of income taxes". In support of his conclusion of law that the defendants were entitled to deduct the corporate income tax they paid on the "Letty Lynton" profits he cites the case of *Stromberg Motor Devices Co.* v. *Zenith-Detroit Corp.*, 73 F. (2d) 62. I think the following quotation from that case is in point 3608
and cites all the leading cases on the question (page 65):

> "Finally, the defendant insists that it should be allowed a deduction for federal income taxes paid and attributable to the profits derived from the infringing carburetors. Such taxes reduce the profits in a very real sense. But for them the profits the defendant would have retained would have been so much the greater. Whether in its accounting with the plaintiff it may be entitled to the deduction depends upon whether it willfully was infringing the Mock patent or not. *Larson Co.* v. *Wrigley Co.*, 277 U. S. 97, 48 S. Ct. 449, 72 L. Ed. 800. It did deliberately test this 3609
> patent. It claimed it to be invalid and denied infringement. The issues raised were not without merit, as is made clear by the fact that it prevailed in the District Court and obtained a decree which we reversed on appeal. There was certainly a real controversy, and it would be a harsh rule which did not give the defendant the right to test the patent without being penalized on the accounting by what would be in effect punitive damages. We think the defendant's honest belief in its right to manufacture

of the costs hereby allowed the complainants in the final decree to be entered herein.

Submit decree in accordance with this opinion on two days' notice.

Dated, December 29th, 1938.

VINCENT L. LEIBELL,
United States District Judge.

Resettled Final Decree Appealed From.

At a Term of the District Court of the United States held in and for the Southern District of New York at the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 23rd day of January, 1939.

Present—HON. VINCENT L. LEIBELL, *District Judge.*

[SAME TITLE.]

The complainants having moved for a resettlement of the decree heretofore made herein on January 6, 1939, and entered in the office of the Clerk of this Court on January 7, 1939,

Now, on reading the notice of resettlement herein, dated January 18, 1939, the affidavit of Edward J. Clarke, verified January 18, 1939, and the aforesaid decree dated January 6, 1939, it is

ORDERED AND ADJUDGED AND DECREED, that the decree dated January 6, 1939, and entered in the office of the Clerk of

this Court on the 7th day of January, 1939, be and the same 3637
hereby is resettled, so as to read as follows:

"At a Term of the District Court of the United States, held in and for the Southern District of New York, at the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 6th day of January, 1939.

Present—Hon. Vincent L. Leibell, *District Judge.*

In Equity No. E-69-218

Edward Sheldon and Margaret Ayer Barnes, 3638
Complainants,

—against—

Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Loew's, Inc. and Culver Export Corporation,
Defendants.

An interlocutory decree having been made herein by Hon. John C. Knox, District Judge, under date of July 29, 1936, and filed in the office of the Clerk of this Court under date 3639
of July 31, 1936, and said interlocutory decree having appointed Gordon Auchincloss, Esq. as Special Master to ascertain and report the amount of complainants' damages herein, and the amount of gains and profits of the defendants and each of them, and the said Special Master having filed with this court a written report on the 9th day of May, 1938, and the complainants having filed exceptions to the said report, and the defendants having filed exceptions to the said report, and this cause having come on to be heard upon the report of said Special Master and upon the exceptions thereto, and O'Brien, Driscoll & Raftery, appear-

3646 hereby fixed at the sum of $59,570.63, and that Metro-Goldwyn Pictures Corporation is jointly liable with the said Metro-Goldwyn-Mayer Distributing Corporation therefor, and it is therefore ordered that the complainants are hereby given a judgment against Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation jointly, in the said sum of $59,570.63, with interest from the 9th day of May, 1938; and it is further

ORDERED, ADJUDGED AND DECREED that the profits made by Loew's, Inc. be and are hereby fixed at the sum of $84,209.51, and that complainants are hereby given judgment against said Loew's, Inc. in said sum, with interest from
3647 the 9th day of May, 1938; and it is further

ORDERED, ADJUDGED AND DECREED that the profits made by Culver Export Corporation be and are hereby fixed at the sum of $140,278.25, and that Metro-Goldwyn Pictures Corporation is jointly liable with the said Culver Export Corporation therefor, and therefore judgment is hereby given to the complainants against Metro-Goldwyn Pictures Corporation and Culver Export Corporation jointly in the sum of $140,278.25, with interest from the 9th day of May, 1938; and it is further

3648 ORDERED, ADJUDGED AND DECREED that Gordon Auchincloss, Esq., as Special Master, be and is hereby allowed the sum of $15,305. as compensation for the services rendered by him herein, plus $265.06 for his disbursements, making a total of $15,570.06, and the defendants herein are ordered and directed jointly to pay the said sum to the said Special Master within thirty days after the entry of this decree; and it is further

ORDERED, ADJUDGED AND DECREED that the complainants be and they hereby are allowed as attorneys' fees the sum of

$55,000., and judgment therefor is decreed as part of the 3649
costs of this action; and it is further

ORDERED, ADJUDGED AND DECREED that the complainants have judgment in the sum of $1328.51 costs of Circuit Court of Appeals as taxed together with taxable costs and disbursements of this Court to be taxed by the Clerk; and it is further

ORDERED, ADJUDGED AND DECREED that the complainants have execution upon the respective sums awarded to them in accordance with the provisions hereof.

VINCENT L. LEIBELL, 3650
U. S. D. J.

C.W. "

VINCENT L. LEIBELL,
U. S. D. J.

3651

640 ing herein as attorneys for complainants, by Arthur F. Driscoll, of counsel; J. Robert Rubin appearing as attorney for defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, by John W. Davis of counsel; Samuel D. Cohen, appearing as attorney for Culver Export Corporation, by John W. Davis as counsel; Leopold Friedman, appearing as attorney for Loew's, Inc. by John W. Davis of counsel, and after hearing counsel, and due deliberation had thereon, and the Court having filed its decision herein, it is

ORDERED, ADJUDGED AND DECREED, that the report of the Special Master be and is hereby confirmed, and the ex-
641 ceptions of the complainants and the exceptions of the defendants be and are hereby overruled except as follows:

Account of Defendant Metro-Goldwyn Pictures Corporation:

An item of $610.76 (negative cost) should be included in the total of the negative cost of the picture and not as part of the general studio overhead as calculated by the special master.

An item of $3,630.12, dues payable to the Motion Picture Producers and Distributors Association, based on percentage of the amount grossed by the
642 picture, was a proper and customary charge, and should have been allowed as an item of cost. The same is true of a similar item of $79.69.

Defendant's exception to the failure of the Special Master to allow a deduction of income taxes is sustained and from the account as restated by the Special Master there should also be deducted income taxes amounting to $16,445.48.

The net profits to be accounted for by the Pictures Corporation after the above deductions will be $248,095.09.

Resettled Final Decree Appealed From.

Account of Metro-Goldwyn-Mayer Distributing Corporation, Loew's, Inc. and Culver Export Corporation: 3643

These defendants are entitled respectively to a deduction of the sums they paid as corporate income taxes (as calculated by the parties in the stipulation herein dated November 14, 1938) from their net profits from the picture 'Letty Lynton' as restated by the Special Master in his report. The amount of these deductions or credits for income taxes paid are as follows:

Metro-Goldwyn-Mayer Distributing Corporation		$9,032.79 3644
Loew's, Inc.	$11,269.80	
Loew's foreign subsidiaries	1,987.37	13,257.17
Culver Export Corporation		12,394.88

After these deductions for income taxes, the net profits for which these three corporations are accountable are as follows:

Metro-Goldwyn-Mayer Distributing Corporation	$59,570.63
Loew's, Inc.	84,209.51
Culver Export Corporation	140,278.25

3645

and it is further

ORDERED, ADJUDGED AND DECREED that the profits made by Metro-Goldwyn Pictures Corporation be and are hereby fixed at the sum of $248,095.09, and that the complainants are hereby given judgment against said Metro-Goldwyn Pictures Corporation in said amount with interest from the 9th day of May, 1938; and it is further

ORDERED, ADJUDGED AND DECREED that the profits made by Metro-Goldwyn-Mayer Distributing Corporation be and are

3616 $2,876.10 received from the renting of films to the United States Navy. It is argued that the Copyright Act has no extraterritorial operation, unless otherwise provided (*American Code Co.* v. *Bensinger*, 282 Fed. 829, 833) and that therefore Culver should not be held to account except for the $2,876.10. This argument overlooks the fact that the Culver Corporation is a domestic corporation and is a mere instrumentality or agency of the Pictures Corporation; that it has a place of business at Culver City, California, and also in New York City; that the infringing negatives were made at Culver City, California, and foreign versions thereof were sent abroad by the Culver Corporation to its foreign
3617 subsidiaries through which positive prints were made and distributed abroad for rental fees. A large part of the revenue thus received was actually paid to Culver as percentages by its foreign subsidiaries. Culver accounts for all the profits made by its foreign subsidiaries because Culver owns the entire capital stock of all those agencies of Culver, except the Swedish corporation in which Culver owns a substantial interest. As to the Swedish corporation, Culver accounts only for the part of the profits Culver received. The Culver Export Corporation was properly held to account for the profits if thus made abroad from the infringement Culver perpetrated, in part, in this country.

3618 Pursuant to Rule 66 of the old Equity Rules exceptions were filed by both sides to the special Master's ruling on numerous items contained in the account filed by defendants, showing their receipts from sales and leases of the picture "Letty Lynton" and the "elements of cost" claimed by them. After certain preliminary hearings before the Court on this motion, waivers of a number of the exceptions were filed so as to leave for determination only the basic objections and the larger items. I will now separately consider the account of each defendant as found and stated by the special master.

Account of defendant, Metro-Goldwyn Pictures Corporation: 3619

All of complainants' exceptions that were not later waived are overruled and the rulings of the special master on the items involved are approved for the reasons stated in his report.

Defendant's exceptions, where not waived, are likewise overruled except as to the following:

An item of $610.76 (negative cost) should be included in the total of the negative cost of the picture and not as part of the General Studio Overhead, as calculated by the special master. An item of $3,630.12, dues payable to the Motion Pictures Producers and Distributors Association based on a percentage of the amount grossed by the picture: these 3620
"dues" were really for services rendered by the association to this producer as a member of the association. In my opinion the Association could properly refuse to refund the same. If the defendant did not pay, the Association would go unpaid so far as this picture is concerned. I believe it was a proper and customary charge and should have been allowed as an item of cost. The same is true of a similar item of $79.69.

Defendant's exception to the failure of the special master to allow a deduction of income taxes is sustained and from the account as restated by the special master there should also be deducted income taxes amounting to $16,445.48. The 3621
net profits to be accounted for by the Pictures Corporation after the above deductions will be $248,095.09.

Account of Metro-Goldwyn-Mayer Distributing Corporation.

Loew's Inc. and
Culver Export Corporation—

All exceptions (not waived) filed by either the complainants or the defendants to the report of the special master in

3622 relation to these accounts and the rulings of the special master on disputed items contained therein, are overruled except that these defendants shall be entitled respectively to a deduction of the sums they paid as corporate income taxes (as calculated by the parties in the stipulation herein dated November 14, 1938) from their net profits from the picture "Letty Lynton" as restated by the special master in his report. The amounts of these deductions or credits for income taxes paid are as follows:

Metro-Goldwyn-Mayer Distributing Corporation		$ 9,032.79
Loew's Inc.	$11,269.80	
3623 Loew's Foreign Subsidiaries	1,987.37	$13,257.17
Culver Export Corporation		$12,394.88

After these deductions for income taxes the net profits for which these three corporations are accountable will be as follows:

Metro-Goldwyn-Mayer Distributing Corporation	$ 59,570.63
Loew's Inc.	84,209.51
Culver Export Corporation	$140,378.25

3624 The question has been raised as to the liability of the several defendants for the profits made by their co-defendants. Section 25 of the Copyright Act requires each infringer to account for the profits it received. The statute gives the complainant the right to recover those profits from that infringer, but no other infringer is jointly liable therefor. As to the damages sustained by a complainant through the infringement of his copyright, infringers who are joint tort feasors are jointly liable.

In *International Radio Tel. Co. v. Atlantic C. Co.*, 290 Fed. 698, a patent infringement case, Judge Hough held

that "there can be no recovery of profits from a defendant, except of profits that defendant made". This principle applies also to the copyright infringers in the case at bar. 3625

However, I am of the opinion that the Distributing Corporation and Culver Corporation were only the agents, instrumentalities or sub-divisions of the Pictures Corporation and that the Pictures Corporation should therefore be held liable not only for its own profits, but for the profits of the Distributing Corporation and the Culver Corporation, in both of which the Pictures Corporation owned the entire capital stock, controlling and using them as mere instrumentalities or adjuncts. *Owl Fumigating Corp.* v. *California Cyanide Co.*, 30 Fed. (2d) 812; *Industrial Research Corp.* v. *General Motors Corp.*, 29 Fed. (2d) 623; *United States* v. *Reading Co.*, 253 U. S. 26; *Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & C. Assn.*, 247 U. S. 490. 3626

Although Loew's owned all the common stock of the Pictures Corporation and 10% of its preferred stock, the business of Loew's embraced several fields of activity in which the Pictures Corporation is not engaged. Further, about 90% of the preferred stock of the Pictures Corporation is owned by the general public. The evidence does not show that the Pictures Corporation was a mere instrumentality or agent of Loew's or a department of Loew's business. Loew's was properly required to account for the profits of the hundred odd theatres, operated by corporations in which it owned all the stock. 3627

The Distributing Corporation owned no stock of Culver Corporation nor did Culver Corporation own any stock of Distributing Corporation. It is true that all of the capital stock of both the Distributing Corporation and the Culver Corporation is owned by the Pictures Corporation, but that would be no basis for charging profits of the Distributing Corporation against the Culver Corporation or vice versa.

Loew's Inc. will not be held liable for the profits of the other defendants. The Pictures Corporation will not be

held for the profits of Loew's. But the Pictures Corporation will be held severally liable for its own profits and also jointly liable with the Distributing Corporation and the Culver Corporation for their respective profits.

The findings of fact and conclusions of law made by the special master, except as herein modified or rejected, are hereby adopted by this Court, and the special master's report is approved; with the exceptions herein indicated.

Two applications for allowances have been made, one by the special master, who requests the sum of $20,000, the other by the attorneys for the successful complainants, who ask for $135,000.

The special master groups his services as follows:—(a) Hearings he held at his office before March 1, 1937, and his preliminary work on the issues involved in the action—38 hours. (b) His trip to Culver City, California, and the hearings he held there, all of which took sixteen days of his time. He left New York on February 25, 1937; the hearings at Culver City, California, began March 1, 1937 and ended March 8th; he left California on his return trip to New York on March 9th. (c) Hearings he held in his office after his return from California, twenty-two hearings totalling forty-four hours. (d) The time spent in preparing his report—241 hours.

Excluding the trip to California and the taking of testimony there, the special master, as set forth in subdivisions (a); (c) and (d), spent 323 hours on this reference. At the rate of $35.00 an hour (*Newton* v. *Consolidated Gas Co.*, 259 U. S. 101) this would total $11,305.00. For his time and services in going to California and taking testimony there (subdivision b) I am of the opinion that he should be allowed $4,000, at the rate of $250.00 a day for the sixteen days that he was away from New York. His total allowance is fixed at $15,305.00, which the defendants are ordered to pay within thirty days after the entry of a final decree herein.

The attorneys for the complainants divide their requested 3631
allowance into two parts—$100,000 for the services rendered in the District Court and $35,000 for the services rendered in the Circuit Court of Appeals.

I have concluded that a proper allowance for all their services in this matter from the time that they were first consulted by their clients down to and inclusive of the entry of a final decree herein would be the sum of $55,000.00, computed as follows:—$10,000 for services rendered prior to the trial of the action; $5,000 for the trial, briefs and the argument; $10,000 (a) for services on the appeal to the Circuit Court of Appeals and for opposing in that Court two applications for a re-hearing and (b) for filing briefs in opposition to the defendants' application to the United 3632
States Supreme Court for a writ of certiorari; $22,500 for their services in the accounting proceeding before the special master; and $7,500 for their services in preparing exceptions to the special master's report, in preparing briefs on this motion, for attendance and argument at hearings on the exceptions and for the entry of a final decree herein. This allowance is, in my opinion, a reasonable attorney's fee (*United States* v. *Equitable Trust Co.*, 283 U. S. 738), to be allowed the complainants for the services of their attorneys, pursuant to the provisions of the Copyright Act, 17 U. S. C. A. §40, and as directed by the Circuit Court of Appeals in its mandate herein. *Sheldon* v. *Metro-Goldwyn* 3633
Pictures Corporation, 81 F. (2d) 49, 56.

"In determining what is a reasonable fee for an attorney, the elements to be considered, among others, are the amount involved, for that measures the attorneys' responsibility; the amount of work necessary; the amount of work done; the skill used, and the result". *Lewys* v. *O'Neill*, 49 F. (2d) 603. See, also, *Darilla* v. *Brunswick Balke Collender Co.*, 94 F. (2d) 567.

The allowance of $55,000.00 to the complainants as a reasonable fee for their attorneys, shall be included, as part

Defendants' Petition for Appeal and Order Allowing Appeal.

3652

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity No. E-69-218.

EDWARD SHELDON and MARGARET AYER BARNES,
Complainants,

—against—

3653 METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Defendants.

To the Honorable Samuel Mandelbaum, One of the Judges of the United States District Court for the Southern District of New York:

The defendants Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Loew's Incorporated, sued herein as Loew's, Inc., and Culver Export Corporation, feeling aggrieved by the final decree rendered in the above-entitled cause and filed and entered on the 7th day of January, 1939, and filed and entered, as resettled herein, on the 23rd day of January, 1939, do hereby appeal from said final decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons set forth in the Assignment of Errors filed herewith, and pray that said appeal be allowed and that citation be issued as provided by law, and that a transcript of the record, proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit

3654

Defendants' Petition for Appeal and Order Allowing Appeal.

Court of Appeals under the rules of such Court in such 3655
cases made and provided.

And your Petitioners further pray that an order of supersedeas may be entered herein pending the final disposition of the cause and that, subject to the consent of the complainants, the deposit of United States Government securities for the account of the complainants with the Empire Trust under an escrow agreement dated March 9, 1939, to secure the payment of any amounts finally adjudged herein to be owing by the defendants to the complainants shall take the place of the usual supersedeas bond.

J. ROBERT RUBIN,
Attorney for defendants Metro-Goldwyn Pic- 3656
tures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

LEOPOLD FRIEDMAN,
Attorney for defendant Loew's, Inc.

SAMUEL D. COHEN,
Attorney for defendant Culver Export Corporation.

The foregoing appeal is hereby allowed and upon the consent of the complainants hereto subjoined, it is ordered 3657
that the escrow agreement described in such consent shall operate with the same force and effect as the usual supersedeas bond and shall stay the enforcement of the final decree of this Court and the issuance of execution thereunder, and also as security for the payment by the defendants of costs and damages on appeal.

Dated: New York, N. Y., March 27th, 1939.

SAMUEL MANDELBAUM,
District Judge.

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16.

The Court in disposing of said motion erred in its decision that

> "the only cases in which the 'in lieu thereof' provision applies are those where the rules of law render difficult or impossible proof of damages or discovery of profits."

17.

3677 The Court in disposing of said motion erred in its decision that there is

> "no discretion resting with the trial court, on the present state of the law, to substitute its own views of what should be the amount of plaintiffs' judgment in lieu of the actual net profits made by the defendants."

18.

3678 The Court in disposing of said motion erred in its decision that the Court in this case was bound by the decision of the United States Circuit Court of Appeals, Second Circuit, in the case of *Dam v. Kirk La. Shelle Co.*, 179 Fed. 903, at page 908.

19.

The Court in disposing of said motion erred in its decision that under the wording of the Copyright Act of 1909, Sec. 25 (b), as interpreted by the decisions of the appellate courts, the Court did not have the power to apply in a copyright case the rule for apportioning profits which is followed in patent infringement cases, by the

determination and allowance to the complainants only of 3679
such portion of the entire profits as was wholly or principally attributable to such use as was made by the defendants in the preparation or production of the defendant's motion picture "Letty Lynton" of any portion of the plaintiffs' play "Dishonored Lady" protected by the plaintiffs' copyright in such play, as distinguished from the determination and allowance to the complainants of the entire net profits realized by the defendants from the production, distribution and exhibition of said motion picture "Letty Lynton."

20.

3680

The Court in disposing of said motion erred in its decision in its allowance to the plaintiffs of the entire net profits realized by the defendants from the production, distribution and exhibition of defendants' motion picture "Letty Lynton" in spite of its holding that

> "An allowance to complainants of 25% of the net profits, as restated, or about $133,000 would be such a sum as could be justly fixed as a limit beyond which complainants would be receiving profits in no way attributable to the use of their play in the production of the picture."

3681

21.

The Court in disposing of said motion erred in its decision that under Section 25(b) of the Copyright Act of 1909, it could not apportion the entire net profits realized from the production, distribtuion and exhibition of the motion picture "Letty Lynton" by a determination and allowance to the complainants only of such portion of such profits as were wholly or principally attributable to the use made by the defendants in the preparation or produc-

3658 The complainants hereby acknowledge the deposit by the defendants for the account of the complainants with the Empire Trust Company of 120 Broadway, New York City under an escrow agreement dated March 9, 1939, of United States Government securities in principal amount and under terms and conditions satisfactory to the complainants and hereby consent that such deposit shall operate with the same force and effect as the usual supersedeas bond, and that in allowing the foregoing appeal the Court may order that such escrow deposit shall stay the enforcement of the final decree of this Court and the issuance of execution thereunder, and also as security for the payment by the defendants of costs and damages on appeal.

3659

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants.

Defendants' Assignment of Errors.

[SAME TITLE.]

3660 Now come the defendants Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Loew's Incorporated and Culver Export Corporation, in the above-entitled cause, and file the following Assignment of Errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the final decree of this Court made on January 6, 1939 and entered on January 7, 1939, as resettled and entered on January 23, 1939.

The following errors are assigned on behalf of all the defendants:

Defendants' Assignment of Errors.

1. 3661

The Court in its interlocutory decree of July 29, 1936, signed by the Honorable John C. Knox, District Judge, erred in that said decree is not in accordance with the opinion of the United States Circuit Court of Appeals, Second Circuit, filed January 17, 1936, nor in accordance with the mandate of said Court, dated February 5, 1936.

2.

The Court erred in providing in said interlocutory decree that 3662

> "complainants recover of the defendants and each of them all damages sustained by them and that the complainants recover of the defendants and each of them all gains and profits made by the defendants and each of them because of the said infringement upon complainants' copyright by copying said dramatic composition or by making the said motion picture 'LETTY LYNTON' and by their use and trafficking in, or in any manner dealing with the said motion picture 'LETTY LYNTON', or in any rights thereto or by giving public performances thereof, or causing, licensing, aiding and abetting or in any other manner assisting in the giving of public performances thereof, or in any other way, form or manner whatsoever" 3663

in so far as said decree is subject to the construction that it provides for the recovery by the complainants from the defendants of all gains and profits made by them from the production, distribution and exhibition of the motion picture Letty Lynton, and that it does not limit the gains and profits so to be recovered to all such gains and profits as were made by the defendants from the use in the preparation or production of such motion picture of any

3670 poration be fixed at the sum of $59,570.63, and that the defendant Metro-Goldwyn Pictures Corporation be held jointly liable with said Metro-Goldwyn-Mayer Distributing Corporation therefor, and that complainants be given judgment against said Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation jointly in said sum of $59,570.63 with interest thereon from May 9, 1938.

9.

The Court, in said final decree, erred in adjudging that the profits made by Loew's Incorporated be fixed at the
3671 sum of $84,209.51, and that complainants be given judgment against said defendant in said sum of $84,209.51 with interest thereon from May 9, 1938.

10.

The Court, in said final decree, erred in adjudging that the profits made by Culver Export Corporation be fixed at the sum of $140,278.25, and that Metro-Goldwyn Pictures Corporation be held jointly liable with said Culver Export Corporation therefor, and that complainants be given judgment against said Metro-Goldwyn Pictures Corporation and said Culver Export Corporation jointly in said sum of
3672 $140,278.25 with interest from May 9, 1938.

11.

That the Court, in said final decree, erred in decreeing that the compensation of Gordon Auchincloss as Special Master, allowed by the Court in the sum of $15,305 as compensation for services rendered by him, should be paid by the defendants to the Special Master within thirty days after entry of the decree.

12. 3673

The Court, in said final decree, erred in decreeing that complainants be allowed as attorneys' fees the sum of $55,000, and in decreeing judgment for said sum as part of the costs of this action.

13.

The Court, in said final decree, erred in decreeing that the complainants have judgment in the sum of $1,328.51 as costs of the Circuit Court of Appeals as taxed, together with taxable costs and disbursements in the District Court to be taxed by the Clerk thereof. 3674

14.

The Court in disposing of said motion erred in its decision that

> "There can be no apportionment of the profits of the infringing composition based upon a comparison of what was plagiarized with what was not."

15.

The Court in disposing of said motion erred in its decision that 3675

> "Under the decisions of the Supreme Court and of the Circuit Court of Appeals in this circuit, as hereinafter discussed, the trial court may not award statutory damages 'in lieu of actual damages and profits' where there is satisfactory proof of the copyright owner's actual damages or of the infringer's actual profits."

3682 tion of the motion picture "Letty Lynton" of any portion of the play "Dishonored Lady" protected by the plaintiffs' copyright in such play.

22.

The Court in disposing of said motion erred in its decision that under Section 25(b) of the Copyright Act of 1909, and particularly under what are called the "in lieu" provisions of said section, it had no power under all the circumstances of this case, in lieu of actual damages and profits, to make an award to the plaintiffs of

3683 "such damages as to the Court shall appear to be just."

23.

The Court in disposing of said motion erred in its decision that the plaintiffs were entitled to recover from the defendants all the net profits of the motion picture "Letty Lynton" in spite of its finding that such award was "punitive and unjust", and that

> "The rule for apportioning profits followed in patent infringement cases, should not be difficult of application to copyright infringement cases"

3684 and that

> "If we are 'to avoid instances of grotesque injustice' then 'we must adopt some working rule' similar to that employed in patent infringement cases."

24.

The Court in disposing of said motion erred in its decision that defendants Metro-Goldwyn-Mayer Distributing

Corporation and Culver Export Corporation respectively were only agents, instrumentalities, or subdivisions of the defendant Metro-Goldwyn Pictures Corporation, and that the defendant Metro-Goldwyn Pictures Corporation should, therefore, be held liable not only for its own profits but as well for the profits of the defendants Metro-Goldwyn-Mayer Distributing Corporation and Culver Export Corporation. 3685

25.

The Court in disposing of said motion erred in its decision that defendant Loew's Incorporated 3686

> "was properly required to account for the profits of the hundred odd theatres, operated by corporations in which it owned all the stock."

in that (1) the evidence does not show that any of said theatre corporations were or are agents or instrumentalities of defendant Loew's Incorporated, and (2) that the uncontradicted evidence shows that Loew's Incorporated was not the owner of all the capital stock in the 103 theatre corporations which exhibited the motion picture "Letty Lynton", but that as appears from defendants' Exhibit L-1, the following are the facts in this regard:

Defendant Loew's Incorporated was the owner of all the capital stock in 48 of said theatre corporations, and in the case of 27 of said theatre corporations was only a partial owner of stock, its interest therein varying from 86.71% to 10.7%, and in respect of 6 of such latter corporations, there were outstanding in the hands of the public issues of preferred stock which ranked ahead of the common stock held by Loew's; in the case of an additional 20 of said theatre corporations, Loew's ownership of stock which was in varying amounts from 100% to 33⅓% of such ownership was only through one or two intermediate corporations, 3687

364 portion of the play Dishonored Lady protected by the complainants' copyright in such play.

3.

The Court erred in providing in said interlocutory decree for a reference to Gordon Auchincloss, Esq., as Special Master,

> "to ascertain and report the amount of complainants' damages herein and the amount of such gains and profits of the defendants and each of them"

365 in so far as it is subject to the construction that the Master is directed thereby to ascertain and report the amount of all gains and profits made by the defendants from the production, distribution and exhibition of the motion picture Letty Lynton, and that it does not direct him to ascertain and report only the amount of all such gains and profits as were made by the defendants from the use in the preparation or production of such motion picture of any portion of the play Dishonored Lady protected by the complainants' copyright in such play.

4.

366 The Court erred in providing in said interlocutory decree for a direction to the Special Master to ascertain and report the amount of all gains and profits made by the defendants from the production, distribution and exhibition of the motion picture Letty Lynton, in so far as it is subject to the construction that he is not directed or authorized by such decree to apportion the said gains and profits as between the contribution made by the complainants thereto by the use made by the defendants in the preparation or production of said motion picture of any portion of the play Dishonored Lady protected by the complainants'

copyright in such play and the contributions made by the defendants, or any of them, in the preparation, production and distribution of such motion picture. 3667

5.

The Court, in said interlocutory decree, erred in failing to provide that in case the Special Master should find that under the circumstances of the case the rules of law should render difficult or impossible the ascertainment of such amount of the gains and profits made by the defendants from the production, distribution and exhibition of the motion picture Letty Lynton as were attributable to the use made by them of any portion of the play Dishonored Lady protected by the complainants' copyright in such play in the preparation or production of such motion picture Letty Lynton, he was empowered to report in lieu of actual damages and profits such damages as to the Court or the Special Master should appear to be just. 3668

6.

The Court, in said final decree, erred in confirming the report of the Special Master subject only to the modification thereof as provided in said final decree.

7. 3669

The Court, in said final decree, erred in adjudging that the profits made by Metro-Goldwyn Pictures Corporation be fixed at the sum of $248,095.09, and that complainants be given judgment against said defendant in said sum of $248,095.09 with interest thereon from May 9, 1938.

8.

The Court, in said final decree, erred in adjudging that the profits made by Metro-Goldwyn-Mayer Distributing Cor-

3688 and that in the case of the remaining 8 theatre corporations, Loew's Incorporated had no stock interest whatever, but merely the right to receive compensation measured by profits under management agreements with the several owners of said theatres.

26.

The Court in disposing of said motion erred in its decision that the defendant Metro-Goldwyn Pictures Corporation should be held jointly liable with the defendant Metro-Goldwyn-Mayer Distributing Corporation and the defendant Culver Export Corporation for the profits made by
3689 such latter defendants respectively.

27.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that the commercial value of the motion picture "Letty Lynton" is not wholly or principally attributable to such use in the preparation or production of such motion picture as was made by the defendants of any portion of the play "Dishonored Lady," protected by the plaintiffs' copyright in such play.

3690

28.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that at the utmost not more than 10% of the total net profits made by the defendants from the preparation, production, distribution and exhibition of the motion picture "Letty Lynton" was made because of the infringement by defendants of plaintiffs' copyright in the play "Dishonored Lady."

29. 3691

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that prior to the exhibition of the motion picture "Letty Lynton" and starting from May 1, 1931, the defendant Metro-Goldwyn-Mayer Distributing Corporation entered into contracts for its exhibition with individual exhibitors on the printed form of contract which is Defendants' Exhibit No. 16, in which contracts the motion picture, later designated as "Letty Lynton," was designated simply as "Production Number 208, Joan Crawford No. 2;" such motion picture was not otherwise designated, nor identified in fact by the title "Letty Lynton" 3692
until on or about May 7, 1932, when the motion picture so entitled was released; before May 7, 1932, 7315 contracts with individual exhibitors out of a total of 7666, of such contracts as listed on Defendants' Exhibit No. 15 had been made and executed by said defendant Metro-Goldwyn-Mayer Distributing Corporation.

30.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that the commercial value of the 3693
motion picture "Letty Lynton" is principally attributable to the stars, Joan Crawford and Robert Montgomery, who played the leading roles therein, to the production and direction of the said motion picture by persons well known in the industry and to the public and to the reputation of the Metro-Goldwyn-Mayer organization.

31.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his

3694 failure or refusal to find that in a certain agreement made by and between the plaintiffs and others with Metro-Goldwyn-Mayer Corporation, dated April 17, 1931, it was agreed that contingent upon Metro-Goldwyn-Mayer Corporation being able to secure the approval of the Hays' Office of the use of the play "Dishonored Lady" for motion picture purposes within 30 days therefrom, Metro-Goldwyn-Mayer Corporation would purchase from the plaintiffs the moving picture rights in such play "Dishonored Lady," and that upon such purchase the price to be paid for said rights under said agreement would be the sum of $30,000; said Hays' Office refused to give its approval to the use of the
3695 play for motion picture purposes after application made to secure such approval.

32.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that the only means open to the plaintiffs for the exploitation of their copyrighted play "Dishonored Lady" by production thereof in motion pictures was by selling the motion picture rights therein to some established motion picture producing organization.

3696

33.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that the market value of the motion picture rights in the play "Dishonored Lady" in the years 1931 and 1932 was not more than $30,000.

34.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his

failure or refusal to find that each of said defendants was 3697
organized at a time prior to the plaintiffs' production or copyright of the play "Dishonored Lady" with separate and distinct charters, boards of directors and officers, with separate and distinct purposes and functions, and with no purpose on the part of said defendants, or any of them, that their respective organizations, functions or operations would in any respect affect any acts or transactions of said defendants, or any of them, having anything whatever to do with plaintiffs' play "Dishonored Lady" or any use which might be made by the defendants, or any of them, of said play in the production, distribution or exhibition of the motion picture "Letty Lynton."

3698

35.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that the acts done or performed by the defendants, or any of them, in the exploitation or handling of the motion picture "Letty Lynton" were done or performed in the same manner and in accordance with the same practice and routine as were followed in the exploitation and handling of other productions of the defendants which involved no questions as to the rights of the defendants, or of any of them, to produce, dis- 3699
tribute or exhibit the same.

36.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that the actual damages sustained by plaintiffs because of the infringement by defendants of plaintiffs' copyright in the play "Dishonered Lady" were $30,000.

37.

The Court erred in overruling the exception taken by the defendants to the Special Master's report because of his failure or refusal to find that the damages which in the opinion of the Special Master is just to award plaintiffs, in lieu of actual damages and profits, is $30,000.

38.

The Court erred in overruling the exception taken to the Special Master's report on the ground of his failure or refusal to make any finding as to the actual damages sustained by plaintiffs because of the infringement by defendants of plaintiffs' copyright in the play "Dishonored Lady."

39.

The Court erred in overruling the exception taken on behalf of defendants to the introductory portion of the Special Master's report (pp. 2, 3 thereof) which shows that for the purposes of the proceedings before him he construed the interlocutory decree of July 29, 1936 as limiting his powers thereunder strictly to a determination of the total net profits derived by the defendants from the production, distribution and exhibition of the picture "Letty Lynton," and as precluding him thereunder from making an apportionment as between such amount of the total net profits as were made "because of the infringement" and such amount thereof as are properly ascribable to such portions and features of the literary material of the film play "Letty Lynton" as were not taken from the copyrighted play "Dishonored Lady," and also such amount thereof as is properly ascribable to the stars, Joan Crawford and Robert Montgomery, who played the leading roles therein, to the production and direction of the said motion picture by persons

well known in the industry and to the public and to the 3703
reputation of the Metro-Goldwyn-Mayer organization; and to his failure in fact to make such apportionments.

40.

The Court erred in overruling the exception taken on behalf of defendants to the introductory portion of the Special Master's report (pp. 2, 3 thereof), which shows that for the purposes of the proceedings before him he construed the interlocutory decree of July 29, 1936, as limiting his powers thereunder strictly to a determination of the total net profits derived by the defendants from the pro- 3704
duction, distribution and exhibition of the picture "Letty Lynton," and as precluding him from making an award thereunder, in lieu of actual damages and profits, of such damages as to him appeared to be just; and to his failure in fact to make such an award in lieu of actual damages and profits.

41.

The Court erred in overruling the exception taken on behalf of defendants to the Special Master's report by reason of his failure or refusal to make any comparison of the continuity of the motion picture "Letty Lynton", 3705
the play "Dishonored Lady", the "Trial of Madeleine Smith", and the novel "Letty Lynton" (marked respectively Defendants' Exhibits R-4, R-3, R-2, and R-5) and the motion picture "Letty Lynton" as actually exhibited to the Special Master, with a view to determining the nature and the extent of the infringement by defendants' motion picture "Letty Lynton" of the complainants' copyrighted play "Dishonored Lady" for the purpose either of apportionment of profits or of making an award of such damages as to him should appear to be just, in lieu of actual dam-

706 ages and profits; and to his failure in fact to make such a determination.

The following errors are assigned on behalf of the defendant Metro-Goldwyn Pictures Corporation (hereinafter called Pictures Corporation) in relation to the Court's rulings upon exceptions taken to that portion of the Special Master's report having to do with this defendant's accounting:

42:

707 The Court erred in overruling the exception taken to the ruling in Paragraph 2 of said portion of the Special Master's report, which disallows as the Pictures Corporation's share of the distributing expense, which "Letty Lynton" should be charged with, the sum of $12,505.33 based on the relation of costs of distribution to gross receipts, and which allows in place thereof only the sum of $8,517.48, upon the theory that all feature pictures distributed during the fiscal year 1932 should bear an equal share of the total distributing expense of the Pictures Corporation for such year for all pictures, and to the portions of Paragraphs 3-10 under the accounting of the defendant Metro-Goldwyn-Mayer Distributing Corporation, which state the reasons for such allowance, and to the findings in Paragraphs 9 and 10 thereof, that during such fiscal year the defendants Pictures Corporation and Distributing Corporation distributed the equivalent of sixty (60) feature pictures, and accordingly excepts to all changes of figures in such accounting based on the rulings herein specified.

708

43.

The Court erred in overruling the exception taken to the ruling in Paragraph 5 of said portion of the Special Master's report, which disallows as an item of negative

cost the sum of $2,500.00 listed as a departmental over- 3709
head charge of the Women's Wardrobe Department, and to the ruling in Paragraph 25 thereof, which purports to compensate for such disallowance merely by adding to General Studio Overhead the total overhead charges for this department of $76,334.90.

44.

The Court erred in overruling the exception taken to the ruling in Paragraph 26 of said portion of the Special Master's report, which disallows as an item of General Studio Overhead the sum of $500,000. as "Addition to Reserve for Continuities" (Defendants' Exhibit 18-D5). 3710

45.

The Court erred in overruling the exception taken to the ruling in Paragraph 28 of said portion of the Special Master's report, which disallowed as an item of General Studio Overhead the sum of $922,141.09 as "Compensation paid to Louis B. Mayer Pictures" (Defendants' Exhibit 18-D5).

46.

The Court erred in overruling the exception taken to 3711
the ruling in Paragraph 31 of said portion of the Special Master's report, which disallows as an item of General Studio Overhead the sum of $1,559,559.79 as "Interest paid (per Exhibit 10)" (Defendants' Exhibit 18-D5).

47.

The Court erred in overruling the exception taken to the ruling in Paragraph 34 of said portion of the Special Master's report, which disallows the defendants' claim that

3712 for the purpose of computing what portion of the General Studio Overhead should be borne by "Letty Lynton", the total amount of such General Studio Overhead should be divided by 36 (approximately), as representing the number of pictures made at the Culver City Studio during the fiscal year 1932, as shown on Defendants' Exhibit C-25, and which instead apportions such General Studio Overhead on the relation which the costs and labor used in the making of "Letty Lynton" bear to the costs and labor used in the making of all pictures made at the said Studio during such fiscal year, and further excepts to the method adopted by the Special Master in arriving at a ratio on the basis stated by using as a numerator purporting to be the 3713 costs and labor used in the making of "Letty Lynton" a figure eliminating foreign version costs and labor, actually expended or used at the Studio, and by using as a denominator a figure which included not only the costs and labor used in the making of all pictures at the Studio during such fiscal year but also the costs and labor expended and used in the making of all foreign versions, including the "Letty Lynton" foreign versions.

The following errors are assigned on behalf of the defendant Metro-Goldwyn-Mayer Distributing Corporation (hereinafter called Distributing Corporation) in relation 3714 to the Court's rulings upon exceptions taken to that portion of the Special Master's report having to do with this defendant's accounting:

48.

The Court erred in overruling the exception taken on behalf of the defendant Distributing Corporation to the ruling in Paragraphs 8 and 10 of said portion of the Special Master's report, which disallows as the Distributing Corporation's share of the distributing expense, which "Letty Lynton" should be charged with, the sum of

$111,777.26, based on the relation of costs of distribution to gross receipts, and to the ruling in Paragraph 15 of said portion thereof, which allows in place thereof only the sum of $76,657.35, upon the theory that all feature pictures distributed during the fiscal year 1932 should bear an equal share of the total distributing expense of the Distributing Corporation for such year for all pictures, and to the portions of Paragraphs 3-10 thereof which state the reasons for such allowance, and to the findings in Paragraph 9 and 10 of said portion thereof, that during such fiscal year the defendants Pictures Corporation and Distributing Corporation distributed the equivalent of sixty (60) feature pictures, and accordingly excepts to all changes of figures in such accounting based on the rulings herein specified. 3715 3716

The following errors are assigned on behalf of the defendant Loew's Incorporated (hereinafter called Loew's) in relation to the Court's rulings upon exceptions taken to that portion of the Special Master's report having to do with this defendant's accounting:

49.

The Court erred in overruling the exception taken on behalf of defendant Loew's to the Special Master's report because of his refusal to rule that Loew's fully discharged its liability to account herein by submitting upon the Accounting Defendants' Exhibit L-1, whereby it was shown that Loew's received no profits or gains from the exhibition of the film play "Letty Lynton", (its liability to account under such decree being limited to profits or gains from *exhibition only*) and whereby it was shown that all exhibitions of the film play "Letty Lynton" were made by corporations, not parties to this suit, and to the action of the Special Master, over the objections and exceptions stated in the record at various places (including, but without limi- 3717

tation, pp. 626 to 660, S. M. N. Y.), which exceptions are herewith repeated and renewed, in requiring the submission herein of separate accounts on behalf of each corporation which exhibited "Letty Lynton" in which Loew's had a stock interest, regardless of whether such stock interest was in whole of the stock or in only a part, and regardless of whether Loew's owned such stock interest directly or through one or more intermediate corporations and, in the case of the eight theatres listed on Defendants' Exhibit L-12, regardless of the absence of all stock interest; and this exception is hereby renewed and repeated as to each of the corporations whose accounts are set forth on any of the Defendants' Exhibits L-6 to L-13, both inclusive, and as to each and every finding of the Special Master predicated upon said accounts separately or collectively; and to each and every ruling imposing any liability upon Loew's to account to the plaintiffs herein for profits.

50.

The Court erred in overruling the exception taken on behalf of defendant Loew's to the Special Master's report because of his finding in Paragraph 5 of said portion thereof, that the defendant Loew's is accountable to the complainants for the gains and profits accruing to it through the exhibition of "Letty Lynton" by the theatres owned by the corporations listed on Defendants' Exhibit L-1, in which Loew's had only a stock interest, and to the finding therein that Loew's, acting through its so-called managing agency, the Marcus Loew Booking Agency, used these corporations as agents for the exhibition of the pictures produced by the production agency of the Loew's organization.

51.

The Court erred in overruling the exception taken on behalf of defendant Loew's to the Special Master's report

because of his ruling in Paragraph 14 of said portion thereof, in respect of the theatres which exhibited "Letty Lynton" for a period less than a full week, which disallows the claim of Loew's that the weekly overhead for each of such theatres, as shown on Exhibits L-7, L-9, L-11 and L-13, should be apportioned in the ratio of the gross receipts during the period when "Letty Lynton" was exhibited to the gross receipts for the entire week, and which allows the claim of the complainants that such total weekly overhead should be divided by seven and multiplied by the number of days during which "Letty Lynton" was exhibited, and to all findings and to all changes in figures in the accounts submitted by defendants based on the ruling in Paragraph 14 of the report. 3721 3722

52.

The Court erred in overruling the exception taken on behalf of defendant Loew's to the ruling in Paragraph 15 of said portion of the Special Master's report, which disallows the claim of Loew's that the net profits of the theatre corporations shown on defendants' Exhibits L-6, L-8, L-8+, L-10 and the theatres shown on defendants' Exhibit L-12, should be apportioned on the basis of ascribing one-third thereof to the other attractions which were exhibited at said theatres during the period when "Letty Lynton" was also exhibited, and to the ruling made in favor of the complainants, which makes no apportionment of the net profits but which ascribes all the net profits of such theatres, after allowance only of the actual costs of the other attractions, to the exhibition of the motion picture "Letty Lynton". 3723

53.

The Court erred in overruling the exception taken on behalf of defendant Loew's to the restatements of the ac-

3724 counts contained in Paragraph 17 of said portion of the Special Master's report, in so far as the same is based on rulings to which exceptions had already been taken herein in behalf of the defendant Loew's and the compilations therein contained made to take the place respectively of defendants' Exhibits L-6, L-8, L-8+, L-10 and L-12.

The following errors are assigned on behalf of the defendant Culver Export Corporation (hereinafter called Culver) in relation to the Court's rulings upon exceptions taken to that portion of the Special Master's report having to do with this defendant's accounting:

54.

3725 The Court erred in overruling the exception taken on behalf of defendant Culver to the refusal of the Special Master to rule that, except as to film rental income in the sum of $2,876.10, shown as "Film Rental Income-Direct" on Defendants' Exhibit 20 and received "from the United States Navy, or steamship lines which Culver sold direct instead of through a subsidiary" (S. M. N. Y. p. 452), Culver was not accountable in this suit, all receipts by Culver having been realized from distribution of the picture "Letty Lynton" outside of the territory to which the Copyright Laws of the United States extend and through stock interest in corporations engaged in the dis-
3726 tribution of "Letty Lynton" outside of such territory, and to the action of the Special Master in overruling the objections and exceptions taken on behalf of Culver (including, but without limitation, pp. 443 to 447, S. M. N. Y.) to the inclusion of any profits and gains by Culver in the accounting in this suit and to each and every finding of the Special Master predicated upon the accounts of the corporations in which Culver had a stock interest, and upon said accounts separately and collectively, and to each and every ruling imposing any liability upon Culver to account to the plaintiffs for gains or profits realized by said corporations.

55. 3727

The Court erred in overruling the exception taken on behalf of defendant Culver to the ruling in Paragraph 4 of said portion of the Special Master's report that Culver was simply an agency used for the purpose of handling the foreign business of distribution and exhibition of Loew's, Inc. pictures in any such sense as to justify the finding that Culver has not in all respects a corporate entity distinct from that of the defendant Loew's or from that of the other corporations defendants.

56. 3728

The Court erred in overruling the exception taken on behalf of defendant Culver to the ruling in Paragraph 5 of said portion of the Special Master's report, that the foreign corporations whose stock was owned by Culver were merely agents, used by Culver for the distribution and exhibition of pictures in the various countries in which they were incorporated, and to the Special Master's failure to find that each of said corporations was a separate and distinct entity, and to the failure of the Special Master to rule that the various foreign companies were entitled to retain the full amount payable to them for distribution under their respective contracts with Culver.

57. 3729

The Court erred in overruling the exception taken on behalf of the defendant Culver to the ruling in Paragraph 6 of said portion of the Special Master's report, that the central control and direction of these foreign corporations rested in the executive offices of Culver located at 1540 Broadway, New York City, that is, in the general New York offices of Loew's, in any such sense as to justify the finding as to each of any of said corporations that their gains or profits derived wholly from the distribution or exhibition of the picture "Letty Lynton" outside of the

3730 United States are in fact those of the defendant Loew's or the defendant Culver or that the defendant Loew's or the defendant Culver is liable by reason of the alleged tortious acts of such corporations committed outside of the United States.

58.

The Court erred in overruling the exception taken on behalf of defendant Culver to the ruling in Paragraph 7 of said portion of the Special Master's report, that Culver is accountable herein (otherwise than in respect of the sum of $2,876.10, as stated in 59 hereof).

3731 59.

The Court erred in overruling the exception taken on behalf of defendant Culver to the ruling in Paragraph 15 of said portion of the Special Master's report, which disallows as Culver's share of the distributing expense, which "Letty Lynton" should be charged with, the sum of $12,536.28 based on the relation of costs of distribution to gross receipts, and which allows in place thereof only the sum of $9,805.79 upon the theory that all feature pictures distributed abroad by Culver during the fiscal year 1933 should bear an equal share of the total distributing expense of Culver for such year for all pictures, and to the por-
3732 tions of Paragraphs 33-36 thereof, both inclusive, which state the reasons for such allowance, and to the finding in Paragraph 35 thereof that during such fiscal year of 1933 the defendant Culver and the foreign corporations of which it was a stockholder distributed the equivalent of forty-five feature pictures, and accordingly excepts to all changes of figures in such accounting based on the aforesaid ruling.

60.

The Court erred in overruling the exception taken on behalf of defendant Culver to the ruling in Paragraph 16

of said portion of the Special Master's report, which disallows the sum of $106,582.99 as the production cost to Culver of the picture "Letty Lynton" and allows in place thereof the sum of $83,967.30, representing 25% of the sum of $335,869.21 found in Paragraph 35 of that part of the report dealing with the accounting of the Pictures Corporation, and herewith repeats and renews all exceptions taken herein to the principles and figures upon which the total figure of negative cost is computed; and further excepts to the recommendation of the Special Master that the negative cost or production cost to Culver be increased from 25% to 35.65% of the total production cost in the event that the Court should hold that the complainants are not entitled to recover against Culver. 3733 3734

The following errors are assigned in relation to the Court's rulings in relation to exceptions having to do with foreign corporations in which Culver had only a stock interest:

61.

The Court erred in overruling the exception taken on behalf of defendant Culver to the ruling in Paragraph 27 of said portion of the Special Master's report, which is the same ruling as in Paragraph 15 thereof, to which exception was taken as shown under 64 hereinabove, viz.: on the ground that such distributing expenses should be based on the relation of costs of distribution to gross receipts and not upon the theory that all feature pictures distributed abroad by Culver during the fiscal year 1933 should bear an equal share of the total distributing expense for all pictures so distributed, and further excepts to all changes of figures based on such ruling. 3735

62.

The Court erred in overruling the exception taken on behalf of defendant Culver to the ruling in Paragraphs 33-36 of said portion of the Special Master's report, both

3736 inclusive, which disallows as the total foreign corporations' share of the distributing expense, which "Letty Lynton" should be charged with, the sum of $84,260.05, based on the relation of costs of distribution to gross receipts in the case of each of said corporations, and which allows in place thereof only the sum of $68,640.54, based upon the theory that all feature pictures distributed abroad by Culver and the foreign corporations during the fiscal year 1933 should bear an equal share of the total distributing expense of Culver and the foreign corporations for such year for all pictures, and further excepts to the portions of such Paragraphs 33-36, both inclusive, which state the reasons for such allowance, and to the finding in Paragraph 35

3737 thereof in which the Special Master finds that during such fiscal year of 1933 the defendant Culver and the foreign corporations of which it was a stockholder distributed the equivalent of forty-five (45) feature pictures, and accordingly excepts to all changes of figures in such accounting based on the rulings in Paragraphs 33-36, both inclusive, of the report.

WHEREFORE, the defendants pray that the said decree may be reversed and for such other and further relief as to the Court may seem just and proper.

Dated, New York, March 27th, 1939.

3738 J. ROBERT RUBIN,
Attorney for Defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

LEOPOLD FRIEDMAN,
Attorney for Defendant Loew's Incorporated.

SAMUEL D. COHEN,
Attorney for Defendant Culver Export Corporation.

Defendants' Citation.

3739

[SAME TITLE.]

By the Honorable Samuel Mandelbaum, One of the Judges of the United States District Court for the Southern District of New York to Edward W. Sheldon and Margaret Ayer Barnes, GREETING:

YOU ARE HEREBY cited and admonished to be and appear before a United States Circuit Court of Appeals to be held in the City of New York in the Borough of Manhattan in the District and Circuit above named, on the 26th day of April, 1939, pursuant to an order allowing an appeal filed 3740
and entered in the Clerk's office of the District Court for the Southern District of New York, from a final decree and filed and entered on the 7th day of January, 1939, and filed and entered, as resettled herein, on the 23rd day of January, 1939, in that certain suit being in Equity No. E 69-218 wherein Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Loew's, Inc., and Culver Export Corporation are defendants and appellants, and you are plaintiffs and appellees, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing the appeal mentioned, should not be corrected and why justice should not be done to the parties in that behalf. 3741

Given under my hand at the City of New York, in the Borough of Manhattan, in the District and Circuit above named, this 27th day of March, in the year of our Lord, One thousand nine hundred and thirty-nine, and of the Independence of the United States One hundred and sixty-third.

SAMUEL MANDELBAUM,
United States Judge for the Southern District of New York in the Second Circuit.

Order and Consent re Record and Exhibits.

[SAME TITLE.]

Upon motion of J. Robert Rubin, Esq., attorney for defendants Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation, and of Leopold Friedman, Esq., attorney for defendant Loew's, Inc., and of Samuel D. Cohen, attorney for defendant Culver Export Corporation,

IT IS ORDERED

1. That the transcript of record, consisting of two volumes, heretofore filed in this action with the United States Circuit Court of Appeals, Second Circuit, on the appeal taken by complainants from the decree of dismissal in this Court, and resulting in a reversal of said decree by said Court and a decree for accounting in accordance with the decision and mandate of said Court, may for convenience be referred to as the "Proceedings before Accounting", and that the transcript of record on the appeal now petitioned for by the defendants from the final decree of this Court, as resettled on January 23, 1939, may, for convenience, be referred to as the "Accounting Proceedings".

2. That upon the instant appeal both sides may make proper references to such prior record, and that the same need not be recertified or reprinted in connection with this appeal, and that any testimony or exhibits or other papers printed in said prior record admitted as evidence by the Special Master in the accounting proceedings, need not be reprinted in the record of the instant appeal, but may be incorporated therein by proper references to said prior record, to the same effect as if recertified and reprinted as a part of the Accounting Proceedings.

3. That the provisions of old Equity Rule 75, still applicable in copyright cases, requiring the reduction of

testimony to narrative form, be and the same hereby are 3745
waived, and that any testimony taken before the Special Master, upon the accounting proceedings, may be incorporated in its original form in the transcript of the record to be filed on the instant appeal.

4. That the following exhibits which were not printed in the prior record or in this record, need not be printed as part of the record on the instant appeal, but may be handed up upon the argument and referred to by any of the parties in briefs with the same force and effect as though physically present in such record:

A. "Trial of Madeleine Smith", offered before the Special Master as Defendants' Exhibit R-2 (marked 3746
Defendants' Exhibit E, but not printed in the prior record).

B. Novel "Letty Lynton" by Mrs. Belloc Lowndes, offered before Special Master as Defendants' Exhibit R-5 (marked Defendants' Exhibit C, but not printed in the prior record).

5. That in case it should become necessary or advisable upon the instant appeal to make proper reference to any exhibits admitted in evidence by the Special Master on the Accounting Proceedings, but by agreement of the parties not printed as part of this record, such exhibits may be handed up upon the argument and referred to by 3747
any of the parties in briefs with the same force and effect as though physically present in such record.

Dated, New York, N. Y., March 27th, 1939.

SAMUEL MANDELBAUM,
District Judge.

Entry of the foregoing order is hereby consented to.

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants.

Complainants' Petition for Appeal and Order Allowing Appeal.

3748

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity No. E-69-218.

EDWARD SHELDON and MARGARET AYER BARNES,
Complainants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,

3749

Respondents.

The above-named complainants conceiving themselves in part aggrieved by the decree made on January 6, 1939, and re-settled on January 23, 1939, in the above-entitled cause, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit for the reasons specified in the assignment of errors which is filed herewith, and they pray that this appeal be allowed and that a transcript of the record and proceedings and papers upon which said decree and order were made and duly authenticated may be sent to the United States Cir-

3750

cuit Court of Appeals for the Second Circuit.

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants.

The foregoing claim of appeal is allowed upon the filing of security for costs or a waiver thereof by the respective defendants.

Dated: New York, March 29th, 1939.

SAMUEL MANDELBAUM,
United States District Judge.

Stipulation Waiving the Filing of Security for Costs.

3751

[SAME TITLE.]

The undersigned attorneys for the respective defendants hereby waive the filing of security for costs with respect to the appeal of the Complainants herein.

Dated, New York, March 27th, 1939.

J. ROBERT RUBIN,
Attorney for Defendants, Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation. 3752

LEOPOLD FRIEDMAN,
Attorney for Defendant, Loew's, Inc.

SAMUEL D. COHEN,
Attorney for Defendant, Culver Export Corporation.

3753

Complainants' Assignments of Error.

[SAME TITLE.]

ASSIGNMENTS OF ERROR.

Now come the complainants in the above-entitled cause and file the following assignments of error upon which they will rely in the prosecution of the appeal herein petitioned for in the said cause from the decree made on January 6, 1939 and re-settled January 23, 1939.

PRELIMINARY.

The complainants' appeal is confined to certain items of allowance made by the Court in an accounting for profits made by the respective respondents and taken before a Special Master in pursuance of an interlocutory decree of the District Court, entered on a mandate of the Circuit Court of Appeals for the Second Circuit on July 29, 1936, and with respect to that account as found by the Court make the following assignments of error.

AS TO METRO-GOLDWYN PICTURES CORPORATION.

(1) The Court erred in allowing Metro-Goldwyn Pictures Corporation as items of direct cost chargeable against the cost of manufacturing the picture "Letty Lynton", which has been found to be an infringement of the complainants' copyrighted play "Dishonored Lady", the following items:

(a) $2,000 of the total salary paid to Joan Crawford, an actress who performed in the picture "Letty Lynton",

(b) $2,500.00 of the total salary paid to Robert Montgomery, an actor who perform d in the picture "Letty Lynton". 3757

representing compensation paid said individuals for their idle time between the finishing of their prior picture and the commencement of their services on the infringing picture "Letty Lynton".

(2) The Court erred in allowing the defendant, Metro-Goldwyn Pictures Corporation charges for departmental overhead as follows:

An item of $896.05 as overhead of the Stock Talent Department, which item represents the cost of idle time for stock actors. 3758

(3) The Court erred in allowing any credit for general studio overhead.

(4) The Court erred in allowing as items of general studio overhead items of $1,047,599.43 and $16,482.79 constituting salaries of executives, assistants, secretaries, stenographers, and expenses of the Executive Department.

(5) The Court erred in allowing as part of the general studio overhead an item of $2745. designated as "Salaries Maintenance" constituting unearned or idle time of doctors and nurses.

(6) The Court erred in allowing as part of the studio overhead an item of $27,715.49 representing salaries of directors unassigned, constituting payment for idle time. 3759

(7) The Court erred in allowing as part of the studio overhead items of $63,996.57, made up of charges for rejected continuities and songs, and an item of $151,686.80 made up of charge incurred on rejected pictures.

(8) The Court erred in allowing as part of studio overhead an item of $298,025.47, representing salaries paid to artists for their idle or unassigned time.

3760 (9) The Court erred in allowing depreciation on defendants' buildings and equipment at Los Angeles Studios or elsewhere.

(10) The Court erred in allowing depreciation on defendants' buildings and equipment at Los Angeles or elsewhere on a basis of cost rather than actual value.

(11) The Court erred in allowing as items of direct costs against the picture "Letty Lynton" the sums of $3630.12 and $79.69, as fees and dues paid by Metro-Goldwyn Pictures Corporation to the Motion Picture Producers and Distributors Association for the United States and Canada, respectively.

3761 (12) The Court erred in allowing as a deduction income taxes amounting to $16,445.48 paid.

As to Metro-Goldwyn-Mayer Distributing Corporation.

(13) The Court erred in making any allowance for home office expense.

(14) The Court erred in making any allowance for depreciation.

(15) The Court erred in making any allowance for depreciation except with respect to the value of the property sought to be depreciated at the time the picture "Letty
3762 Lynton" was distributed.

(16) The Court erred in making an allowance of $9-032.79 for income taxes.

As to Defendant, Loew's, Inc.

(17) The Court erred in making any allowance of overhead for the theatres owned, controlled, operated or otherwise affiliated with this defendant during the time the picture "Letty Lynton" was exhibited.

(18) The Court erred in making any allowance for losses 3763
sustained by this defendant directly or indirectly through companies owned, controlled or operated or otherwise affiliated with it in the exhibition of the picture "Letty Lynton".

(19) The Court erred in allowing this defendant a deduction of $11,269.80 for income taxes paid.

(20) The Court erred in allowing this defendant a deduction in the sum of $1987.37 for income taxes paid by its foreign subsidiaries.

AS TO DEFENDANT, CULVER EXPORT CORPORATION. 3764

(21) The Court erred in allowing this defendant as an expense of foreign distribution the following:

New York overhead	$178,538.33
Depreciation	137,810.39
Loss on Outside Producers' Pictures	11,551.86
Total	$327,900.58

(22) The Court erred in allowing this defendant the sum of $12,394.88, as a deduction for income taxes paid.

WHEREFORE, complainants pray that the said decree be 3765
modified in such wise as to give effect to the foregoing assignments, and that the account be appropriately recast and for such other and further relief as to the Court may seem just and proper.

Dated: New York, March 28th, 1939.

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants.

EDWARD J. CLARKE,
One of the attorneys for Complainants.

Complainants' Citation.

3766

By the Hon. Samuel Mandelbaum, One of the Judges for the Southern District of New York, in the Second Circuit to Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, Loew's, Inc., and Culver Export Corporation, GREETINGS:

YOU ARE HEREBY CITED and admonished to be and appear before the United States Circuit Court of Appeals, for the Second Circuit, to be holden in the Borough of Manhattan, in the District and Circuit above-named, on the 28th day of April, 1939, pursuant to an appeal filed in the Clerk's Office of the District Court of the United States for the
3767 Southern District of New York, wherein Edward Sheldon and Margaret Ayer Barnes are appellants, and you are the appellees to show cause, if any there be, why the decree in said cause should not be corrected, and why speedy justice should not be done the parties in that behalf.

GIVEN under my hand, in the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 29th day of March, in the year of our Lord, One Thousand Nine Hundred thirty-nine, and of the Independence of the United States of America the one hundred and sixty-third year.

3768

SAMUEL MANDELBAUM,
United States District Judge for the Southern District of New York in the Second Circuit.

Stipulation as to Record.

3769

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD SHELDON and MARGARET AYER BARNES,
Complainants-Appellees and Appellants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION.
Defendants-Appellants and Appellees. 3770

IT IS HEREBY stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above entitled matter as agreed upon by the parties.

Dated, New York, April 25th, 1939.

J. ROBERT RUBIN,
Attorney for the Defendants-Appellants and Appellees Metro-Goldwyn Pictures Corporation and Metro-Goldwyn-Mayer Distributing Corporation.

LEOPOLD FRIEDMAN, 3771
Attorney for the Defendant-Appellant and Appellee Loew's, Inc.

SAMUEL D. COHEN,
Attorney for the Defendant-Appellant and Appellee Culver Export Corporation.

O'BRIEN, DRISCOLL & RAFFERTY,
Attorneys for the Complainants-Appellees and Appellants Edward Sheldon and Margaret Ayer Barnes.

Clerk's Certificate.

3772

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EDWARD SHELDON and MARGARET AYER BARNES,
Complainants-Appellees and Appellants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION.

3773 Defendants-Appellants and Appellees.

United States of America, —
Southern District of New York—ss.:

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed upon.

3774 IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District, this day of in the year of our Lord one thousand nine hundred and thirty-nine and of the Independence of the said United States the one hundred and sixty-third.

CHARLES WEISER,
Clerk.

(Seal)

Opinion, Circuit Court of Appeals.

3775

No. 392—October Term, 1938.

Argued June 15, 1939. Decided July 28, 1939.

Appeal from the District Court of the United States for the Southern District of New York.

Before—L. Hand, Chase, and Patterson, *Circuit Judges*.

Edward Sheldon and Margaret Ayer Barnes,
Appellees-Appellants,

v.

3776

Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corp'n, Loew's, Inc. and Culver Export Corp'n,
Appellants-Appellees.

Appeals by both plaintiffs and defendants from a final decree in equity of the District Court for the Southern District of New York in a suit for the infringement of a copyright.

Arthur F. Driscoll, of New York City, for plaintiffs.

3777

John W. Davis, of New York City, for defendants.

L. Hand, *Circuit Judge*:

This case comes before us again, this time upon a final decree, entered upon the accounting which we directed before. 81 F. 2d 49. The district court referred the account to a master, who heard the parties at great length and made a voluminous report which the district judge affirmed in most respects. The decree awards to the plaintiffs all the profits made by the defendants from exhibitions of the picture, "Letty Lynton", and the principal question is whether this was correct. The defendants insist that the

3778 profits should have been apportioned, and that the record contains evidence by which that can be done. Their reasoning is that the recovery of the author of a copyrighted work ought to be limited to those profits which result from its exploitation; and that since the value of the picture here depended only in very small measure upon those parts which the defendants have been found to have lifted, they should be accountable for only a correspondingly small part of the profits. Even if this be true, it is equally true that an infringer carries the burden of disentangling the contributions of the several factors which he has confused. The law requires him to resolve any doubts arising from his wrong; he is like any other constructive trustee.

3779 *Callaghan* v. *Myers*, 128 U. S. 617, 666, 9 S. Ct. 177, 32 L. Ed. 547. Unless, however, there is an absolute bar against his success, the only question is what evidence of separation courts will accept. Strictly and literally, it is true that the problem is insoluble. The profits from a picture consist of admission fees, which the playgoers pay because the picture attracts them with the hope of enjoyment. That enjoyment, which is one source of its further popularity, is made up of many factors: the actors, the work of the producer and director, the story, the scenery and costumes. The attraction and the hope which first draws them are principally aroused by advertisements, and

3780 the reputation of the stars and the producing company. These factors have no unit common to all, and are therefore incommensurable; in that, the situation is not different from the usual case of copyright infringement where the pirated material has been mixed with matter in the public demesne. The difficulties of separation have generally prevented infringers from attempting any apportionment; they have contented themselves with getting down the net profits as low as possible. That was the case in *Callaghan* v. *Myers*, supra; and in *Belford, Clarke & Co.* v. *Scribner*, 144 U. S. 488, 508, 12 S. Ct. 734, 36 L. Ed. 514; and for this reason the general language there used is not to be taken as holding that the infringer must always be unsuccessful,

no matter what evidence he may bring forward. They hold 3781
no more than that when he makes no effort to discharge the duty resting upon him, he will be cast for the whole profit. *Dam* v. *Kirke La Shelle Co.*, 2 Cir., 175 F. 902, 41 L. R. A., N. S. 1002, 20 Ann. Cas. 1173, cannot, however, be so explained. The appeal came up from an interlocutory decree, which did not of itself involve the point, but the court, apparently sua sponte, undertook to declare that the plaintiff should recover all the profits. The defendant moved for a modification of this provision, so as to allow it to prove the value of its own contribution to the play. By affidavits it proposed to show what were the royalties usual in the industry, and other matters which it thought 3782.
relevant. The court nevertheless adhered to its first decision, apparently not because the specific evidence offered was unacceptable, but because no evidence would serve. We understand it to have held that an infringer, at least if he is a deliberate plagiarist, must surrender his entire profits, regardless of the relative importance of the copyrighted and uncopyrighted material he has used. In *Harold Lloyd Corp.* v. *Witwer*, 9 Cir., 65 F. 2d 1, the bill was dismissed for non-infringement, but Judge McCormick in a dissenting opinion declared that the profits might be and should be apportioned. He seems to have based his conclusion principally upon that clause in section 25 of the Copyright Act, 17 U. S. C. A. §25, which gives the court 3783
power to award damages "in lieu of actual damages and profits". *Hartford Printing Co.* v. *Hartford Directory & Printing Co.*, C. C., 146 F. 332, is the only other decision on the point that we have found, and looks towards the possibility of apportionment. It must be owned, however, that in point of authority the plaintiffs have the advantage.

Essentially the same problem arises in patent accountings. It is true that the question most mooted there is in what circumstances the patentee succeeds in throwing upon the infringer the duty of separating that part of the profits which he has himself contributed; and upon that rock most patentees used to be wrecked. *Westinghouse Electric &*

84 *Mfg. Co.* v. *Wagner Electric & Mfg. Co.*, 225 U. S. 604, 32 S. Ct. 691, 56 L. Ed. 1222, 41 L. R. A., N. S. 653, was primarily intended to treat them more liberally, and, so far, it is not relevant to this appeal, for that burden is always on the copyright infringer. However, in those situations in which the burden does shift to the patent infringer, the same difficulty appears as in copyright suits, for in both it is nearly as unfair to cast the infringer for all the profits, as it would be to deny the patentee or author any recovery whatever, because he could not separate his contribution. This plight of the infringer was considered in *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric & Mfg. Co.*, supra, and in 225 U. S. on page 620, 32 S. Ct. on page 696, 56
85 L. Ed. 1222, 41 L. R. A., N. S. 653, the court plainly recognized that "by general evidence, expert testimony or otherwise" he might relieve himself; his privilege was confirmed in *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, 235 U. S. 641, 647, 35 S. Ct. 221, 59 L. Ed. 398. In 1922, in rather delayed response to these decisions, Congress changed the statute by providing (section 70, Title 35, U. S. Code, 35 U. S. C. A. §70) that "opinion or expert testimony" should be competent upon the issue, apparently without regard to where the burden of proof might for the moment lie. Since then such testimony has often been used in patent accountings, though it has by no means removed
86 all the difficulties. It seems to us that we ought not to disregard the progress of the law in a field so close to that before us. While it remains true for the reasons we have already given, that, except in the most general way, the percentages of experts cannot be used to solve a problem in which there is no common measure; yet it would be a mistake to deny all weight to them. Men often make quantitative judgments and act upon them in matters which logically admit of them as little as this. If one says that he likes one kind of music twice as much as another, we do not charge him with talking nonsense. We should indeed do so, if he added that his liking for Wagner was ten per cent of his liking for Beethoven; but even then it would express,

however pedantically, a different degree of preference from 3787
the first form, and it might well have different practical consequences. A court is justified in basing its decrees upon practices common in other human affairs; and we can no longer accept the doctrine of *Dam v. Kirke La Shelle Company*, supra, that by no hook or crook can an infringer be relieved of so manifestly unjust a result.

The evidence offered in the case at bar was of two kinds: the price of the picture rights in the play, as both plaintiffs and defendants had agreed to it, and the opinions of experts. As to the first, if we knew that the price represented the utmost that the defendants would have given for the rights, and if at that time they also knew how much the 3788
picture as a whole would cost, the proportion between that cost and the price of the rights might vaguely indicate the defendants' judgment of the play's proportional drawing power. These conditions were not, however, shown to have been fulfilled. The price resulted from a bargain, determined as well by the plaintiffs' necessities, as by the defendants' estimate of the play's probable contribution. Again, while the defendants knew whom they would make the stars, it does not appear that they had forecast the whole cost of the picture. Finally, even were all this known, the cost of the other factors was by no means a measure of their relative drawing powers. For these reasons we discard the agreed price. The expert testimony was 3789
of two kinds, that of producers and that of exhibitors. The questions put to each were substantially the same: what was the proportion of the gross receipts properly apportionable to the play? Their answers were in percentages that ran between five and twelve (one of them is perhaps to be understood as saying that the play contributed nothing at all). Very generally they professed to believe that the controlling factor in the success of a play was the popularity of the actors—the stars—and that in the case at bar the two "leads", Crawford and Montgomery, had stood very high in the public esteem in 1932. (Indeed, the infringing picture itself was sold to many exhibitors merely as "Pro-

90 duction No. 208, Joan Crawford No. 2".) They agreed that in the case of a very well known book or play, the story might contribute more, but that the plaintiffs' play was not in that class. They thought that the other chief factors were the skill and reputation of the producer and the director, the scenery and costumes, the extent of the advertising and the reputation and standing of the producing company itself, which gave an assurance to exhibitors and to playgoers, on which both very largely relied. The plaintiffs called no witnesses to rebut this testimony, and if their failure to do so was because of the commanding position of the defendants in the industry, they did not prove it. We must therefore assume that the testimony
91 represents the best opinion of the calling.

Before fixing a percentage upon the basis of this testimony we must consider two things peculiar to the case at bar. First, all the witnesses' estimates were based upon the contribution of the entire play; that is, as though it was completely the work of the plaintiffs. As we know, that was not the case; the plaintiffs worked over old material; the general skeleton was already in the public demesne. A wanton girl kills her lover to free herself for a better match; she is brought to trial for the murder and escapes. Nobody can say how far this basic plot is to be credited with whatever the play contributed to the drawing power
92 of the picture. That consideration must therefore count towards reducing the percentage of profits recoverable. On the other hand the defendants may not count the effect of their standing and reputation in the industry; probably the most important factor of all, after the stars. They were not innocent offenders; they deliberately lifted the play; it would take far more than the denials in the old record to convince us to the contrary in the face of the step by step "tracking" which our comparison and analysis disclosed. The defendants appear to have understood our refusal on the first appeal to pass upon this issue as evidence of our acceptance of their disclaimers. We meant nothing of the kind: it was not necessary to decide the issue and we left it open against the chance of receiving new light.

No new light has come, and we now hold that the borrowing 3793
was a deliberate plagiarism. It follows that they can be credited only with such factors as they bought and paid for; the actors, the scenery, the producers, the directors and the general overhead. *Callaghan* v. *Myers*, supra, 128 U. S. 617, at page 665, 9 S. Ct. 177, 32 L. Ed. 547; *Flat Slab Patents Co.* v. *Turner*, 8 Cir., 285 F. 257, 282, 283; *Kansas City Hay Press Co.* v. *Derol*, C. C., 127 F. 363, 369. Indeed a constructive trustee, who consciously misappropriates the property of another, is often refused allowance even of his actual expenses (Restatement of Restitution §158(d)) and although this harsh rule, which would charge the defendants with the whole gross receipts, has been 3794
softened, a plagiarist may not charge for his labor in exploiting what he has taken. A fortiori he should not be allowed for the currency which his reputation may have given to the combined product.

We are aware that out of all this no real standard emerges, and that it would be absurd to treat the estimates of the experts as being more than expressions of very decided opinions that the play should count for very little. But we are resolved to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share. In cases where plaintiffs fail to prove their damages exactly, we often make the best estimate we can, even though it is 3795
really no more than a guess (*Pieczonka* v. *Pullman Co.*, 2 Cir., 102 F. 2d 432, 434), and under the guise of resolving all doubts against the defendants we will not deny the one fact that stands undoubted. Procedural duties are devised in aid of truth; and their unsparing use may defeat their whole purpose, as here it would. However, though we do not press the burden of proof so far, the defendants must be content to accept much of the embarrassment resulting from mingling the plaintiffs' property with their own. We will not accept the experts' testimony at its face value; we must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a

796 figure which will favor the plaintiffs in every reasonable chance of error. With this in mind we fix their share of the net profits at one fifth.

THE ACCOUNTING.

Both parties objected to a number of items in the accounts, as fixed by the master and confirmed by the judge. We shall first take up the defendants' objections, and then the plaintiffs', in the same order in which they appear in the briefs.

THE DEFENDANTS' OBJECTIONS.

797

(1) The master refused to allow as a credit a certain part of the profits which had been paid to the Louis B. Mayer Company, a partnership made up of three persons—Mayer, Thalberg and Rubin—all important officers of one or another of the defendants. When they entered the defendants' employ, they were able, because of their strong position in the industry, to exact an agreement for a share of all the profits of the Metro-Goldwyn Pictures Company. This was evidenced by a contract which was later superseded by a contract with Loew's, Inc., whose profits were substituted for those of the Pictures Company. We do not see why payments made under these contracts should 798 not be credited to the defendants. Even though we assume arguendo that the plaintiffs could recover them from the partners personally, in this suit they can reach only the defendants' profits. The payments were never profits of the defendants at all; the contracts effectively laid hold of them the moment they came into existence. Not to allow the credit would be in substance to introduce the partners as defendants into this suit, and yet to hold Loew's, Inc., liable for the recovery against them. We allow the credit.

(2) The next question is how to find the proper distribution cost of the infringing picture. Several ways might be theoretically proper; but we have to choose between only

two: one, to divide the total by the number of pictures dis- 3799
tributed by the defendants in 1932; the other, to divide it by the infringing picture's proportion of the total gross receipts. The master took the first; the defendants wish us to take the second; nobody suggests that the costs should be divided in accordance with the cost of production. The distribution cost is made up of a number of items, some of which it might be better to divide by one rule, and some by another. For example, the cost of the advertisements and other publicity might very well vary with the cost of production; the cost of carriage might perhaps best be divided by the number of theatres at which the picture was exhibited. But we cannot see why on any theory the cost of distribution should vary with gross receipts. As between 3800
the two we therefore accept the master's disposition of this item.

(3) The next point is whether to include the profits made from exhibiting the infringing picture outside the United States. At first blush it would indeed seem that these should be excluded. The plaintiffs made no proof of foreign law, and we cannot say that the exhibition of the positives abroad was a tort. However, exhibition is not the only act forbidden by the Copyright Act; Section 1(d), 17 U. S. C. A. §1(d), gives to the author the exclusive right, not only to perform a dramatic work, but "to make 3801
* * * any transcription or record thereof * * * from which, in whole or in part, it may in any manner * * * be * * * reproduced." The Culver Company made the negatives in this country, or had them made here, and shipped them abroad, where the positives were produced and exhibited. The negatives were "records" from which the work could be "reproduced", and it was a tort to make them in this country. The plaintiffs acquired an equitable interest in them as soon as they were made, which attached to any profits from their exploitation, whether in the form of money remitted to the United States, or of increase in the value of shares of foreign companies held by the

02 defendants. We need not decide whether the law of those countries where the negatives were exploited, recognized the plaintiffs' equitable interest; we can assume arguendo that it did not, for, as soon as any of the profits so realized took the form of property whose situs was in the United States, our law seized upon them and impressed them with a constructive trust, whatever their form. Compare *Goulds Manufacturing Co.* v. *Cowing*, 105 U. S. 253, 26 L. Ed. 987; *Dowagiac Mfg. Co.* v. *Minnesota Moline Plow Co.*, supra, 235 U. S. 641, at page 650, 35 S. Ct. 221, 59 L. Ed. 398.

(4) The next item is the profits of the defendant Loew's theatre-subsidiaries, with which the defendants say that
03 they should not be charged, except so far as they have received them in kind. If any subsidiary were insolvent, it would of course be true that its creditors would have a prior claim upon its profits; but there is no suggestion that any of them are. That being true, it makes no practical difference whether the profit comes to the defendants in the form of a dividend, or whether it merely enhances the value of their shares. (This we have already implied under the last point.) The master in all cases prorated the subsidiary's profits to the proportion of its shares held by the defendants, and they can demand nothing more. It is true that the defendants were not formally the exhibitors of
04 these positives, but that makes no difference. Indeed, the situation in this respect is precisely like that of the exported negatives which we have just considered. Moreover, as to these positives there are two other answers. The exhibitions were torts, even if they were not torts of the defendants, and the profits were benefits arising from them, which the defendants received as volunteers, for they paid nothing for them. Like other volunteers they are accountable for any benefits received from a constructive trustee. Restatement of Restitution §160(g). Finally, the defendants were in fact the real tortfeasors, because, although the subsidiaries had a formal separate existence, the master found that Loew's, Inc. was the principal even in the act of

exhibiting the pictures; their officers were in complete con- 3805
trol of the subsidiaries, which were used merely as agents. *Kingston Dry Dock Co.* v. *Lake Champlain Transportation Co.*, 2 Cir., 31 F. 2d 265, 267; *Pacific Can. Co.* v. *Hewes*, 9 Cir., 95 F. 2d 42, 45, 46; *Berkey* v. *Third Avenue R. Co.*, 244 N. Y. 84, 95, 155 N. E. 58, 50 A. L. R. 599.

(5) Next, the defendants wish the "overhead expenses" allocated by the number of pictures, as the master allocated the distribution cost. The master, on the contrary, used the cost of production as the basis. Neither is theoretically accurate; to make a perfect allocation one would have to examine what part of the time of all the employees whose pay went into the "overhead", was given to each picture; 3806
and so of the other expenses. That was obviously impossible. It is on the whole more likely that a given picture required that proportion of the general services represented by its cost of production, than that each picture shared those services equally. The last is a very remote possibility indeed; the first is more likely to conform to the facts, if we could know them. The master's solution appears to us as nearly right as was practically possible.

(6) Next is an item disallowed by the master, which arose as follows. The defendants found by experience that of those "continuities" which they made from stories or 3807
from plays bought by them, or which were entirely composed by writers in their employ, a very substantial number turned out failures. To meet this, in 1932 for the first time, they set up on their books, as part of "studio overhead" an item of $500,000, representing what they estimated would be the loss on their existing stock of "continuities". Had this been an annual depreciation credit, based upon past experience, something might be said for treating it as an expense of the business, like the item of "rejected continuities" which will come up later. But it was not of that kind; it was an estimate of the proper deduction from the cost on the books of losses already suf-

3808 fered. We cannot understand by what reasoning this should be part of the "overhead" for the year 1932.

(7) The last of the defendants' objections was to the master's exclusion as a deduction of the interest upon a large loan made by Loew's, Inc., the "top company", to the Pictures Company, in the form of an open account going back twelve years. It is impossible to say how much of those things purchased by the proceeds of this loan continued to be used in 1932. The master included in the "overhead" an interest charge upon all the plant investment of the defendants used in making the picture. He com-
3809 puted this like the other "overhead" by taking that proportion of the total plant machinery and "properties", which the cost of production of the picture bore to the cost of production of all pictures. To this he added the interest for six months upon $300,000, taken as working capital. Certainly it would have been improper to allow both this and interest on the loan. If the Picture Company borrowed its capital and was allowed the interest as an expense, it could not charge anything for the value of those things used in production. But that aside, there was no warrant for allowing interest on the loan in any case. So far as its proceeds had been used up, the continued payment of interest upon the loan by which they had been procured, was
3810 not relevant to the production of the infringing picture. The master's method was in any event preferable. Moreover, the transaction seems to have been strictly intramural; we cannot understand why it should figure as an item in the accounts of the plaintiffs with the defendants collectively.

THE PLAINTIFFS' OBJECTIONS.

(1) The plaintiffs' first objection is to the master's allowance as a credit of the income taxes paid by the defendants. He allowed them because he thought that the defendants were not deliberate plagiarists; otherwise the

case would have fallen within the ruling of the Supreme 3811
Court in *L. P. Larson, Jr., Co.* v. *Wm. Wrigley, Jr., Co.*, 277 U. S. 97, 48 S. Ct. 449, 72 L. Ed. 800; *Goodyear Tire & Rubber Co.* v. *Overman Cushion Tire Co.*, 6 Cir., 95 F. 2d 978, 985. See, also, *Stromberg Motor Devices Co.* v. *Detroit Trust Co.*, 7 Cir., 44 F. 2d 958; *Stromberg Motor Devices Co.* v. *Zenith-Detroit Corp.*, 2 Cir., 73 F. 2d 62. From what we have already said regarding the defendants' guilt, it appears that the master was wrong. It does indeed seem somewhat arbitrary to distinguish this from other expenses necessary to the business; yet on the other hand the distinction illustrates that in dealing with a conscious wrong-doer, courts do not feel obliged for consistency's 3812
sake to take one extreme or the other.

(2) The second objection is to the allowance by the master for what is known as "idle time". It was the frequent practice of the defendants to employ their more costly employees—directors, producers, stars and writers—at yearly salaries, rather than by the picture. This involved a certain waste of time since one picture cannot always be fitted closely upon another. The "idle time" of Crawford and Montgomery before making the infringing picture was allowed as a credit, and similar allowances were made in the "overhead". The plaintiffs must take the defendants' practices as they were; they are confined to the profits 3813
actually made, not to what the defendants might have made. If it was in the long run more economical to employ their assistants by the year, obviously the "idle time" must be paid for by the returns from pictures, and whether it was better to charge it to the next following picture, or to an earlier one, is not important. The allocation was fair.

(3) Next is the objection to deducting a payment made by the defendants to the Motion Pictures Producers and Distributors Association (the Will Hays Association) based upon the revenues derived from the infringing picture. The assumption is that this association will repay, or rebate,

3814 so much of this payment as represented the profits which must be restored under the decree in this suit. That is, however, speculative; the money was paid and created a credit; if the plaintiffs had wished to prove a corresponding charge, it rested with them to do so. They could have examined the officers of the association.

(4) Next is a challenge to any allowance for "overhead" at all, on the theory that the defendants did not show that it had been increased by the production of the infringing picture. The correct rule upon this point is stated in *Levin Bros.* v. *Davis Mfg. Co.*, 8 Cir., 72 F. 2d 163, and in substance it is this. "Overhead" which does not assist
3815 in the production of the infringement should not be credited to the infringer; that which does, should be; it is a question of fact in all cases. In the case at bar the infringing picture was one of over forty made by the defendants, using the same supervising staff and organization, which had to be maintained if the business was to go on at all. Without them no picture could have been produced; they were as much a condition upon the production of the infringing picture as the scenery, or the plaintiffs' play itself. *Levin Bros.* v. *Davis Mfg. Co.*, supra, did not hold otherwise; nor did *Haiss Mfg. Co.* v. *Link-Belt Co.*, 3 Cir., 63 F. 2d 479.

3816 (5) The next objection is to the inclusion in the "overhead" of an allowance for continuities scrapped, and for completed pictures never exhibited. The plaintiffs invoke the rule that an author, like a patentee, may select those infringements which prove profitable, and ignore the rest. *Crosby Steam Gage Valve Co.* v. *Consolidated Safety Valve Co.*, 141 U. S. 441, 457, 12 S. Ct. 49, 35 L. Ed. 809. On the other hand there is in most industries a certain inevitable wastage, resulting from imperfect industrial technique and the like; and this, being a condition upon all production, is a part of the cost of production. *Duplate Corp.* v. *Triplex Safety Glass Co.*, 298 U. S. 448, 56 S. Ct.

792, 80 L. Ed. 1274. The charge for wasted pictures and 3817
"continuities" was of this kind; owing to the imperfect forecast of what would prove a good "continuity", a number of false starts were inevitable; sometimes even a complete picture would also turn out to be valueless. The plaintiffs answer that they were not in partnership with the defendants, whose failures should not be charged to them. But the infringing picture owed its success in part to the fact that it was only one of a large number produced that year. Had defendants not had so large a capacity, the profits might never have been made at all; certainly they would not have been as large. Since therefore the plaintiffs profited by the fact that the defendants had developed this 3818
capacity, they must be content to take the breakage, so to say, which was its inevitable incident.

16 & 7 T next objection we may pass, because it is covered by what we have said in section four. The next following relates to the way in which the interest item in the overhead was calculated; that is, to the "base" used. In computing it the realty was appraised, but the value of the personalty was taken at cost less depreciation. It was formally inconsistent not to appraise both, but the extravagant labor of doing so was an excuse, especially when one considers the small amount involved. It was better also to compute this item by assuming that the infringing picture used that proportion of the whole plant 3819
which its cost of production bore to the cost of production of all pictures made that year, than to attempt any allocation of buildings and other property according to their actual use for the picture. The second method would have been incredibly difficult in application, involving as it would a different proportional use of each bit of property concerned.

(8 & 9) The next objection is covered by what we said in section four, but the following one raises an interesting question. The plaintiffs say that they should not be charged with the losses resulting from the exhibition of the infringing picture in certain theatres, where the receipts did not

3820 equal the costs of maintenance during the period of the exhibition. We think that so far they are right. The exhibition of a picture at theatre X was a separate tort which the plaintiffs might elect to sue upon, ignoring any losses from the exhibition at theatre Y. As to exhibitions in the United States we therefore hold that the losses should not be credited to the defendants. Exhibitions in foreign countries stand on another basis. As we have said, the exhibition of the positives was not a tort, or at least it was not shown to have been a tort; therefore the plaintiffs had no choice but to sue for the next profits arising out of the manufacture of the negative. They could not therefore select the profitable exhibitions and discard those which
3821 resulted in a loss, but must take the bitter with the sweet. The ruling of the master is modified as to exhibitions in the United States.

(10) The last of the plaintiffs' objections is somewhat complicated, though it involves very little. It arose in this way. The Culver Company exported all the negatives manufactured by the defendants during 1932, the infringing picture among them. There were expenses of distribution for all these amounting to nearly $500,000, and the question is how much of this should be credited against profits from the infringing picture. We have already affirmed the master in his apportionment of distribution
3822 costs equally among the "feature pictures". In his apportionment of the United States costs, in order to get a commutation figure for "news reels" and "shorts"—of which a great number was sent out—he adopted the formula that one "feature" was equal to nine reels; and by applying this he found an equivalent of 60 "features" distributed in the United States, made up of true "features" together with commuted "news reels" and "shorts". Forty-three "features" were exported in 1932; and forty-three two reel "shorts" and forty-one one reel "shorts" along with them. Using the master's formula that was the equivalent of fifty-seven "features". He reduced this divisor to forty-five because not all of the "features" were sent to all the coun-

tries where the costs were incurred. On the other hand 3823
he made no allowance for the foreign films that went along with the American films, as the laws of many countries often require. The deduction, being a credit, the defendants had the burden of proving it; all they did prove was that the equivalent of fifty-seven films were exported. It seems to us that, for all we can tell, the reduction of the divisor to forty-five for those "features" which were not sent to all countries, may well have been balanced by the foreign films that went along with the American; and that there was really no warrant for any other divisor than fifty-seven, which we fix as the proper one. The item will be so computed.

3824

ALLOWANCE TO THE PLAINTIFFS' ATTORNEYS.

There remains nothing but the allowance to the plaintiffs' attorneys in all courts. This the judge fixed at $55,000, not including this appeal. He made up the figure as follows: $10,000 for preparing for trial, $5,000 for the trial, $10,000 for the appeal; $22,500 for the accounting; $7,500 for arguing the exceptions before himself. The great reduction in the recovery must result in a reduction of the allowances, though by no means in the same proportion. The amount of work was extremely large, and the computations were intricate and long; the plaintiffs had to go to California for part of the hearings, and the 3825
cause has been pending for more than seven years. We will make the following awards: for preparation for trial and for the trial $10,000; for the first appeal $5,000; for the hearings before the master $15,000; for the hearing on the exceptions $3,000; making $33,000 in all. We shall allow nothing for the argument on this appeal, since the defendants were successful. Section 40 of the Copyright Act, 17 U. S. C. A. §40, awards "full costs" to the "prevailing party", and that will give the costs of the appeal to the plaintiffs; but it leaves the allowance to attorneys in the discretion of the court.

Decree reversed and cause remanded for further proceedings not inconsistent with the foregoing.

Petition for Rehearing.

3826 UNITED STATES CIRCUIT COURT OF APPEALS,
SECOND CIRCUIT.

EDWARD SHELDON and MARGARET AYER BARNES,
Appellants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC., and CULVER EXPORT CORPORATION,
Appellees.

3827

To Honorable Circuit Judges Learned Hand, Harrie B Chase and Robert Patterson:

This is a petition for rehearing on the following grounds:

(a) The case of *Belford* v. *Scribner*, 144 U. S. 488, cited by this Court cannot be distinguished on the basis that the record therein contained no evidence upon which apportionment of profits might be based.

(b) Even if the decisions of the Supreme Court are held not to be controlling and the present case is held to be one proper for apportionment, plaintiffs should be
3828 **allowed to present evidence before *one-fifth of the profits* is finally fixed as a yardstick.**

A.

***Belford* v. *Scribner*, 144 U. S. 488.**

There have been three outstanding authorities, all mentioned in the opinion of this Court, upon the question of whether deliberate plagiarists should be made to account for all profits accruing to them from the infringement or whether on the other hand there should be apportionment

between the literary material and the other factors con- 3829
tributing to the infringing work. These cases are *Callaghan* v. *Myers*, 128 U. S. 617; *Belford* v. *Scribner*, *supra*, and *Dam* v. *Kirk LaShelle Co.*, 175 Fed. 902 (2nd Circuit).

In its opinion herein this Court states:

> "The difficulties of separation have generally prevented infringers from attempting any apportionment; they have contented themselves with getting down the net profits as low as possible. That was the case in *Callaghan* v. *Myers*, *supra*, and in *Belford* v. *Scribner*, 144 U. S. 488, 508; and for this
> reason the general language there used is not to be 3830
> taken as holding that the infringer must always be unsuccessful, no matter what evidence he may bring forward. They hold no more than that when he makes no effort to discharge the duty resting upon him, he will be cast for the whole profit."

The record in the *Belford* case, *supra*, discloses very definitely that the defendant not only made an effort to have the profits apportioned, but that upon the evidence therein profits could have been apportioned almost to a mathematical certainty.

The *Belford* case concerned the plagiarism of a cook book. In an endeavor to seek an apportionment of the 3831
profits defendants placed upon the stand as an expert on cook books one Thomas W. Handford, who testified at page 116 of the record, that he had made a careful examination of the protected and the infringing cook books. He testified that such examination had disclosed that 153 recipes had been copied in whole or in part by the infringer from the protected cook book. These recipes constituted only a part of the recipes in the infringing cook book. Mr. Handford testified that these plagiarized recipes constituted a total of 2,010 lines, or 56 pages of the total of 300 pages of recipes contained in the infringing cook book. At folio

832 211, page 117 of the record Mr. Handford was asked the following question, and made the following reply:

> "Q. If the matter which has been copied from 'Common Sense in the Household' and which appears in 'How to Cook', including all recipes, any portion of which has been there copied, were to be taken out of the book 'How to Cook', would it leave a work of value as a cook book? A. Oh, yes, certainly."

At page 122 of the record we find the following specific assignment of error to the Supreme Court of the United
833 State by the appellant Belford:

> "Because the decree goes for the entire amount of the profits realized by Belford, Clark & Co., who were the proprietors of the book which is alleged to infringe the rights of the complainant *instead of for such part of the profits as were realized by the infringement.*"

The foregoing is definitely at variance with the statement of the Court that the *Belford* case holds no more than that when an infringer makes no effort to discharge the duty resting upon him of showing how the profits might be apportioned, he will be cast for the whole profit.
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B.

Even if the decisions of the Supreme Court are held not to be controlling, and the present case is held to be one proper for apportionment, plaintiffs should be allowed to present evidence, before the Court fixes one-fifth of the profits as the proper yardstick.

This Court, speaking of the expert testimony offered by defendants, stated:

> "The plaintiffs called no witnesses to rebut this testimony, and if their failure to do so was because

> of the commanding position of the defendants in the industry, they did not prove it. We must therefore assume that the testimony represents the best opinion of the calling." 3835

The Court in this statement overlooked important factors. Prior to the decision in this case the law in this circuit was deemed settled by the case of *Dam* v. *Kirk LaShelle Company*, 175 Fed. 902, which case was understood to rule as your Honors have stated:

> "We understand it to have held that an infringer, at least if he is a deliberate plagiarist, must surrender his entire profits, regardless of the relative importance of the copyrighted and uncopyrighted material he has used." 3836

Since the law on the question of apportionment was apparently settled by the prior decision of this Court in *Dam* v. *Kirk LaShelle Company*, *supra*, plaintiffs were justified in objecting to the evidence of defendants' experts as irrelevant and immaterial and refusing to meet the issue, as complainants did.

The present decision of the Court fixing the yardstick of one-fifth of the profits, penalizes complainants for accepting the law to be as set forth in *Dam* v. *Kirk LaShelle Company*, *supra*, not then overruled, and as set forth in *Belford* v. *Scribner* and *Callaghan* v. *Myers*. 3837

Plaintiffs' Offer of Proof.

If permission is granted to plaintiffs to present testimony in rebuttal of the defendants' experts, plaintiffs can and will furnish evidence which will demonstrate that the ruling laid down by this Court allowing the copyright owners 20% of the net profits, is not only improper and inadequate, but constitutes an open invitation to plagiar-

3838 ism, since it would enable a deliberate plagiarist to pirate literary material without fear of penalty.

The plaintiffs' proof would include the following:

(1) *Testimony of Experts.*

Expert testimony to establish that the story is the most important factor contributing to the gross receipts or the box office success and that it outweighs in importance all other contributions. This evidence will establish that the critical element which has determined the issue of success or failure of a motion picture has been the story. In a motion picture photoplay, far more than on the stage, 3839 the play itself is the thing which catches the favor of the audience.

(2) *Pictures With Star Casts and Poor Stories Have Been Box Office Failures, and Pictures With Good Stories, Even With Unstarred Actors, Have Been Box Office Successes.*

The testimony which will be offered by the plaintiffs' experts can be corroborated factually by submitting a long list of pictures in which outstanding starred and featured actors and extravagant production have failed to carry a poor story to box office success. On the other 3840 hand a list of motion pictures can be compiled, extending for many years back, which will overwhelmingly demonstrate the importance of a good story to the picture.

(3) *Prices Paid for Successful Stage Plays.*

Any realistic approach to the proper measure of the value of the story to the motion picture must take into consideration the experience of the past seven years in which this suit has been in litigation with respect to the prices paid for the motion picture rights of stage successes.

The importance of dramatic material as the basis for

motion pictures has come to be recognized more and more, and may be gathered from the following list:

Plays for Which $200,000 or More Has Been Paid for the Motion Picture Rights Within the Past Several Years:

ROOM SERVICE ($255,000)
AMERICAN WAY
YOU CAN'T TAKE IT WITH YOU
ABE LINCOLN IN ILLINOIS

$150,000 to $200,000:

DEAD END
BROTHER RAT
DODSWORTH

$100,000 to $150,000:

YES, MY DARLING DAUGHTER
EXCURSION
BOY MEETS GIRL
IDIOT'S DELIGHT
STAGE DOOR
THE WOMEN
ANYTHING GOES
PETRIFIED FOREST
GREEN PASTURES
DINNER AT EIGHT
GOOD EARTH

In some instances in the foregoing list a percentage of the gross receipts was provided for in addition to payment of the specific sum.

The novel, BEN HUR, has produced in royalties for the Wallace family in the neighborhood of $4,000,000, of which a large portion is made up of moneys, royalties and percentages paid for the motion picture rights.

3844 The motion picture rights of the play ABIE'S IRISH ROSE were sold for $300,000 plus 50% of the profits.

In the testimony offered by the defendants in this action the experts expressed their opinion as to the share of the gross receipts attributable to the story. This Court has accepted, apparently, the principle that such apportionment can be made, and the plaintiffs now request that this Court grant them leave to offer testimony on their own behalf on this point. It must be observed, however, that even though it may be possible in the opinion of defendant's experts to attribute various portions of the *gross receipts* to different factors or elements entering into the ultimate motion picture photoplay, it does not neces-
3845 sarily follow that such division of gross receipts should be applied to an apportionment of profits in a plagiarism case. An apportionment of gross receipts assures the author of a payment for his rights in accordance with the percentage asserted by such experts to be adequate. An apportionment of profits assures the author of nothing and the application of such principle may permit a motion picture company to pirate a highly valuable piece of literary property and by extravagant production reduce the profits to a small amount and thus leave the injured party with a wholly inadequate recovery.

The decision by this Court that a wilful plagiarist, who
3846 has been compensated fully for all his costs and expenses, may nevertheless retain 80% of the profits, is in a very real sense an invitation to the plagiarism of the successful stage successes since the only risk incurred is a possible obligation to pay for the cost of the material pirated at less than the established range of prices for such plays.

The plaintiffs should have the opportunity to try the issue which under the law as it existed (*Dam* v. *Kirk LaShelle*) was irrelevant and immaterial.

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for a Rehearing be granted.

Should this Court deem it necessary to afford the defend-

ants herein an opportunity to be heard in opposition to 3847
plaintiffs' application herein for leave to adduce testimony in rebuttal of the expert testimony presented by defendants, it is respectfully requested that the issuance of the mandate herein be stayed until the hearing and determination of a motion by the plaintiffs in this Court for the said relief, which motion will be made returnable by plaintiffs on the first motion day of this Court on October 2, 1939.

Dated, New York, August 11, 1939.

Respectfully submitted,

3848

O'BRIEN, DRISCOLL & RAFTERY,
Attorneys for Complainants, Appellants
and Appellees,
Office and P. O. Address,
152 West 42nd Street,
Borough of Manhattan,
City of New York.

Of Counsel:
ARTHUR F. DRISCOLL,
BENJAMIN PEPPER,
T. NEWMAN LAWLER.

3849

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, ARTHUR F. DRISCOLL, counsel for the above named complainants, appellants and appellees, do hereby certify that the foregoing Petition for a Rehearing in this action is presented in good faith and not for delay.

ARTHUR F. DRISCOLL.

Denial.

3850

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

EDWARD SHELDON and MARGARET AYER BARNES,
Appellants,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC., and CULVER EXPORT CORPORATION,

3851 Appellees.

Before—L. HAND, CHASE and PATTERSON,
Circuit Judges.

PER CURIAM: Petition for rehearing denied.

Circuit Judges.

3852

Order Denying Petition.

3853

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 5th day of September, one thousand nine hundred and thirty-nine.

Present—HON. LEARNED HAND,
" HARRIE B. CHASE,
" ROBERT P. PATTERSON, *Circuit Judges*.

3854

EDWARD SHELDON and MARGARET AYER BARNES,
Plaintiffs-Appellants,

vs.

METRO-GOLDWYN PICTURES CORPORATION, et al.,
Defendants-Appellants.

A petition for a rehearing having been filed herein by counsel for the plaintiffs;

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Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

D. E. ROBERTS,
Clerk.

(Back)

3856

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

EDWARD SHELDON and another

vs.

METRO-GOLDWYN PICTURES CORPORATION, et al.

ORDER.

3857

United States Circuit Court of Appeals

Second Circuit

Filed Sep. 5, 1939

D. E. Roberts, Clerk.

3858

Order for Mandate.

UNITED STATES CIRCUIT COURT OF APPEALS, 3859

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 8th day of September, one thousand nine hundred and thirty-nine.

Present—HON. LEARNED HAND,
" HARRIE B. CHASE,
" ROBERT P. PATTERSON, *Circuit Judges.*

3860

EDWARD SHELDON and MARGARET AYER BARNES,
Plaintiffs-Appellants,

vs.

METRO-GOLDWYN PICTURES CORPORATION, et al.,
Defendants-Appellants.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the 3861
Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with costs of the appeal to the plaintiffs, and cause remanded for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS,
Clerk.

(Back)

3862

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

EDWARD SHELDON and MARGARET AYER BARNES

vs.

METRO-GOLDWYN PICTURES CORPORATION, et al.

ORDER FOR MANDATE.

3863

United States Circuit Court of Appeals

Second Circuit

Filed Sep. 8, 1939.

D. E. Roberts, Clerk.

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Clerk's Certificate.

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UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 1280, inclusive in 2 volumes, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

EDWARD SHELDON and MARGARET AYER BARNES,
Plaintiffs-Appellants, 3866

—against—

METRO-GOLDWYN PICTURES CORPORATION, et al.,
Defendants-Appellants.

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this nineteenth day of September in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the said United States the one hundred 3867
and sixty-fourth.

D. E. ROBERTS,
Clerk.

(Seal)

Opinion of Circuit Court of Appeals in Prior Appeal on Issue of Infringement.

3871

UNITED STATES CIRCUIT COURT OF APPEALS.

FOR THE SECOND CIRCUIT.

No. 118—October Term, 1935.

Argued Nov. 13, 1935. Decided Jan. 17, 1936.

Edward Sheldon and Margaret Ayer Barnes,

Appellants,

v.

3872

Metro-Goldwyn Pictures Corporation, Metro-Goldwyn Distributing Corporation, Loew's Inc. and Culver Export Corporation,

Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

Before—L. Hand, Swan and Chase, *Circuit Judges*.

Appeal by the plaintiffs from a decree of the District Court for the Southern District of New York dismissing a bill in equity for infringement of a copyright. 3873

Arthur F. Driscoll, of New York City, for appellants.

Nathan Burkan, of New York City, for appellees.

L. Hand, *Circuit Judge*:

The suit is to enjoin the performance of the picture play, "Letty Lynton", as an infringement of the plaintiffs' copyrighted play, "Dishonored Lady". The plaintiffs' title is conceded, so too the validity of the copyright;

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the only issue is infringement. The defendants say that they did not use the play in any way to produce the picture; the plaintiffs discredit this denial because of the negotiations between the parties for the purchase of rights in the play, and because the similarities between the two are too specific and detailed to have resulted from chance. The judge thought that, so far as the defendants had used the play, they had taken only what the law allowed, that is, those general themes, motives, or ideas in which there could be no copyright. Therefore he dismissed the bill.

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An understanding of the issue involves some description of what was in the public demesne, as well as of the play and the picture. In 1857 a Scotch girl, named Madeleine Smith, living in Glasgow, was brought to trial upon an indictment in three counts; two for attempts to poison her lover, a third for poisoning him. The jury acquitted her on the first count, and brought in a verdict of "Not Proven" on the second and third. The circumstances of the prosecution aroused much interest at the time not only in Scotland but in England; so much indeed that it became a cause célèbre, and that as late as 1927 the whole proceedings were published in book form. An outline of the story so published, which became the original of the play here in suit, is as follows: The Smiths were a respectable middle-class family, able to send their daughter to a "young ladies' boarding school"; they supposed her protected not only from any waywardness of her own, but from the wiles of seducers. In both they were mistaken, for when at the age of twenty-one she met a young Jerseyman of French blood, Emile L'Angelier, ten years older, and already the hero of many amorous adventures, she quickly succumbed and poured out her feelings in letters of the utmost ardor and indiscretion, and at times of a candor beyond the standards then, and even yet, permissible for a well-nurtured young woman. They wrote each other as though already married, he assuming to dic-

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tate her conduct and even her feelings; both expected to marry, she on any terms, he with the approval of her family. Nevertheless she soon tired of him and engaged herself to a man some twenty years older who was a better match, but for whom she had no more than a friendly complaisance. L'Angelier was not, however, to be fobbed off so easily; he threatened to expose her to her father by showing her letters. She at first tried to dissuade him by appeals to their tender memories, but finding this useless and thinking herself otherwise undone, she affected a return of her former passion and invited him to visit her again. Whether he did, was the turning point of the trial; the evidence, though it really left the issue in no doubt, was too indirect to satisfy the jury, perhaps in part because of her advocate's argument that to kill him only insured the discovery of her letters. It was shown that she had several times bought or tried to buy poison,—prussic acid and arsenic,—and that twice before his death L'Angelier became violently ill, the second time on the day after her purchase. He died of arsenical poison, which the prosecution charged that she had given him in a cup of chocolate. At her trial, Madeleine being incompetent as a witness, her advocate proved an alibi by the testimony of her younger sister that early on the night of the murder as laid in the indictment, she had gone to bed with Madeleine, who had slept with her throughout the night. As to one of the attempts her betrothed swore that she had been with him at the theatre.

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This was the story which the plaintiffs used to build their play. As will appear they took from it but the merest skeleton, the acquittal of a wanton young woman, who to extricate herself from an amour that stood in the way of a respectable marriage, poisoned her lover. The incidents, the characters, the mis en scène, the sequence of events, were all changed; nobody disputes that the plaintiffs were entitled to their copyright. All that they took

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MATTHEW BENDER & COMPANY
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from the story they might probably have taken, had it even been copyrighted. Their heroine is named Madeleine Cary; she lives in New York, brought up in affluence, if not in luxury; she is intelligent, voluptuous, ardent and corrupt; but, though she has had a succession of amours, she is capable of genuine affection. Her lover and victim is an Argentinian, named Moreno, who makes his living as a dancer in night-clubs. Madeleine has met him once in Europe before the play opens, has danced with him, has excited his concupiscence, he presses presents upon her. The play opens in his rooms, he and his dancing partner who is also his mistress, are together; Madeleine on the telephone recalls herself to him and says she wishes to visit him, though it is already past midnight. He disposes of his mistress by a device which does not deceive her and receives Madeleine; at once he falls to wooing her, luring her among other devices by singing a Gaucho song. He finds her facile and the curtain falls in season.

The second act is in her home, and introduces her father, a bibulous dotard, who has shot his wife's lover in the long past; Laurence Brennan, a self-made man in the fifties, untutored, self-reliant and reliable, who has had with Madeleine a relation, half paternal, half-amorous since she grew up; and Denis Farnborough, a young British labor peer, a mannekin to delight the heart of well ordered young women. Madeleine loves him; he loves Madeleine; she will give him no chance to declare himself, remembering her mottled past and his supposedly immaculate standards. She confides to Brennan, who makes clear to her the imbecility of her self-denial; she accepts this enlightenment and engages herself to her high-minded paragon after confessing vaguely her evil life and being assured that to post-war generations all such lapses are peccadillo.

In the next act Moreno, who has got wind of the engagement, comes to her house. Disposing of Farnborough, who

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chances to be there, she admits Moreno, acknowledges that she is to mary Farnborough, and asks him to accept the situation as the normal outcome of their intrigue. He refuses to be cast off, high words pass, he threatens to expose their relations, she raves at him, until finally he knocks her down and commands her to go to his apartment that morning as before. After he leaves full of swagger, her eye lights on a bottle of strychnine which her father uses as a drug; her fingers slowly close upon it; the audience understands that she will kill Moreno. Farnborough is at the telephone; this apparently stiffens her resolve, showing her the heights she may reach by its execution.

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The scene then shifts again to Moreno's apartment; his mistress must again be put out, most unwillingly for she is aware of the situation; Madeleine comes in; she pretends once more to feel warmly, she must wheedle him for he is out of sorts after the quarrel. Meanwhile she prepares to poison him by putting the strychnine in coffee, which she asks him to make ready. But in the course of these preparations during which he sings her again his Gaucho song, what with their proximity, and this and that, her animal ardors are once more aroused and drag her unwillingly and protesting, from her purpose. The play must therefore wait for an hour or more until, relieved of her passion, she appears from his bedroom and while breakfasting puts the

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strychnine in his coffee. He soon discovers what has happened and tries to telephone for help. He does succeed in getting a few words through, but she tears away the wire and fills his dying ears with her hatred and disgust. She then carefully wipes away all traces of her finger prints and manages to get away while the door is being pounded in by those who have come at his call.

The next act is again at her home on the following evening. Things are going well with her and Farnborough and her father, when a district attorney comes in, a familiar of the household, now in stern mood; Moreno's mistress and

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a waiter having incriminated Madeleine, and a cross has been found in Moreno's pocket, which he superstitiously took off her neck the night before. The district attorney cross-questions her, during which Farnborough several times fatuously intervenes; she is driven from point to point almost to an avowal when as a desperate plunge she says she spent the night with Brennan. Brennan is brought to the house and, catching the situation after a moment's delay, bears her out. This puts off the district attorney until seeing strychnine brought to relieve the father, his suspicions spring up again and he arrests Madeleine. The rest of the play is of no consequence here, except that it appears in the last scene that at the trial where she is acquitted, her father on the witness stand accounts for the absence of the bottle of strychnine which had been used to poison Moreno.

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At about the time that this play was being written an English woman named Lowndes wrote a book called Letty Lynton, also founded on the story of Madeleine Smith. Letty Lynton lives in England; she is eighteen years old, beautiful, well-reared and intelligent, but wayward. She has had a more or less equivocal love affair with a young Scot, named McLean, who worked in her father's chemical factory, but has discarded him, apparently before their love-making had gone very far. Then she chances upon a

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young Swede—half English—named Ekebon, and their acquaintance quickly becomes a standardized amour, kept secret from her parents, especially her mother, who is an uncompromising moralist, and somewhat estranged from Letty anyway. She and her lover use an old barn as their place of assignation; it had been fitted up as a play house for Letty when she was a child. Like Madeleine Smith she had written her lover a series of indiscreet letters which he has kept, for though he is on pleasure bent Ekebon has a frugal mind, and means to marry his sweetheart and set himself up for life. They are betrothed and he keeps pressing her to declare it to her parents, which she means never

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to do. While he is away in Sweden Letty meets an unmarried peer considerably older than she, poor, but intelligent and charming; he falls in love with her and she accepts him, more because it is a good match than for any other reason, though she likes him well enough, and will make him suppose that she loves him.

Thereupon Ekebon reappears, learns of Letty's new betrothal, and threatens to disclose his own to her father, backing up his story with her letters. She must at once disown her peer and resume her engagement with him. His motive, like L'Angelier's, is ambition rather than love, though conquest is a flattery and Letty a charming morsel. His threats naturally throw Letty into dismay; she has come to loathe him and at any cost must get free, but she has no one to turn to. In her plight she thinks of her old suitor, McLean, and goes to the factory only to find him gone. He has taught her how to get access to poisons in his office and has told of their effect on human beings. At first she thinks of jumping out the window, and when she winces at that, of poisoning herself; that would be easier. So she selects arsenic which is less painful and goes away with it; it is only when she gets home that she thinks of poisoning Ekebon. Her mind is soon made up, however, and she makes an appointment with him at the barn; she has told her father, she writes, and Ekebon is to see him on Monday, but meanwhile on Sunday they will meet secretly once more. She has prepared to go on a week-end party and conceals her car near the barn. He comes; she welcomes him with a pretence of her former ardors, and tries to get back her letters. Unsuccessful in this she persuades him to drink a cup of chocolate into which she puts the arsenic. After carefully washing the pans and cups, she leaves with him, dropping him from her car near his home; he being still unaffected. On her way to her party she pretends to have broken down and by asking the help of a passing cyclist establishes an alibi. Ekebon dies at his

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home attended by his mistress; the letters are discovered and Letty is brought before the coroner's inquest and acquitted chiefly through the alibi, for things look very bad for her until the cyclist appears.

The defendants, who are engaged in producing speaking films on a very large scale in Hollywood, California, had seen the play and wished to get the rights. They found, however, an obstacle in an association of motion picture producers presided over by Mr. Will Hays, who thought the play obscene; not being able to overcome his objections, they returned the copy of the manuscript which they had had. That was in the spring of 1930, but in the autumn they in-

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duced the plaintiffs to get up a scenario, which they hoped might pass moral muster. Although this did not suit them after the plaintiffs prepared it they must still have thought in the spring of 1931 that they could satisfy Mr. Hays, for they then procured an offer from the plaintiffs to sell their rights for $30,000. These negotiations also proved abortive because the play continued to be objectionable, and eventually they cried off on the bargain. Mrs. Lowndes' novel was suggested to Thalberg, one of the vice-presidents of the Metro-Goldwyn Company, in July, 1931, and again in the following November, and he bought the rights to it in December. At once he assigned the preparation of a play to

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Stromberg, who had read the novel in January, and thought it would make a suitable play for an actress named, Crawford, just then not employed. Stromberg chose Meehan, Tucheck and Brown to help him, the first two with the scenario, the third with the dramatic production. All these four were examined by deposition; all denied that they had used the play in any way whatever; all agreed that they had based the picture on the story of Madeleine Smith and on the novel, "Letty Lynton". All had seen the play, and Tucheck had read the manuscript, as had Thalberg, but Stromberg, Meehan and Brown swore that they had not; Stromberg's denial being however worthless, for he had

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originally sworn the contrary in an affidavit. They all say that work began late in November or early in December, 1931, and the picture was finished by the end of March. To meet these denials, the plaintiffs appeal to the substantial identity between passages in the picture and those parts of the play which are original with them.

The picture opens in Montevideo where Letty Lynton is recovering from her fondness for Emile Renaul. She is rich, luxurious and fatherless, her father having been killed by his mistress's husband; her mother is seared, hard, selfish, unmotherly; and Letty has left home to escape her, wandering about in search of excitement. Apparently for 3896
the good part of a year she has been carrying on a love affair with Renaul; twice before she has tried to shake loose, has gone once to Rio where she lit another flame, but each time she has weakened and been drawn back. Though not fully declared as an amour, there can be no real question as to the character of her attachment. She at length determines really to break loose, but once again her senses are too much for her and it is indicated, if not declared, that she spends the night with Renaul. Though he is left a vague figure only indistinctly associated with South America somewhere or other, the part was cast for an actor with a marked foreign accent, and it is plain that he was meant to be understood, in origin anyway, 3897
as South American, like Moreno in the play. He is violent, possessive and sensual; his power over Letty lies in his strong animal attractions. However, she escapes in the morning while he is asleep, whether from his bed or not is perhaps uncertain; and with a wax figure in the form of a loyal maid,—Letty in the novel had one,—boards a steamer for New York. On board she meets Darrow, a young American, the son of a rich rubber manufacturer, who is coming back from a trip to Africa. They fall in love, upon the faintest provocation and become betrothed before the ship docks, three weeks after she left Monte-

3898 video. At the pier she finds Renaul who has flown up to reclaim her. She must in some way keep her two suitors apart, and she manages to dismiss Darrow and then to escape Renaul by asking him to pay her customs duties, which he does. Arrived home her mother gives her a cold welcome and refuses to concern herself with the girl's betrothal. Renaul is announced; he has read of the betrothal in the papers and is furious. He tries again to stir her sensuality by the familiar gambit, but this time he fails; she slaps his face and declares that she hates him. He commands her to come to his apartment that evening; 3899 she begs him to part with her and let her have her life; he insists on renewing their affair. She threatens to call the police; he rejoins that if so her letters will be published, and then he leaves. Desperate, she chances on a bottle of strychnine, which we are to suppose is an accoutrement of every affluent household, and seizes it; the implication is of 'intended' suicide, not murder. Then she calls Darrow, tells him that she will not leave with him that night for his parents' place in the Adirondacks as they had planned; she renews to him the pledge of her love, without him she cannot live, an intimation to the audience of her purpose to kill herself.

3900 That evening she goes to Renaul's apartment in a hotel armed with her strychnine bottle, for use on the spot; she finds him cooling champagne, but in bad temper. His caresses which he bestows plentifully enough, again stir her disgust not her passions, but he does not believe it and assumes that she will spend the night with him. Finding that he will not return the letters, she believes herself lost and empties the strychnine into a wine glass. Again he embraces her; she vilifies him; he knocks her down; she vilifies him again. Ignorant of the poison he grasps her glass, and she, perceiving it, lets him drink. He woos her again, this time with more apparent success, for she is terrified; he sings a Gaucho song to her, the

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same one that has been heard at Montevideo. The poison begins to work and, at length supposing that she has meant to murder him, he reaches for the telephone; she forestalls him, but she does not tear out the wire. As he slowly dies, she stands over him and vituperates him. A waiter enters; she steps behind a curtain; he leaves thinking Renaul drunk; she comes out, wipes off all traces of her fingerprints and goes out, leaving however her rubbers which Renaul had taken from her when she entered.

Next she and Darrow are found at his parents' in the Adirondacks; while there a detective appears, arrests Letty and takes her to New York; she is charged with the murder 3902
of Renaul; Darrow goes back to New York with her. The finish is at the district attorney's office; Letty and Darrow, Letty's mother, the wax serving maid are all there. The letters appear incriminating to an elderly rather benevolent district attorney; also the customs slip and the rubbers. Letty begins to break down; she admits that she went to Renaul's room, not to kill him but to get him to release her. Darrow sees that that story will not pass, and volunteers that she came to his room at a hotel and spent the night with him. Letty confirms this and mother, till then silent, backs up their story; she had traced them to the hotel and saw the lights go out, having ineffectually tried to dissuade them. The maid still further confirms 3903
them and the district attorney, not sorry to be discomfited, though unbelieving, discharges Letty.

We are to remember that it makes no difference how far the play was anticipated by works in the public demesne which the plaintiffs did not use. The defendants appear not to recognize this, for they have filled the record with earlier instances of the same dramatic incidents and devices, as though, like a patent, a copyrighted work must be not only original, but new. That is not however the law as is obvious in the case of maps or compendia, where later works will necessarily be anticipated. At times, in

3916 as an inevitable consequence of past conduct, itself not evil enough to quench pity. It is the essence of the authors' expression, the very voice with which they speak.

We have often decided that a play may be pirated without using the dialogue. *Daly* v. *Palmer*, Fed. Cas. No. 3,552, 6 Blatch. 256; *Daly* v. *Webster*, 56 F. 483, 486, 487; *Dam* v. *Kirke La Shelle Co.*, 175 F. 902, 907, 41 L. R. A. (N. S.) 1002, 20 Am. Cas. 1173; *Chappell & Co.* v. *Fields*, 210 F. 864. *Dymow* v. *Bolton*, 11 F. (2d) 690, and *Nichols* v. *Universal Pictures Corporation*, *supra*, 45 F. (2d) 119, do not suggest otherwise. Were it not so, there

3917 could be no piracy of a pantomime, where there cannot be any dialogue; yet nobody would deny to pantomime the name of drama. Speech is only a small part of a dramatist's means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell. To be sure, not all this is always copyrighted, though there is no reason why it may not be, for those decisions do not forbid which hold that mere scenic tricks will not be protected. *Serrana* v. *Jefferson* (C. C.),

3918 33 F. 347; *Barnes* v. *Miner* (C. C.), 122 F. 480; *Bloom et al.* v. *Nixon* (C. C.), 125 F. 977. The play is the sequence of the confluents of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which a substitute can be found, which keeps the whole dramatic meaning. That as it appears to us is exactly what the defendants have done here; the dramatic significance of the scenes we have recited is the same, almost to the letter. True, much of the picture owes nothing to the play; some of it is plainly drawn from the novel; but that is entirely immaterial; it is enough that substantial parts were lifted,

Opinion of Circuit Court of Appeals in Prior Appeal on Issue of Infringement.

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no plagiarist can excuse the wrong by showing how much of his work he did not pirate. We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue.

The decree will be reversed and an injunction will go against the picture together with a decree for damages and an accounting. The plaintiffs will be awarded an attorney's fee in this court and in the court below, both to be fixed by the District Court upon the final decree.

Decree reserved.

A true copy.

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D. E. ROBERTS,
Clerk.
(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed December 4, 1939.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Opinion of Circuit Court of Appeals in Prior Appeal on Issue of Infringement

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Discussing how much of the substance of a play the copyright protects, courts have indeed used language which seems to give countenance to the notion that, if a plot were old, it could not be copyrighted. *London v. Biograph Co.* (C. C. A.), 231 F. 696; *Eichel v. Marcin* (D. C.), 241 F. 404. But we understand by this no more than that in its broader outline a plot is never copyrightable, for it is plain beyond peradventure that anticipation as such cannot invalidate a copyright. Borrowed the work must indeed not be, for a plagiarist is not himself pro tanto an "author"; but if by some magic a man who had never known it, were to compose a new Keats's Ode on a Grecian Urn, he would be an "author", and if he copyrighted it, others might not copy that poem, though they might of course copy Keats's. *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 249, 23 S. Ct. 298, 47 L. Ed. 460; *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F. (2d) 159, 161 (C. C. A. 2); Weil, Copyright Law, page 234. But though a copyright is for this reason less vulnerable than a patent, the owner's protection is more limited, for just as he is no less an "author" because others have preceded him, so another who follows him is not a tort feasor unless he pirates his work. *Jewelers' Circular Publishing Co. v. Keystone Co.*, 281 F. 83, 92, 26 A. L. R. 571 (C. C. A. 2); *General Drafting Co. v. Andrews*, 37 F. (2d) 54, 56 (C. C. A. 2); *Williams v. Smythe* (C. C.), 110 F. 961; *American, etc., Directory Co. v. Gehring Pub. Co.* (D. C.), 4 F. (2d) 415; *New Jersey, etc., Co. v. Barton Business Service* (D. C.), 57 F. (2d) 353. If the copyrighted work is therefore original, the public demesne is important only on the issue of infringement; that is, so far as it may break the force of the inference to be drawn from likenesses between the work and the putative piracy. If the defendant has had access to other material which would have served him as well, his disclaimer becomes more plausible.

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In the case at bar there are then two questions: First, whether the defendants actually used the play; second, if so, whether theirs was a "fair use". The judge did not make any finding upon the first question, as we said at the outset, because he thought the defendants were in any case justified; in this following our decision in *Nichols v. Universal Pictures Corporation*, 45 F. (2d) 119. The plaintiffs challenge that opinion because we said that "copying" might at times be a "fair use"; but it is convenient to define such a use by saying that others may "copy" the "theme", or "ideas", or the like, of a work, though not its "expression". At any rate so long as it is clear what is meant, no harm is done. In the case at bar the distinction is not so important as usual, because so much of the play was borrowed from the story of Madeleine Smith, and the plaintiffs' originality is necessarily limited to the variants they introduced. Nevertheless, it is still true that their whole contribution may not be protected; for the defendants were entitled to use, not only all that had gone before, but even the plaintiffs' contribution itself, if they drew from it only the more general patterns; that is, if they kept clear of its "expression". We must therefore state in detail those similarities which seem to us to pass the limits of "fair use". Finally, in concluding as we do that the defendants used the play pro tanto, we need not charge their witnesses with perjury. With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions; memory and fancy merge even in adults. Yet unconscious plagiarism is actionable quite as much as deliberate. *Buck v. Jewell-LaSalle Realty Co.*, 283 U. S. 191, 198, 51 S. Ct. 410, 75 L. Ed. 971, 76 A. L. R. 1266; *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, 16 (C. C. A. 9); *Fred Fisher, Inc. v. Dillingham* (D. C.), 298 F. 145.

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The defendants took for their mis en scène the same city and the same social class; and they chose a South

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American villain. The heroines had indeed to be wanton, but Letty Lynton "tracked" Madeleine Cary more closely than that. She is overcome by passion in the first part of the picture and yields after announcing that she hates Renaul and has made up her mind to leave him. This is the same weakness as in the murder scene of the play, though transposed. Each heroine's waywardness is suggested as an inherited disposition; each has had an errant parent involved in scandal; one killed, the other becoming an outcast. Each is redeemed by a higher love. Madeleine Cary must not be misread; it is true that her lust overcomes her at the critical moment, but it does not extinguish

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her love for Farnborough; her body, not her soul, consents to her lapse. Moreover, her later avowal, which she knew would finally lose her her lover, is meant to show the basic rectitude of her nature. Though it does not need Darrow to cure Letty of her wanton ways, she too is redeemed by a nobler love. Neither Madeleine Smith, nor the Letty of the novel, were at all like that; they wished to shake off a clandestine intrigue to set themselves up in the world; their love as distinct from their lust, was pallid. So much for the similarity in character.

Coming to the parallelism of incident, the threat scene is carried out with almost exactly the same sequence of

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event and actuation; it has no prototype in either story or novel. Neither Ekelson nor L'Angelier went to his fatal interview to break up the new betrothal; he was beguiled by the pretence of a renewed affection. Moreno and Renaul each goes to his sweetheart's home to detach her from her new love; when he is there, she appeals to his better side, unsuccessfully; she abuses him; he returns the abuse and commands her to come to his rooms; she pretends to agree, expecting to finish with him one way or another. True, the assault is deferred in the picture from this scene to the next, but it is the same dramatic trick. Again, the poison in each case is found at home, and the girl talks

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with her betrothed just after the villain has left and again pledges him her faith. Surely the sequence of these details is pro tanto the very web of the authors' dramatic expression; and copying them is not "fair use".

The death scene follows the play even more closely; the girl goes to the villain's room as he directs; from the outset he is plainly to be poisoned while they are together. (The defendants deny that this is apparent in the picture, but we cannot agree. It would have been an impossible denouement on the screen for the heroine, just plighted to the hero, to kill herself in desperation, because the villain has successfully enmeshed her in their mutual past; 3914
yet the poison is surely to be used on someone.) Moreno and Renaul each tries to arouse the girl by the memory of their former love, using among other aphrodisiacs the Gaucho song; each dies while she is there, incidentally of strychnine not arsenic. In extremis each makes for the telephone and is thwarted by the girl; as he dies, she pours upon him her rage and loathing. When he is dead, she follows the same ritual to eradicate all traces of her presence, but forgets tell-tale bits of property. Again these details in the same sequence embody more than the "ideas" of the play; they are its very raiment.

Finally in both play and picture in place of a trial, as in the story and the novel, there is substituted an 3915
examination by a district attorney; and this examination is again in parallel almost step by step. A parent is present; so is the lover; the girl yields progressively as the evidence accumulates; in the picture, the customs slip, the rubbers and the letters; in the play, the cross and the witnesses, brought in to confront her. She is at the breaking point when she is saved by substantially the same most unsuspected alibi; a man declares that she has spent the night with him. That alibi there introduced is the turning point in each drama and alone prevents its ending in accordance with the classic canon of tragedy; i. e., fate

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IN THE

Supreme Court of the United States

October Term—1939.

No. 482

EDWARD SHELDON and MARGARET AYER BARNES,

Petitioners,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

ARTHUR F. DRISCOLL,
Attorney for Petitioners.

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V. The payment of $922,141.09 to Messrs. Mayer, Rubin and Tindberg, in addition to salaries of $130,000, $104,000 and $208,000 respectively in the year 1932, is a distribution of profits not properly allowed as cost 25

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No.

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—against—

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

The petitioners above named pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit entered in this case on September 8, 1939 (R. 1287).

Outline of Matters Involved.

This action was begun June 24, 1932 by the filing of a bill in equity in the District Court, Southern District of New York (R. 1). The bill charged copyright infringement of petitioners' play DISHONORED LADY by respondents' motion picture LETTY LYNTON,

and an injunction and an accounting of profits were sought (R. 4f).

After a trial the District Judge dismissed the bill finding no infringement (7 Fed. Supp. 837).

The issue of infringement was appealed to the Circuit Court which reversed, found and enjoined the infringement, and ordered an accounting of profits (81 Fed. 2d 49, R. 1291; R. 6). Respondents then sought a writ of certiorari which was denied (298 U. S. 669).

A Special Master took the account of profits. His report, with slight modifications, was confirmed by the District Court (26 Fed. Supp. 134; R. 1212). Petitioners were awarded all of the profits made by the infringement.

The respondents' plea before the Master and the District Court was that there should be an apportionment of the profits. Both the Master and the District Court refused to apportion (R. 1194). The Circuit Court reversed the District Court and apportioned the profits—20% to petitioners—80% to respondents (R. 1266). A petition for rehearing was denied on September 5, 1939 (R. 1285).

Facts.

Petitioners are playwrights of experience and ability. On January 18, 1930 they copyrighted their play DISHONORED LADY as an unpublished work (R. 4a, 4b). Their play was inspired by a famous Scotch criminal trial which occurred in 1859 known as "The Trial of Madeline Smith".

DISHONORED LADY opened in New York on February 4, 1930 and after its New York run, toured the road. Katharine Cornell, an outstanding actress, played the

leading role. The play was also produced abroad in London.

Respondents are allied corporations engaged in production, distribution and exhibition of motion pictures. Respondent, Metro-Goldwyn Pictures Corporation, engages in the *production** or manufacture; respondent, Metro-Goldwyn-Mayer Distributing Corporation engages in the *distribution*, that is, licenses their exhibition in theatres; defendant, Loew's, Inc. operates (through subsidiaries) a chain of theatres which *exhibits* pictures; Culver Export Corporation takes over distribution abroad.

Shortly after the New York opening the respondents procured a manuscript of the play DISHONORED LADY and negotiations were carried on for sixteen months for the sale of the motion picture rights thereto. The parties had agreed on a price and a formal contract was prepared.

However, before the money was passed, respondents wanted to satisfy a trade association of which they were members, known colloquially as the "Hays Organization". The "Hays Organization" barred the play for picture purposes, unless certain requirements could be met which it thought to be in keeping with a code it had set up.

In May, 1930, while the deal was still pending, a novel entitled LETTY LYNTON was published in England by Marie Belloc-Lowndes. This novel was also inspired by the Madeline Smith trial.

In June, 1931, the respondents abandoned negotiations for petitioners' play.

Shortly thereafter they bought the motion picture rights of the novel LETTY LYNTON. For it they paid

* Italics throughout the petition and brief are ours.

$3,500. The price fixed upon petitioners' play had been $30,000.

Immediately and deliberately they proceeded to make a motion picture of petitioners' copyrighted stage play DISHONORED LADY. The novel LETTY LYNTON served as a screen.*

The Court below found the motion picture to be a deliberate plagiarism (R. 1264, 1265):

> "They were not innocent offenders; they deliberately lifted the play; it would take far more than the denials in the old record to convince us to the contrary in the face of the step by step 'tracking', which our comparison and analysis disclose. * * * *We now hold that the borrowing was a deliberate plagiarism.*"

The respondents' motion picture was first released or publicly shown on May 7th, 1932 (R. 302).

Petitioners promptly filed suit on June 24, 1932. Issue was joined on July 25, 1932. Petitioners applied for an injunction *pendente lite* on July 29, 1932.

The District Court, in balancing the conveniences, denied the injunction but set the case "near the head of the Day Calendar for trial October 1932".

The trial, however, was not held in October but was delayed about nine months, until April 1933. The Judge who dismissed the bill did not render his decision until July 31, 1934, over a year after the trial (7 Fed. Supp. 837). (R. 1.)

The box office value of a motion picture exhausts itself in the United States in about six months after

* These facts appear in the prior opinion of the Court below 81 Fed. (2) 49; (R. 1291) and the District Court's opinion on dismissal of the bill 7 Fed. Supp. 837.

its first release, and in the foreign field in about a year after the release in the United States (R. 383, 385).

Petitioners, though duly energetic, never succeeded in procuring an injunction until July, 1936—too late by over three years to be of service (R. 4).

Meanwhile, although they have been found deliberate plagiarists and had exhausted the infringing work at the box office, respondents nevertheless have not only been allowed to recoup all of their costs but in addition, have been awarded 80% of the profits.

The Court below justified its apportionment of profits by distinguishing the cases of *Callaghan* v. *Myers*, 128 U. S. 617, and *Belford* v. *Scribner*, 144 U. S. 488, and by overruling its own prior decision of *Dam* v. *Kirk LaShelle*, 175 Fed. 902 (C. C. A. 2). It said that the *Callaghan* and *Belford* cases,

> "hold no more than that when he (the infringer) makes no effort to discharge the duty resting upon him (of furnishing a basis of apportionment), he will be cast for the whole profit" (R. 1261).

Because respondents had selected popular actors and had supplied a skillful director and producer, along with other contributions, *e. g.*, scenario, costumes, advertising, etc., and had made a successful motion picture, the Circuit Court made an arbitrary apportionment of profits, giving respondents 80% (R. 1266).

It also allowed as part of overhead an item of $922,141.09 (R. 1266).

The question of apportionment of profits and this one item are the sole questions which petitioners ask

$922,141.09 Item.

The facts on the $922,141.09 item are as follows:

Prior to 1924 Louis B. Mayer, Irving Thalberg and J. Robert Rubin were *producing* motion pictures through a corporation called Louis B. Mayer Pictures, Inc.

On April 7, 1924 it made an agreement with Metro Pictures Corporation (name later changed to Metro-Goldwyn Pictures Corporation) (Ex. 33, R. 832). Under that contract the two corporations who theretofore had been separately producing motion pictures were unified. The three individuals, Mayer, Thalberg and Rubin, took charge of motion picture production for Metro Pictures Corporation. They were paid substantial weekly salaries, plus 20% of the net receipts of Metro Pictures Corporation (Ex. 33, R. 839).

In 1926 Mayer, Thalberg and Rubin formed a partnership—Louis B. Mayer Pictures—and this partnership thereupon succeeded to the old position held by Louis B. Mayer Pictures, Inc. (Ex. 33, R. 858).

In 1927 Loew's, Inc., the "top" holding company (Ex. 17, R. 770) took over and extended this contract to 1932 and the interest of the partnership which theretofore had been in the earnings of Metro Pictures Corporation, Inc. was changed to an interest in the combined annual net profits of Loew's, Inc. (Ex. 33, R. 861).

The three individuals comprising the partnership would now receive 20% of the combined annual net profits of Loew's, Inc., up to two and one-half million dollars, after payment of $2 per share on Loew's stock, and 15% of all other combined net profits (Ex. 33, R. 862; R. 986).

Loew's, Inc., through its stock holdings, was not only interested in the production of motion pictures, but also in their distribution and exhibition as well as incident real estate holdings (R. 770-Ex. 17; R. 900-Ex. L1; R. 913-Ex. L10).

This percentage interest of the three individuals amounted in 1932 to $922,141.09.

In addition they received the following salaries: Mayer $2500 per week, Thalberg $4000 per week, Rubin $2000 per week (R. 987).

Petitioners contend that the item is merely a distribution of profits to the three individuals. The Master said "*in no sense could it be considered as a part of the cost of production*" (R. 987).

The Court below, in overruling the Master and the District Court, said (R. 1266):

> "The payments were never profits of the defendants at all; the contracts effectively laid hold of them the moment they came into existence."

Jurisdiction.

Jurisdiction is involved under Section 240(a) of the Judicial Code, 28 U. S. C. §347 as amended by the Act of February 13, 1925 (43 Stat. 938), and Section 38 of the Copyright Law (17 U. S. C. §38).

Cases believed to sustain the jurisdiction are: *Callaghan* v. *Myers*, 128 U. S. 617; *Belford* v. *Scribner*, 144 U. S. 488; *Douglas* v. *Cunningham*, 294 U. S. 207; *Duplate Corp.* v. *Triplex Safety, etc.*, 298 U. S. 448.

Questions Presented.

1. In a suit for copyright infringement can the owners of a copyrighted play recover all profits made from a motion picture found to have infringed such play where such infringement is a deliberate plagiarism?

2. Can there be any apportionment of profits where a copyrighted play is an integral, literary, dramatic unit and has been infringed by a motion picture which is likewise an integral, literary dramatic unit?

3. Because the picture has been successful, can there be an apportionment of profits to a wilful infringer, upon the basis of the popularity of the stars, the skill and reputation of the producer and director, the scenery and costumes and the extent of the advertising?

4. Can a charge of $922,141.09, based upon earnings of a holding corporation, paid to three individuals in addition to annual salaries of $130,000, $104,000 and $208,000, stemming from the consolidation of the businesses of two corporations, be charged as part of the cost of the picture?

Reasons for Granting the Writ.

1. The decision of the Court below in allowing copyright infringers to retain 80% of the profits realized from the infringing work is the first decision of its kind in this country or in England that counsel has been able to find.

2. The decision is in conflict with the Section 25 of the Copyright Law (U. S. C. A. 17) which gives

to the copyright owner "all the profits which the infringer shall have made from such infringement" and in conflict with the controlling decisions of this Court in copyright cases of *Callaghan* v. *Myers*, 128 U. S. 617 and *Belford* v. *Scribner*, 144 U. S. 488.

3. The decision, in granting an apportionment on the basis of the actors, producer, director, scenery, costumes and advertising supplied by the infringer, is in conflict with precedents established by this Court in patent cases as set forth in *Duplate Corporation* v. *Triplex Safety Glass Co.*, 298 U. S. 448. It is also in conflict with *Conroy* v. *Pa. Electrical & Mfg. Co.*, 199 Fed. 427 (C. C. A. 3), with *Clark* v. *Johnson*, 199 Fed. 116 (C. C. A. 7) and with *Stearns-Rogers Mfg. Co.* v. *Ruth*, 87 Fed. (2d) 35 (C. C. A. 10).

4. The decision of the Court below in granting the respondents 80% of the net profits, *though finding that they were deliberate plagiarists*, is in conflict with the decisions of this Court of *Westinghouse* v. *Wagner*, 225 U. S. 604; *Dowagiac* v. *Minnesota*, 235 U. S. 641; *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251, and with the cases of *Brennan* v. *Dowagiac*, 162 Fed. 472 and *Underwood* v. *Fox*, 220 Fed. 880, in the Sixth Circuit.

5. The allowance of the item of $922,141.09 as a deduction from profits is at variance with the decision of *Lee* v. *Malleable Iron Range Co.*, 247 Fed. 795, modified and affirmed 263 Fed. 896 (C. C. A. 7), cert. denied 251 U. S. 562.

Concerning the Importance of the Questions Presented.

Until the decision below, a copyright owner was thought to be entitled to all profits made by an infringer in the use of his work. The effect of the decision is to overrule this Court's decisions in *Callaghan* v. *Myers*, and *Belford* v. *Scribner*, which granted to the author all profits made from the infringement of his work.

If apportionment is to be had in copyright infringement cases, particularly on the erroneous basis as suggested by the decision below, no one can overstate the possibilities of the decision.

Today the vast and multiple means of dissemination of authors' works, and the almost instantaneous surfeiting of the entire nation therewith, is illustrated in the fields of radio, motion picture, theatrical and embryonic television industries, to say nothing of the mass publication of books, novels, newspapers and other publications.

The authors who create, and the industries which manufacture the copies of their creations, lean heavily upon the uniform and correct application of the laws which affect them respectively.

If industry can make a glorified copy of the work of an author; escape the hazard of an injunction because the arm of equity is not quick enough to stop the wrong before it has run, and after eight years of crushing litigation retain 80% of the gains, there is little incentive left for industry to consult or make contracts with authors.

The law was designed as a deterrent to plagiarism—the copyright owner was given "all the profits" be

they great or small. The law was not designed with regard to the ultimate position of the copyright owner—his position to be varied with the amount of the profits. The design of the law was to deprive the wrongdoer of *all* profits—not all profits if the infringement is a financial failure—and 20% of the profits if the infringement is a success.

Unless the decision is corrected, district courts and courts of other circuits are sure to follow it. Already it is furnishing thought to the bar as a basis for reentry to the field of trademark, despite the case of *Hamilton-Brown Shoe Co.* v. *Wolf*, 240 U. S. 251, wherein this Court refused an apportionment because it was "inherently impossible", and where the supposed analogies to patent cases were rejected. As a consequence it is probable that there will soon be forthcoming similar contentions in trademark cases.

It is therefore of great public interest and for the sake of uniform and correct administration of law that the questions be settled by this Court.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals should be granted.

Dated, October 23rd, 1939.

ARTHUR F. DRISCOLL,
Attorney for Petitioners.

BRIEF IN SUPPORT OF THE PETITION.

Opinions Below.

On the merits of the infringement (not involved here):

The opinion of District Judge Woolsey is reported at 7 Fed. Supp. 837.

The opinion of the Circuit Court of Appeals is reported at 81 Fed. (2d) 49.

On the accounting of profits:

The opinion of District Judge Leibell is reported at 26 Fed. Supp. 134.

The opinion of the Circuit Court of Appeals is reported at 106 Fed. (2d) 45.

The grounds upon which jurisdiction of this Court is invoked are set forth in the petition, page 7.

The statement of the case containing matters material to the consideration of the questions presented is set forth in the foregoing petition.

Constitution and Statutes Involved.

Article I, Section 8, Clause 8 of the Constitution and the pertinent provisions of the Copyright Act of March 4, 1909, as amended, 17 U. S. C., Sections 25, 34 and 38, are printed in the Appendix at page 29.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the copyright owners were not entitled to all the profits realized by the infringers.

2. In failing to follow the law and precedent established by this Court in *Callaghan* v. *Myers*, *supra*, and *Belford* v. *Scribner*, *supra*.

3. In holding that in the *Callaghan* and *Belford* cases, the infringers were "cast for the whole profit" because they had made "no effort to discharge the duty resting upon him (them)", of making the apportionment.

4. In apportioning the profits because the infringement of the copyrighted work was in the form of a motion picture copy thereof.

5. In apportioning profits when the infringing motion picture was a single indissoluble unit, which was distributed and exhibited as a unit, and all receipts therefrom were for the use of the infringing work as a unit.

6. In apportioning to the infringers 80% of profits solely upon the popularity of the stars or actors, the skill and reputation of the producer and the director, the scenery and costumes, and the extent of the advertising furnished by respondents in the manufacture of their motion picture copy.

7. In not holding that the alleged contributions made by the respondents to the infringing work were nothing more than contributions of labor and material, and therefore but an item of expense of manufacture, rather than a distinct contribution.

8. In apportioning profits where the infringement is a deliberate plagiarism.

9. In allowing the respondents a credit of $922,141.09 as part of the overhead to be charged proportionately against the cost of manufacturing the respondents' picture.

Summary of the Argument.

I. The Court below, in making an apportionment of profits in a suit for copyright infringement, erred in not following the decisions of this Court of *Callaghan v. Myers* and *Belford v. Scribner*, which refuse such apportionment and in purportedly distinguishing them on a non-existent basis.

II. The Court below justified its apportionment by a resort to patent cases.

But granting *arguendo* that there can be an apportionment of profits in a suit for copyright infringement, the basis used by the Court below has never been recognized even in the field of patents.

III. At all events, since the respondents have been found to be "deliberate plagiarists" they are under no circumstances entitled to an apportionment or other equitable consideration.

IV. The payment of $922,121.09 to Messrs. Mayer, Rubin and Thalberg, in addition to salaries of $130,000, $104,000 and $208,000 respectively, in the year 1932, is a distribution of profits and is not properly allowed as cost.

POINT I.

The decision of the Court below is the first of its kind in this country or in England that counsel has been able to find.

It is therefore respectfully urged that "there are special and important reasons" why this Court should take jurisdiction under the general reserve of discretion indicated in Rule 38, Subd. 5 of the Supreme Court Rules.

POINT II.

The Court erred in not following the decisions of this Court of *Callaghan* v. *Myers* and *Belford* v. *Scribner*, and in purportedly distinguishing them on a non-existent basis.

The Court below did not follow, but purported to distinguish, the prior decisions of this Court of *Callaghan* v. *Myers* and *Belford* v. *Scribner*, by saying that "they hold no more than that when he (the infringer) makes no effort to discharge the duty resting upon him he will be cast for the whole profit" (R. 1261). This distinction has no basis in fact.

We have examined the records of those cases. Not only was "an effort" made in both, but in the *Belford* case, counsel apparently sought to escape the doctrine of the *Callaghan* case; for Belford not only *offered* expert testimony, but specifically *pleaded in mitigation* that the infringing portions "do not exceed from ten to fifteen percent of the entire contents" (Belford Rec., p. 22).

Belford called an expert on cook books. He testified that 153 cooking recipes had been copied, in whole or in part, but that these constituted but a total of 2,010 lines, or 36 pages out of a total of 300 pages contained in the infringing cook book; that "if the matter which has been copied * * * were to be taken out of the book, it would leave a work of value as a cook book" (Belford Rec., pp. 116, 117).

Scribner did not offer to rebut this testimony.

On appeal Belford assigned as error to this Court the refusal to apportion profits (Assignment No. 5, Belford Rec., p. 122). Belford's brief to this Court

(p. 15) specified as error that the infringement constituted but a "small part" and could "easily and certainly been separated from the balance".

The record in the *Belford* case demonstrates the error of the Court below in attempting to distinguish it on the basis that "no effort" was made to furnish a basis for apportionment.

In the *Callaghan* case, the infringement had to do with Freeman's Illinois Reports. Freeman had taken the court opinions which were common property or *publici juris* and had given them the usual reporter's treatment by adding indices, headnotes and the like. These were copyrighted and were found to have been infringed.

In the *Callaghan* case no so-called expert evidence appears to have been offered, but Callaghan's counsel in his brief to this Court (p. 7), urged that the apportionment be made on the physical content measured separate from the opinions, which, considering the subject matter, was as sane a basis as any other. The invitation was refused.

The Court below in overruling its own prior decision of *Dam* v. *Kirk LaShelle*, 175 Fed. 902, thought that the court, there in refusing an apportionment, acted *sua sponte* (R. 1261).

It is submitted that the Court in the *Dam* case was not acting *sua sponte*, but was following well recognized legal principles.

It was the Court below which acted *sua sponte* in making the purported distinction that "no effort" was made in either the *Belford* or *Callaghan* cases; for not even the respondents suggested that the *Callaghan* and *Belford* cases were distinguishable upon that ground. They contented themselves with trying to

demonstrate that the *Callaghan* and *Belford* cases involved slavish copying, done wilfully.*

These grounds are now no longer available to respondents as they are now themselves convicted as deliberate plagiarists (R. 1265).

The Court below noted that: "The plaintiff called no witnesses to rebut this testimony" (R. 1264). Neither did Scribner in the *Belford* case. It, therefore, cannot be said that in the *Belford* case this Court refused the apportionment on any weight of evidence theory. The apportionment was refused solely as a principle of law. In *Callaghan* v. *Myers* this court had previously said (p. 666):

> "* * * the only proper rule to be adopted is to deduct from the selling price the actual and legitimate manufacturing cost. If the volume contains matter to which a copyright could not properly extend, incorporated with matter proper to be covered by a copyright, the two necessarily going together when the volume is sold as a unit, and it being impossible to separate the profits on the one from the profits on the other, and the lawful matter being useless without the unlawful, it is the defendants who are responsible for having blended the lawful with the unlawful, and they must abide the consequences on the same principle that he who has wrongfully produced a confusion of goods must alone suffer."
>
> * * * * * * *
>
> "The present is one of those cases in which the value of the book depends upon its completeness and integrity. It is sold as a book, and not as the fragments of a book. In such a case, as

* (Respondents' Brief below, pp. 22, 23, 24.)

the profits result from the sale of the book as a whole, the owner of the copyright will be entitled to recover the entire profits on the sale of the book if he elects that remedy."

In the *Belford* case the Court said at page 508:

"The rule is well settled that, although the entire copyrighted work be not copied in an infringement, but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff."

This Court has refused to extend the apportionment theory to trademarks because it was found to be "inherently impossible", *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251.

Nor was this Court in the *Hamilton-Brown* case without the benefit of *Westinghouse* v. *Wagner*, 225 U. S. 604, or *Dowagiac Mfg. Co.* v. *Minnesota Plow Company*, 235 U. S. 641, the two cases which formed the keystone of the respondents' argument, and of the decision below.

Both were referred to in the *Hamilton-Brown* case, but this Court refused to apply the suggested analogies of patent to trademark cases.

And it is submitted here that apart from the fact that both a patent and a copyright are statutory monopolies there is nothing in common between them. The subject matter protected, means of securing, requirements for and the scope of the protection when acquired are worlds apart.

It is not lacking in significance that the Copyright Law (17 U. S. C.) Section 25b provides for a re-

covery of "all profits" whereas the Patent Statute (35 U. S. C.) Section 70 and the Trademark Statute (15 U. S. C.) Section 99 provide for a recovery of "the profits."

"All" is missing in both the Patent and Trademark Statutes.

POINT III.

Granting that there should be apportionment, the basis used by the Court below has never been recognized even in the field of patents.

The Court below said there were "two kinds" of evidence offered. One was "the price of the picture rights in the play, as both plaintiffs and defendants had agreed to it"; the other was "the opinions of experts".

The Court rejected the agreed price leaving as the sole basis for apportionment the "expert testimony".

"Very generally they ('the experts') professed to believe that the controlling factor in the success of a play (picture) was the popularity of the actors—the stars—* * *; that the other chief factors were the skill and reputation of the producer and the director, the scenery and the costumes, the extent of the advertising, and the reputation and standing of the producing company itself" (R. 1263, 1264).

On the foregoing categories, less the "currency of the respondents' reputation", the Court predicated its apportionment, stating, however, that it was "aware that out of all this no real standard emerges and that it would be absurd to treat the estimates of experts as being more than expressions of very decided opinions that the play should count for very little" (R. 1265).

We call this nothing more than "labor and material"; merely an item of cost to be allowed before arriving at the figure of profit.

But the Court below, not only allowed the cost of the labor and material, but allowed respondents to share in the profits to the extent of 80%. Such treatment is never found in patent cases.

In *Duplate Corporation* v. *Triplex Safety Glass, etc.*, 298 U. S. 448, a similar contention was before this Court in a patent case. Justice Cardozo in that case said (at p. 457):

> "But this is to misconceive utterly the position of an infringer accounting for illicit profits. 'An infringer cannot be heard to say that his superior skill or intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized.' *Lauther* v. *Hamilton* (C. C.), 64 F. 221, 224 (citing cases). * * * Whatever is at his call in the service of the enterprise—*brawn* and *intelligence*, *factories* and *lands*, *patents* and *machinery*—will be viewed upon an accounting as if held upon a quasi-trust to contribute what it can to the profits of the business. *The wrong-doer must yield the gains begotten of his wrong.*"

In *Conroy* v. *Penn. Electrical & Mfg. Co.*, 199 Fed. 427, 430, 431 (C. C. A., 3rd), the Court expressed a similar view:

> "As argued by counsel, defendants might as well claim that they had more skilled workmen than other manufacturers or more experienced and efficient managers, or more reputation and prestige in the trade, which enabled them to secure higher prices for their goods."

The same view, very well expressed, is found in the opinion of Judge Geiger in *Christensen v. National Brake & Electric Co.*, 10 Fed. (2d) 856, at 866:

> "In other words, his liability is not dependent upon his having been lavish or niggardly in the accoutrements of the infringing device, or in the degree of its perfection *within the scope* of the patent. Such a situation, as I conceive it, never presents an issue of segregation in its true sense."

The fallacy of the Court below is in attempting to apportion the profits falling *within the scope of the copyright itself.*

If there were to be an apportionment based upon patent analogy, it should be by a segregation of the copyrighted material from the added non-copyrighted portion.

In patent, the profits may be attributable to other portions of the machine *without the scope of the patent* because the unpatented portion may still stand as a useful mass and be viewed in its "distinct and independent character". *Clark v. Johnson*, 199 Fed. 116.

But a literary composition is so essentially different from a mechanical structure that the same cannot be said. The third act of a comedy will hardly improve the second act of a tragedy; and likewise if the third act of any play is removed, the remaining two will be comparatively useless to anyone.

The courts do not consider what portion of the profit may be ascribed to the defendant's good workmanship in infringing *within the scope of the patent.*

> "The items for which allowance of profit may be made must be of a *distinct* and *independent* character."

Clark v. *Johnson*, 199 Fed. 116, 122 (C. C. A. 7).

If apportionment theories of patent law are to be extended to the copyright law, and perchance to the trademark law as well, then at least *the foundation for such apportionment should also be analogous to that in patent cases.*

The author of a book or play does not write the play or the book anticipating that he himself will either produce the play or publish the work. His sole function is with the pen.

Yet, any wilful infringer of either the play or book, by demonstrating to the Court that he did a good job in producing the play or in publishing the book, is entitled, under the decision of the Court below, not only to receive back his cost, but 80% of the profits as well.

All of the apportionment evidence was objected to and due exception was taken*.

It should not have been received much less acted upon.

In *Stearns-Roger Mfg. Co.* v. *Ruth*, 87 Fed. (2d) 35, 39 (C. C. A., 10, 1936), similar evidence was presented to the Court and rejected, the Court stating:

> "This evidence is without value. * * * If so, the profits would vary with the state of mind of different purchases. * * * where the recovery is limited to *net profits* of sales actually made, *such evidence is not pertinent.*"

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*R. 164-171, 266, 267, 279, 281-283, 541, 544, 563-568, 574-577, 590, 597-599, 601-603, 609, 611, 618, 619.

POINT IV.

Since the respondents have been found to be "deliberate plagiarists", they are under no circumstances entitled to an apportionment or other equitable consideration.

The respondents have been stamped as "deliberate plagiarists" (R. 1265).

Nevertheless the Court below has allowed them, not only all their manufacturing costs, including overhead, but also 80% of the net profits.

Such action is not only contra to the policy of the patent decisions but also every legal rule respecting the treatment of wrongdoers.

This Court in softening the previous hard and fast "alternative rule" of *Garretson* v. *Clark*, 111 U. S. 120, by its decisions in *Westinghouse* v. *Wagner*, 225 U. S. 604, and *Dowagiac Mfg. Co.* v. *Minn. Plow Co.*, 235 U. S. 641, has restricted its application to those cases where the infringement was not done in bad faith.

Thus in *Westinghouse* v. *Wagner*, *supra*, the Court pointed out that the liberation from the heavy burden of proof established by *Garretson* v. *Clark* would not extend to those who had "been guilty of gross wrong" (p. 620).

And in confirming this liberation in *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, the Court rested its view on the express finding of good faith. Thus, it says (p. 644):

> "At the outset it should be observed that, while the defendants were infringers and bound to re-

spond as such to the plaintiff, their infringement was not wanton or wilful."

In the trademark case of *Hamilton-Brown Shoe Co.*, v. *Wolf Bros.*, 240 U. S. 251, 261, 262, this Court, although it refused an apportionment because it was "inherently impossible", gave as additional ground for not doing so the bad faith of the defendant.

Also:

Underwood Typewriter Co. v. *Fox Typewriter Co.*, 220 Fed. 880, 886 (C. C. A. 6);
Brennan & Co. v. *Dowagiac Mfg. Co.*, 162 Fed. 472, 476 (C. C. A. 6);
Dowagiac Mfg. Co. v. *Superior Drill Co.*, 162 Fed. 479 (C. C. A. 6).

And as Mr. Justice Lamar in the *Westinghouse* case pointed out "the liability is not lessened because the confusion is due to a wrongful appropriation by a trustee *de son tort*, instead of carelessness of a trustee lawfully appointed" (p. 619).

POINT V.

The payment of $922,141.09 to Messrs. Mayer, Rubin and Thalberg, in addition to salaries of $130,000, $104,000 and $208,000 respectively in the year 1932, is a distribution of profits and is not properly allowed as cost.

These three individuals were engaged solely in the *production* of motion pictures. Their percentage compensation is predicated upon the earnings of Loew's, Inc., a holding company, *not* so engaged. It

merely owns *some* stock of the producing company (Ex. 17-R. 770, offered R. 327). Its other activities are *distribution* of motion pictures through stock ownership, and *exhibition* of pictures through its theatre subsidiaries, as well as real estate ventures incident thereto (Ex. 17-R. 770—offered R. 327; Ex. LJ-R. 900—offered R. 457).

Before these individuals are entitled to the percentage Loew's, Inc. must first earn $2 a share on its outstanding stock (R. 986).

The Court below allowed this item, saying:

> "The payments were never profits of the defendants at all. The contracts effectively laid hold of them the moment they came into existence" (R. 1266).

How could existing contracts "lay hold" of profits of Loew's, Inc. which never in equity belonged to it? The profits made by Loew's, Inc. from this picture were equitably the property of petitioners.

Since profit is the residuum after payment of creditors, the petitioners, being equitable creditors, should not be called upon to participate in contributing to the claimed profits of Loew's.

Their rights precede the right of these individuals to claim profits.

The Master in disallowing this item followed *Leo v. Malleable Iron Range Co.*, 247 Fed. 795, 798, modified on other grounds and affirmed 263 Fed. 896 (C. C. A. 7), and cert. denied 254 U. S. 562 (R. 984).

It is submitted that the size of the percentage item, coupled with the huge annual salaries, alone serve to earmark it as a distribution of profits, particularly

when the distribution is made upon the basis of all of Loew's operations, when the three individuals receiving it are solely engaged in but one *i. e.* the production of pictures.

CONCLUSION.

It is therefore respectfully submitted that a writ of certiorari should be granted in this case.

Respectfully submitted,

ARTHUR F. DRISCOLL,
Attorney for Petitioners.

APPENDIX.

Constitution and Statutes Involved.

The Constitution of the United States (Article I, Section 8, Clause 8) gives to Congress the power:

> "8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The pertinent portions of the Copyright Law (Tit. 17, U. S. C.) are:

> "Section 25. *Infringement.* If any person shall infringe the copyright in any work protected under the Copyright Laws of the United States, such person shall be liable:
>
> (a) *Injunction.* (a) To an injunction restraining such infringement.
>
> (b) *Damages and profits; amount, other remedies.* (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * *.
>
> (c) *Impounding during action.* (c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;
>
> (d) *Destruction of infringing copies and plates.* (d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for

making such infringing copies as the court may order.

§34. *Jurisdiction of actions under laws.* All actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the district courts of the United States, * * *.

§38. *Review of orders, judgments, or decrees.* The orders, judgments, or decrees of any court mentioned in section 34 of this title arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in said courts, respectively."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC., and CULVER EXPORT CORPORATION,
Respondents.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

ARTHUR F. DRISCOLL,
Counsel for Petitioners.

THE COURT PRESS, N. Y. C.

TABLE OF CASES CITED.

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Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U. S. 251 10

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L. C. Page & Company v. *Fox Film Corp.*, 83 Fed. (2d) 196 (C. C. A. 2) 5, 7

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Macmillan v. *Cooper* (1923), 40 T. L. R. 186 ..... 10a

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OTHER AUTHORITIES CITED:

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35 U. S. C. A. Sec. 70 6

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PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The purpose of the petition is not as stated in respondents' brief page 1 "to review solely the bases taken by the Court below for its award of profits". Our position is that there can be no apportionment on any basis—that the statute says we are entitled to "all profits"—that even though there can be a *basis* for doing less than required by the plain mandate of Congress, the basis employed below is erroneous and unjustified even by the patent cases to which the Court below had recourse.

Infringement has been found. Respondents are convicted of being deliberate plagiarists. We question the propriety, therefore, of references to the prior record in nowise involved by the present petition. The respondents by these prior references seek to extenuate their deliberate plagiarism.

The *pro tanto* appropriation which the respondents afforded to themselves of the petitioners' work can best be gleaned from the opinion of the Circuit Court (81 Fed. (2d) 49, 56), where the Court said:

> "We cannot avoid the conviction that, if the picture was not an infringement of the play, there can be none short of taking the dialogue."

The award given to the copyright owners by the Special Master and confirmed by the District Court is in essence no more disproportionate than the recovery by the plaintiff in *Dam v. Kirk LaShelle*, 175 Fed. 902. There the short story that was infringed upon had been sold for $85. This was not sufficient ground to defeat plaintiff's recovery of *all the profits*.

The present Copyright Law has been on the books for thirty years. It is significant that there have been no recoveries by the copyright owner of profits out of proportion with the original value of the property stolen. Defendants' argument in effect is that although they stole plaintiffs' property, nevertheless they should not be made to account for all of the profits, and thereby comply with the plain mandate of the statute because the profits made were large.

On page 3 of their brief defendants quote from Judge Leibell's decision in the District Court in which Judge Leibell said (R. 1202):

> "If we are 'to avoid instances of grotesque injustice' then 'we must adopt some working rule' similar to that employed in patent infringement cases."

Defendants would emphasize the thought that there has been grotesque injustice in the present case.

What is injustice?

What is grotesque?

Is it grotesque injustice to take from deliberate infringers the profits they have made after allowing them to deduct all items of expense, including the enormous salaries and compensation of the individuals directly involved?

Is it grotesque injustice when deliberate infringers are made to account for their profits only after every item of expense is allowed them, including overhead, depreciation, and even interest on the investment made by them in the infringing work?

Is it grotesque injustice because an infringer who makes but small profits is compelled to disgorge all without allowance for such items as special salaries to officers (*Philadelphia Rubber Works* v. *U. S. Rubber Reclamation Works*, 276 Fed. 600 (D. C. N. Y., 1920)); Overhead (*Winchester Repeating Arms Co.* v. *American Buckle & Cartridge Co.*, 62 Fed. 278, *Haiss Manufacturing Company* v. *Link Belt Co.*, 63 Fed. (2nd) 479 C. C. A. 3, *Kreutler-Arnold Hinge Last Company* v. *Leman*, 24 Fed. (2nd) 423, *Levin Brothers* v. *Davis Manufacturing Company*, 72 Fed. (2nd) 163); Taxes and Insurance Paid (*Metallic Rubber Tire Company* v. *Hartford Rubber Works Co.*, 245 Fed. 860, *Christenson* v. *National B & E Company*, 10 Fed. (2nd) 856, *National Folding Box & Paper Company* v. *Dayton Novelty Company*, 95 Fed. 991); Repairs, Building, Machine and Plant Depreciation (*Metallic Rubber Tire Co.* v. *Hartford Rubber Works Company*, 245 Fed. 860); Interest on Invested Capital (*Ruth* v. *Stearns-Rogers Manufacturing Company*, 13 Fed. Supp. 697); Expenses of Experimental Work (*Coffield Motor Washer Co.* v. *Wayne Mfg. Co.*, 255 Fed. 558); Expenses of Litigation and of Patents (*Computing Scale* v. *Toledo*, 279 Fed. 648); Cost of advertising not actually identified with infringing article (*Coffield Motor Washer*

Company v. Wayne Mfg. Co., 255 Fed. 558), and other similar items, while in the case at Bar, because defendants are clever enough to make large profits, they are allowed to keep 80%, thereof.

Does "grotesque injustice" depend upon the success made by deliberate plagiarists? Does it become more grotesque as profits increase?

Respondents in their brief, page 6, under the heading of "The Question Presented (a)", urge that the factors which they contributed were "separate and apart" from the copyrighted property. Did anyone ever see or hear of a play being produced without a producer, actors and a director? Are these factors "separate and apart" from the copyrighted property? Plays are not written to be read but to be enacted. How else can a play be infringed unless it be produced, enacted and directed? The producer, actors and director are nothing but "labor and material", for which credit is to be taken before arriving at a figure of profit.

Again on page 6 of the respondents' brief, under the heading, "The Question Presented (b)", the respondents speak of an award of profits as being a remedy "which equity itself devised and controls". That is only a half truth in this instance. Equity did not devise nor does it control Section 25 of the Copyright Statute. Congress devised Section 25. Equity administers it but that administration must be in accordance with and not *contra* to the plain mandate of Congress.

Historically, in the absence of a statute, equity might have devised and controlled an award of profits on plain common law, equitable principles. Here equity is confronted with a statute. The 1909 Act provides in plain terms that an infringer shall be

liable for *all* profits made by him out of the infringement, and Congress must have intended that a suit in equity, in preference to an action at law, might be maintained for an accounting of profits.

Under the act now in force the remedy of accounting for profits is *not* dependent on the remedy of injunction. The prior copyright statutes had made no mention of an infringer's liability for profits made by him. They provided only for damages and for injunction. Relief by way of an accounting for profits had been added by the courts but only as an incident to the issuance of an injunction.

Stevens v. *Gladding*, 17 How. 447.

In the 1909 Act liability for profits was made one of the consequences of infringement by express provision and there is nothing in the text to indicate that the copyright proprietor should recover profits of an infringement only in cases where he might win an injunction. On the contrary, the present act makes it clear that the remedy of injunction and the remedy of accounting for profits are independent of one another.

Page & Company v. *Fox Film Corp.*, 83 Fed. (2d), 196, 200 C. C. A. 2.

The copyright statute is unlike the patent statute in this respect. Under the patent statute a naked bill for accounting of profits will not lie, since such an accounting is purely incidental to the injunction provided for in the patent act. Under the present patent act the courts

> "shall have power to grant injunctions according to the course and principles of courts of equity,

to prevent the violation of any rights secured by the patent, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby." 35 U. S. C. A., Sec. 70.

The recovery of profits in a suit in equity for patent infringement is thus made to depend on the plaintiff's right to an injunction; *Root* v. *Railway*, 105 U. S. 189. The same is true of trademark infringement under the trademark statutes. 15 U. S. C. A., Sec. 99. But the present copyright act contains no such qualification on the right to hold an infringer of copyright for profits made.

It may be said, therefore, that under the present act a court of equity while it administers the act, did not devise nor does it control it.

The respondents on page 8 of their brief speak of the motion picture as "a distinctly new, artistic creation". While that question may be a mooted one, nevertheless if true, it would seem to call for a special act of Congress if the motion picture is such a "distinctly new artistic creation" that it can not be comprehended along with all the other works of art which the present copyright statute is supposed to protect.

On page 8, emphasis is placed on the drawing power of the stars who appeared in the picture. It may be asked if the public would have attended the theatre merely to see these stars functioning without a play as a background against which their thespian talents might have been thrown?

On page 9, emphasis is placed on the purchase

price of $30,000 placed upon the motion picture rights of petitioners' play. All this is *post hoc*.

Any wrongdoer would gladly pay the price of the article which he has appropriated in order to escape the mandate of the law on his apprehension. It is all quite immaterial.

> "The value which the plaintiff put upon its rights in incompleted negotiations with the defendants will be wholly immaterial."
>
> *L. C. Page & Co. Inc.* v. *Fox Film Corp.*, 83 Fed. (2d) 196, 200.

Likewise, "It is not a case of an established license fee or royalty".

> *L. C. Page & Co. Inc.* v. *Fox Film Corp.*, *supra*.

On pages 10 and 11 of respondents' brief they mention "a comparison made of the play and the picture", as being a suitable basis for apportionment. This argument overlooks the fact that their infringing picture is an integral, literary, dramatic unit, any portion of which is incapable of separation from the whole and it therefore falls within the rule of *Callaghan* v. *Myers*, 128 U. S. 617, and *Belford* v. *Scribner*, 144 U. S. 488, wherein this court refused to attempt any apportionment where the matter was inextricably blended.

Further than that the court below did not attempt any apportionment on this suggested basis, but rather proceeded on the erroneous basis of apportioning on the "labor and materials" furnished by the respondents in making the picture, all of which is fully discussed in the brief submitted with our petition under Point III.

On page 12 of respondents' brief it is said that Judge McCormick in *Harold Lloyd Corporation* v. *Witwer*, 65 Fed. (2d) 1 (C. C. A. 9), "declared that the profits might be and should be apportioned". The opinion of Judge McCormick is pure *dicta** since the majority court found there was *no infringement* and anyway he made no such suggestion. He erroneously (we think) concluded that Section 25 of the Copyright Act gave the court power to award damages "in lieu of actual damages and profits," contrary to the rule as later announced in *Davilla* v. *Brunswick*, 94 Fed. (2d) 567 (C. C. A. 2), cert. denied 304 U. S. 572, wherein it was held that when actual profits are ascertainable the plaintiff *must* take them and cannot elect to take the statutory awards mentioned in Sect. 25.

It is also counter to the rule of this Court announced in *Douglas* v. *Cunninghain*, 294 U. S. 207 (1935), where the statutory damages were confined to cases "where the rules of law render difficult or impossible proof of damages or discovery of profits".

It is said on page 13 of respondents' brief that "the likely explanation of the dearth of English authority on the subject is that in England the copyright proprietor must elect between damages and profits. He cannot sue for both".

We understand it to be the law of this country that a plaintiff cannot have both damages and profits if the profits exceed the damage. The greater of course includes the lesser.

Under Point II, page 14, of respondents' brief they attempt to distinguish the *Callaghan* and *Belford*

* Judge McCormick's opinion was a dissenting one.

cases. The effort leaves considerable to be desired. It is said on page 14,

> "in both cases there were factual findings that the infringers' work was as an entirety an infringement of the copyrighted work".

No reference is made to support that statement.

At any rate, if that statement is true, it is difficult to explain why the court in both the *Callaghan* and *Belford* cases undertook to discuss the possibilities of an apportionment. If the infringement was an entire infringement, obviously it was futile to discuss any apportionment.

In discussing the *Callaghan* case, respondents say (p. 15), "the opinions were lifted bodily", and that "there was no basis for apportionment solely because of the inclusion of the opinions". The opinions of the court were common or public property. They were not susceptible of copyright, and even though the defendant in the *Callaghan* case had "lifted them bodily" he was not liable since the plaintiff had no proprietory interest in them. They were *publici juris*.

On page 17 of respondents' brief, in discussing the *Belford* case, respondents say:

> "Naturally the Supreme Court made no reference to any claim of apportionment in the face of a finding that the defendant's work in 'matter and language' was substantially the same as the plaintiff's."

But the Supreme Court did make "reference to claim of apportionment" in the *Belford* case and discusses it fully at page 508.

It is difficult to understand the foregoing statement found in the respondents' brief.

Respondents attempt to distinguish, on page 18, the case of *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.* 240 U. S. 251, the trademark case in which the court held an apportionment was "inherently impossible". The distinction respondents make is that it was only "inherently impossible" for the plaintiff. If it was "inherently impossible", it shouldn't make very much difference who attempted to overcome the inherent impossibility.

On page 25 the respondents refer to a statement of the court below, as follows:

> "Nobody can say how far this basic plot is to be credited with whatever the play contributed to the drawing power of the picture. That consideration must therefore count toward reducing the percentage of profits received (R. 1264)."

The court below did not make any apportionment on the basis of that statement, but if it had, it is submitted that it was in complete error.

A copyright, unlike a patent, does not need to be new and original. The only originality required of a copyright is that it be original *with the author.* The story, plot or subject matter may be ancient and common but the author is, nevertheless, entitled to copyright.

In *Emerson* v. *Davis*,* 8 Fed. Cas. 615 and 620, Judge Story said:

> "It is a great mistake to suppose, because all of the materials of a work or some parts of its plan or arrangements and modes of illustration, may be found separately, or in a different form,

* Approved by Lord Atkinson in *Macmillan* v. *Cooper* (1923) 40 T. L. R. 186.

> or in a different arrangement, in other distinct works, that therefore if the plan or arrangement or combination of these materials in other works is new, or for the first time made, the author or compiler or framer of it (call him what you please) is not entitled to a copyright. The reverse is the truth in law, and, as I think, in common sense also."

The respondents are not charged with or convicted of having copied the trial of Madeleine Smith. They had a perfect right to do that and to dramatize it if they wished. They have been charged with and convicted of copying our dramatization of the trial of Madeleine Smith, which is a clear violation of petitioners' right under Section 6 of the Act, which specifically gives protection to

> "abridgements, adaptations, arrangements, *dramatizations*, translations or other versions of *works* in the public domain".

What the trial of Madeleine Smith may or may not have contained is irrelevant. What was copied was petitioners' dramatization of it.

Petitioners in writing their play did not need to turn to Madeleine Smith for inspiration. History at any stage would have furnished the same material, as would also the headlines of most any metropolitan daily. "The skeleton (it is said) was already in the public demesne" (R. 1264)—as what is not—before Madeleine Smith was ever born and will probably continue to remain so till the end of time.

If the defendants' reasoning is right, and if Polti* is also right that there are but thirty-six possible

* The Thirty-six Dramatic Situations, by Georges Polti published by Writers Digest 1931; James Knapp Reeve 1921; The Editor Company 1916, 1917.

dramatic situations, an author's protection would be indeed scant were he to undertake to dramatize again the life of Lincoln or Napoleon.

Surely, if the court below is correct in its statement that "that consideration should have counted toward reducing the percentage of profits recoverable", then the case of *Callaghan* v. *Myers* where nine-tenths of the volumes of the copyrighted work was in the public domain (in the form of the courts' opinions) is one of *a fortiori*. As we know the court in the *Callaghan* case awarded all profits to the copyright owner and "that consideration" did not count toward reducing the percentage of profits recoverable.

On pages 25 and 26 of respondents' brief respondents attempt to distinguish the decision of this Court in *Duplate Corporation* v. *Triplex, etc.*, 298 U. S. 448, cited and quoted from in our brief, page 21. The attempt leaves considerable to be desired. Respondents say "the only allowance that respondents received was compensation for *converting* a play * * * into a successful motion picture." We assume that that statement would be equally applicable to the infringer in the *Duplate* case, who was merely *converting* the plaintiff's patent into a successful mechanical product.

The respondents are at pains to escape the stigma of deliberate plagiarism and they say, page 29:

> "There has never been any suggestion by the Master or by either of the courts below that the defendants have 'been guilty of gross wrong'."

If a deliberate plagiarism is not a gross wrong it would be difficult to conceive what might be one. Plagiarism is the most subtle and despicable form of

wrong. One may have a healthy respect for the courage of a brigand by which he carries out his crude operations, but a plagiarist can only be viewed with contempt.

On pages 30 and 31 respondents complain of the finding of the court below that there was a deliberate plagiarism and of the court's comment that "no new light has come". They say, "where was this new light to come from * * * and even if such additional evidence had been offered before him (the Master), *we are confident it would not have been received.*"

The source of respondents' confidence in this respect is difficult to fathom, since there was directly involved before the Master the good faith of the respondents on the question of allowance or disallowance of income taxes paid, as a deduction against profits. The income tax deduction was expressly disallowed by the Circuit Court upon its finding the defendants guilty (R. 1271). The respondents were at all times familiar with the rule of *Lurson* v. *Wrigley*, 277 U. S. 97, and similar cases wherein an allowance of income tax as a deduction is expressly rested upon the good faith of the defendants. Why then did they not produce their witnesses before the Master to show this good faith?

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated, November 16, 1939.

ARTHUR F. DRISCOLL,
Counsel for Petitioners.

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IN THE

Supreme Court of the United States

October Term—1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

ARTHUR F. DRISCOLL,
Attorney for Petitioners.

DENNIS F. O'BRIEN,
EDWARD C. RAFTERY,
EDWARD J. CLARKE,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Judicial Code (28 U. S. C. A. §347) as amended by the Act of February 13, 1925 (43 Stat. 938):

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OTHER AUTHORITIES CITED:

The Thirty-Six Dramatic Situations by Georges Polti published by the Editor Company 1916, 1917; James Knapp Reeve 1924; Writers Digest 1931 .. 24*a*

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October Term—1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR PETITIONERS.

Opinions Below and Jurisdiction.

On the merits of the infringement (not involved here):

The opinion of District Judge Woolsey is reported at 7 Fed. Supp. 837.

The opinion of the Circuit Court of Appeals is reported at 81 Fed. (2d) 49.

On the accounting of profits (on which the present writ was granted):

The opinion of District Judge Leibell is reported at 26 Fed. Supp. 134.

The opinion of the Circuit Court of Appeals is reported at 106 Fed. (2d) 45.

The final judgment of the Circuit Court of Appeals was entered on September 8, 1939 (R. 1287). A petition for certiorari was filed on October 25, 1939 and was granted on December 4th, 1939.

Jurisdiction arises under Section 240(a) of the Judicial Code (28 U. S. C. A. ¤347), as amended by the Act of February 13, 1925 (43 Stat. 938), and Section 38 of the Copyright Law (17 U. S. C. A. ¤38).

Constitution and Statutes Involved.

Article I, Section 8, Clause 8 of the Constitution of the United States; and relevant portions of the Copyright Statute (17 U. S. C. A.) Sections 25, 34 and 38 are set out in the appendix (p. 45).

Brief History of the Case.

This action was begun June 24, 1932 by the filing of a bill in equity in the District Court, Southern District of New York (R. 1). The bill charged copyright infringement of petitioners' play DISHONORED LADY by respondents' motion picture LETTY LYNTON, and an injunction and an accounting of profits were sought (R. 4f).

After a trial, the District Judge dismissed the bill finding no infringement (7 Fed. Supp. 837).

The issue of infringement was appealed to the Circuit Court of Appeals which reversed, found and enjoined the infringement, and ordered an accounting of profits (81 Fed. 2d 49, R. 1291; R. 6). Respondents then sought a writ of certiorari which was denied

(298 U. S. 669). A second application on the final judgment was denied on December 4, 1939—No. 505.

A Special Master took the account of profits. Petitioners offered no proof of damages but were awarded all of the profits made by the infringement (R. 1040). The Special Master's report, with slight modifications, was confirmed by the District Court (26 Fed. Supp. 134; R. 1212).

The respondents' plea before the Master and the District Court was that there should be an apportionment of the profits. Both the Master and the District Court refused to apportion (R. 1194). The Circuit Court of Appeals reversed the District Court and, though finding that the infringement was a deliberate plagiarism (R. 1265), nevertheless apportioned the profits—20% to the copyright owners—80% to the infringers (R. 1266).

Statement.

Petitioners are playwrights of experience and ability. On January 18, 1930 they copyrighted their play DISHONORED LADY as an unpublished work (R. 4a, 4b).

Their play was inspired by a famous Scotch criminal trial which occurred in 1859 known as "The Trial of Madeleine Smith".

DISHONORED LADY opened in New York on February 4, 1930 and after its New York run, toured the road. Katharine Cornell, an outstanding actress, played the leading role. The play was also produced abroad in London.

Respondents are allied corporations engaged in production, distribution and exhibition of motion pictures.

Respondent, Metro-Goldwyn Pictures Corporation, engages in the *production** or manufacture; respondent, Metro-Goldwyn-Mayer Distributing Corporation engages in the *distribution*, that is, licenses their exhibition in theatres; defendant, Loew's, Inc. operates (through subsidiaries) a chain of theatres which *exhibits* pictures; Culver Export Corporation takes over distribution abroad (R. 962, 963).

Shortly after the New York opening the respondents procured a manuscript of the play DISHONORED LADY and negotiations were carried on for sixteen months for the purchase of the motion picture rights thereto. The parties had agreed on a price and a formal contract was prepared.

However, before the money was passed, respondents wanted to satisfy a trade association of which they were members, known colloquially as the "Hays Organization".

The "Hays Organization" barred the play for picture purposes, unless certain requirements could be met which it thought to be in keeping with a code it had set up.

In May, 1930, while the deal was still pending, a novel entitled LETTY LYNTON, by Marie Belloc-Lowndes, was published in England. This novel was also inspired by the Madeleine Smith trial.

In June, 1931, the respondents abandoned negotiations for petitioners' play.

Shortly thereafter they bought the motion picture rights of the novel LETTY LYNTON. For it they paid $3,500. The price fixed upon petitioners' play had been $30,000.

Immediately and deliberately they proceeded to make a motion picture of petitioners' copyrighted

* Italics throughout the brief are ours.

stage play DISHONORED LADY. The novel LETTY LYNTON served as a screen.*

The Court below found the respondents' motion picture to be a deliberate plagiarism (R. 1264, 1265):

> "They were not innocent offenders; they deliberately lifted the play; it would take far more than the denials in the old record to convince us to the contrary in the face of the step by step 'tracking', which our comparison and analysis disclose. * * * *We now hold that the borrowing was a deliberate plagiarism.*"

The respondents' motion picture was first released, or publicly shown on May 7th, 1932 (R. 302).

Petitioners filed suit on June 24, 1932. Issue was joined on July 25, 1932. Petitioners applied for an injunction *pendente lite* on July 29, 1932.

The District Court, in balancing the conveniences, denied the temporary injunction but set the case "near the head of the Day Calendar for trial October 1932".

The trial, however, was delayed about nine months—until April 1933. The Judge who heard the case did not render his decision, dismissing the bill, until July 31, 1934, over fifteen months after the trial. (7 Fed. Supp. 837; R. 1.)

The box office value of a motion picture exhausts itself in the United States in about six months after its first release, and in the foreign field in about a year after the release in the United States (R. 383, 385).

Petitioners, though duly energetic, because of the dismissal of the bill, never succeeded in procuring an

* These facts appear in the prior opinion of the Court below 81 Fed. (2) 49; (R. 1291) and the District Court's opinion on dismissal of the bill 7 Fed. Supp. 837.

injunction until July, 1936—too late by over three years to be of service (R. 4).

Meanwhile, respondents, who have been found to be deliberate plagiarists, and had exhausted the infringing work at the box office (although petitioners as now appears were entitled to an injunction from the outset) are now nevertheless, not only allowed to recoup all of their costs, but in addition, have been permitted to retain 80% of the profits.

The Copyright Statute (17 U. S. C. A. #25b) provides that the infringer shall pay to the copyright owner "such damages as the copyright proprietor may have suffered * * * as well as *all the profits* which the infringer shall have made from such infringement * * *".

The Court below however, did not follow the Statute or the prior decisions of this Court, but justified its apportionment of profits by attempting to distinguish the cases of *Callaghan v. Myers*, 128 U. S. 617, and *Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, and by overruling its own prior decision of *Dam v. Kirk LaShelle Co.*, 175 Fed. 902 (C. C. A. 2) (R. 1260, 1261, 1263). It said of the *Callaghan* and *Belford* cases,

> "The difficulties of separation have generally prevented infringers from attempting any apportionment; they have contented themselves with getting down the net profits as low as possible. That was the case in *Callaghan v. Myers*, supra; and in *Belford, Clarke & Co. v. Scribner*, 144 U. S. 488, 508, 12 S. Ct. 734, 36 L. Ed. 514; and for this reason the general language there used is not to be taken as holding that the infringer

must always be unsuccessful, no matter what evidence he may bring forward. They hold no more than that when he makes no effort to discharge the duty resting upon him, he will be cast for the whole profit" (R. 1260, 1261).

As we shall see (*post*, p. 13 *et seq.*), this distinction is without factual basis to support it.

The infringers in those cases did not "content themselves with getting the net profits down as low as possible" but made strenuous "effort" to have the profits apportioned, and in the *Belford* case actual evidence was offered therefor, which was not contradicted.

Having thus attempted to distinguish the two controlling decisions of this Court, the Court below aggravated the error by making its apportionment on the basis of a supposed patent analogy which does not exist even in patent law.

In substance, because respondents had selected popular actors and had supplied a skillful director and producer, along with other contributions, *e. g.*, scenario, costumes, advertising, etc., and had made a successful motion picture,—the Court below held that the respondents were entitled to an arbitrary apportionment of 80% of the profits (R. 1266).

In so doing the Circuit Court of Appeals has rendered the first decision of its kind in this Country or in England that counsel has been able to find.

Although apportionment of profits in copyright cases has been heretofore sought, it has always been rebuffed, notably by the decisions in this court in the *Callaghan* and *Belford* cases.

The *net* profits were indeed net profits—for they were what remained only after the allowance of de-

ductions that included not only *actual* disbursements but *theoretical* disbursements which *never* were made, *i. e.*, interest on investment—depreciation, etc. The extent of all these allowances will be gauged by reference to the District Court's opinion where it appears that out of the gross sum of $1,655,269.45 realized from the infringement, respondents were credited with deductions aggregating $1,867,664.78 (R. 1188).

The Court below also allowed as part of overhead an item of $922,141.09 (R. 1266).

The question of apportionment of profits and this one item are the sole questions which petitioners raise in this Court.

$922,141.09 Item.

The facts on the $922,141.09 item are as follows:

Prior to 1924 Louis B. Mayer, Irving Thalberg and J. Robert Rubin were *producing* motion pictures through a corporation called Louis B. Mayer Pictures, Inc.

On April 7, 1924 it made an agreement with Metro Pictures Corporation (name later changed to Metro-Goldwyn Pictures Corporation) (Ex. 33, R. 832 offered R. 719). Under that contract the two corporations which theretofore had been separately producing motion pictures were unified. The three individuals, Mayer, Thalberg and Rubin, took charge of motion picture production for Metro Pictures Corporation. They were paid substantial weekly salaries, plus 20% of the net receipts of Metro Pictures Corporation (Ex. 33, R. 839 offered R. 719).

In 1926 Mayer, Thalberg and Rubin formed a partnership—Louis B. Mayer Pictures—and this

partnership thereupon succeeded to the old position held by Louis B. Mayer Pictures, Inc. (Ex. 33, R. 858 offered R. 719).

In 1927 Loew's, Inc., the "top" holding company (Ex. 17, R. 770 offered R. 327) took over and extended this contract to 1932 and the interest of the partnership which theretofore had been in the earnings of Metro Pictures Corporation, Inc. was changed to an interest in the combined annual net profits of Loew's, Inc. (Ex. 33, R. 861 offered R. 719).

After payment of $2 per share dividend on Loew's stock, the three individuals comprising the partnership would now receive 20% of the combined annual net profits of Loew's, Inc., up to two and one-half million dollars, and 15% of all other combined net profits (Ex. 33, R. 862; R. 986 offered R. 719). This percentage interest amounted in 1932 to $922,141.09 (Ex. 18-D5, R. 788 offered R. 328).

Loew's, Inc., through its stock holdings, was not only interested in the production of motion pictures, but also in their distribution and exhibition as well as incident real estate holdings (R. 770-Ex. 17 offered R. 327; R. 900-Ex. L1 offered R. 457; R. 913-Ex. L10 offered R. 529).

In addition to the sum of $922,141.09 the three individuals received the following salaries: Mayer $2500 per week, Thalberg $4000 per week, Rubin $2000 per week (R. 987; Ex. 33-R. 860, R. 870, 875, 857 offered R. 719).

Petitioners contend that the item is merely a distribution of profits to the three individuals. The Master said:

> "I can find * * *. no evidence in the record to justify a holding that the sum paid by virtue of

defendants' Exhibit 33 to Louis B. Mayer Pictures during the year of this accounting was a part of the general expenses of the production of pictures by the Metro-Goldwyn Pictures Corporation during the year in question. * * * *It is perfectly clear* * * * *that the percentage to be paid had no relation whatsoever to the cost of production and in no sense could it be considered as a part of the cost of production*" (R. 987).

The Court below did not disturb the finding of the Master that the percentage payment could not be considered as a cost of production.

Instead, the Court below allowed the percentage on the erroneous legal ground that the right of the three individuals to claim the percentage based on profits *preceded* the rights of respondents to *recover* the profits made by the defendants on the infringement.

The Court below said:

> "The payments were never profits of the defendants at all; the contracts effectively laid hold of them the moment they came into existence. Not to allow the credit would be in substance to introduce the partners as defendants into this suit and yet to hold Loew's Inc. responsible for the recovery against them" (R. 1266).

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the copyright owners were not entitled to all the profits realized by the infringers.

2. In failing to follow the Statute (17 U. S. C. A. #25b) and the precedent established by this Court in *Callaghan* v. *Myers, supra*, and *Belford* v. *Scribner, supra*.

3. In holding that in the *Callaghan* and *Belford* cases, the infringers were "cast for the whole profit" because they had made "no effort to discharge the duty resting upon him (them)", of making the apportionment.

4. In apportioning the profits because the infringement of the copyrighted work was in the form of a motion picture copy thereof.

5. In apportioning profits when the infringing motion picture was a single indissoluble unit, which was distributed and exhibited as a unit, and all receipts therefrom were for the use of the infringing work as a unit.

6. In apportioning to the infringers 80% of profits solely upon the popularity of the stars or actors, the skill and reputation of the producer and the director, the scenery and costumes, and the extent of the advertising furnished by respondents in the manufacture of their motion picture copy.

7. In not holding that the alleged contributions made by the respondents to the infringing work were nothing more than contributions of labor and material, and therefore but an item of expense of manufacture, rather than a distinct contribution.

8. In apportioning profits when the infringement is a deliberate plagiarism.

9. In allowing the respondents a credit of $922,141.09 as part of the overhead to be charged proportionately as part of the cost of manufacturing the infringing picture.

Summary of the Argument.

I. There can be no apportionment of profits in a suit for copyright infringement: It is forbidden both by the Statute (17 U. S. C. A. #25b) and the decisions of this Court.

The Court below, in making an apportionment of profits in this suit for copyright infringement, erred in not following the Statute and the decisions of this Court in *Callaghan* v. *Myers* and *Belford* v. *Scribner*, which refuse such apportionment and in attempting to distinguish them on a non-existent basis.

II. The Court below erroneously justified its apportionment by a resort to patent cases.

Granting *arguendo* that there can be an apportionment of profits in a suit for copyright infringement, the basis used by the Court below has never been recognized even in the field of patents.

III. At all events, since the respondents have been found to be "deliberate plagiarists" they are under no circumstances entitled to an apportionment or other equitable consideration.

IV. The payment of $923,121.09 to Messrs. Mayer, Rubin and Thalberg, in addition to salaries of $130,000, $104,000 and $208,000 respectively, in the year 1932, is a distribution of profits and is not properly allowed as cost.

POINT I.

(Specifications 1, 2, 3, 4 and 5.)

The Circuit Court of Appeals erred in not following the Statute and the decisions of this Court in *Callaghan* v. *Myers* and *Belford* v. *Scribner*, and in attempting to distinguish them on a non-existent basis.

Apart from failing to heed the plain mandate of the Statute (17 U. S. C. A. #25b) that grants to petitioners "all the profits", the Circuit Court of Appeals did not follow, but attempted to distinguish, the prior decisions of this Court in *Callaghan* v. *Myers* and *Belford* v. *Scribner*, by saying that "they hold no more than that when he (the infringer) makes no effort to discharge the duty resting upon him he will be cast for the whole profit" (R. 1261). This distinction has no basis in fact.

In the *Belford* case, defendant apparently sought to escape the doctrine of the *Callaghan* case; for Belford not only *offered* expert testimony, but specifically *pleaded in mitigation* that the infringing portions "do not exceed from ten to fifteen percent of the entire contents" (Belford Rec., p. 22).

Belford called an expert on cook books. He testified that 153 cooking recipes had been copied, in whole or in part, but that these constituted but a total of 2,010 lines, or 56 pages out of a total of 300 pages contained in the infringing cook book; that "if the matter which has been copied * * * were to be taken out of the book, it would leave a work of value as a cook book" (Belford Rec., pp. 116, 117).

Scribner did not offer to rebut this testimony.

On appeal Belford assigned as error to this Court the refusal to apportion profits (Assignment No. 5,

Belford Rec., p. 122). Belford's brief to this Court (p. 15) specified as error that the infringement constituted but a "small part" and could "easily and certainly been separated from the balance".

Indeed the Court below in the case at bar in finding "no effort" was made must have even overlooked a vital portion of this Court's opinion in the *Belford* case for the opinion of this Court expressly sets forth Belford's fifth assignment of error in *hæc verba* at page 502 as follows:

> "(5) Because the decree goes for the entire amount of profits realized by the corporation defendant which was the proprietor of the book which is alleged to infringe the rights of the plaintiff, instead of such part of the profits as was realized by such infringement."

Therefore not only the record but also the opinion in the *Belford* case demonstrates the error of the Court below in attempting to distinguish it on the basis that "no effort" was made to furnish a basis for apportionment.

In the *Callaghan* case, the infringement had to do with Freeman's Illinois Reports. Freeman had taken the court opinions which were common property or *publici juris* and had given them the usual reporter's treatment by adding indices, headnotes and the like. These were copyrighted and were found to have been infringed.

In the *Callaghan* case no so-called expert evidence appears to have been offered, but Callaghan's counsel in his brief to this Court (p. 7), urged that apportionment be made on the physical content measured separate from the opinions, which, considering the

subject matter, was as sane a basis as any other. The invitation was refused.

The Court below in overruling its own prior decision of *Dam* v. *Kirk LaShelle*, 175 Fed. 902, thought that the court, there in refusing an apportionment, acted *sua sponte* (R. 1261).

It is submitted that the Court in the *Dam* case was not acting *sua sponte*, but was following well recognized legal principles.

It was the Court below which acted *sua sponte* in making the purported distinction that "no effort" was made in either the *Belford* or *Callaghan* cases; for not even the respondents suggested that the *Callaghan* and *Belford* cases were distinguishable upon that ground. They contented themselves with trying to demonstrate that they were innocent infringers whereas the *Callaghan* and *Belford* cases involved slavish copying, done wilfully.*

These grounds are no longer available to respondents as they now, themselves, stand convicted as deliberate plagiarists (R. 1265).

The Court below noted that: "The plaintiff called no witnesses to rebut this testimony" (R. 1264). The plaintiffs did object to the evidence throughout however**; standing on what they understood the then existing law to be as stated in the *Callaghan*, *Belford* and *Dam* cases.

But Scribner in the *Belford* case likewise did not offer any evidence to rebut the apportionment contention.

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* (Respondents' Brief below, pp. 22, 23, 24.)

** R. 164-171, 266, 267, 279, 281-283, 541, 544, 563-568, 574-577, 590; 597-599, 601-603, 609, 611, 618, 619.

If, therefore, cannot be said that in the *Belford* case this Court refused the apportionment on any weight of evidence theory.

The apportionment was refused solely as a principle of law. In *Callaghan v. Myers* this Court had previously said (p. 666):

> "In regard to the general question of the profits to be accounted for by the defendants, as to the volumes in question, the only proper rule to be adopted is to deduct from the selling price the actual and legitimate manufacturing cost. If the volume contains matter to which a copyright could not properly extend, incorporated with matter proper to be covered by a copyright, the two necessarily going together when the volume is sold, as a unit, and it being impossible to separate the profits on the one from the profits on the other, and the lawful matter being useless without the unlawful, it is the defendants who are responsible for having blended the lawful with the unlawful and they must abide the consequences, on the same principle that he who has wrongfully produced a confusion of goods must alone suffer. As was said by Lord Eldon, in *Mawman v. Tegg*, 2 Russ. 385, 391:
>
> 'If the parts which have been copied cannot be separated from those which are original, without destroying the use and value of the original matter, he who has made an improper use of that which did not belong to him must suffer the consequences of so doing. If a man mixes what belongs to him with what belongs to me, and the mixture be forbidden by the law, he must again separate them, and he must bear

all the mischief and loss which the separation may occasion. If an individual chooses in any work to mix my literary matter with his own, he must be restrained from publishing the literary matter which belongs to me; and if the parts of the work cannot be separated, and if by that means the injunction, which restrained the publication of my literary matter, prevents also the publication of his own literary matter, he has only himself to blame.'

"The present is one of those cases in which the value of the book depends upon its completeness and integrity. It is sold as a book, and not as the fragments of a book. In such a case, as the profits result from the sale of the book as a whole, the owner of the copyright will be entitled to recover the entire profits on the sale of the book, if he elects that remedy. *Elizabeth* v. *Nicholson Pavement Co.*, 97 U. S. 126, 139 (24: 1000, 1006)."

In the *Belford* case the Court said at page 508:

"The rule is well settled that, although the entire copyrighted work be not copied in an infringement, but only portions thereof, if such portions are so interningled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff. This was the rule laid down by this court in *Callaghan* v. *Myers*, 128 U. S. 617, 665 [32; 547, 562], following *Mawman* v. *Tegg*, 2 Russ. 385, 391, and *Elizabeth* v. *Nicholson Pav. Co.*, 97 U. S. 126, 139 [24; 1000, 1006]."

The Court below said that this "general language" was not controlling in the case at bar (R. 1260).

If, as the Court below states, "no effort was made" in the *Belford* and *Callaghan* cases, it is hard to understand why the Court was at pains to point out why an apportionment could not be had.

Surely the full reasoning given in both cases is otherwise unexplainable.

In *Dam* v. *Kirk La Shelle Co.*, 175 Fed. 902, 908 the Court said:

> "On the other hand, unless the complainant is entitled to all the profits arising from the production of the play, she is, as a practical matter, entitled to no pecuniary recovery at all. It is manifestly impossible for an author of a book or story which he has never dramatized to show that he has sustained any actual damage by the dramatization and production of a play based upon it. It is equally impossible for him to show the proportion of the profits accruing to a theatrical company from the use of a copyrighted theme or plot and the proportion accruing from the use of the scenery, the employment of favorite actors, and other sources. *If in a case like the present an author cannot hold the theatrical company as his trustee and accountable for all the profits from the play, then it necessarily follows that all copyrighted but undramatized books and stories may be appropriated and used with impunity.*"

The *Callaghan* and *Belford* cases were both decided prior to the enactment of the present Act of 1909. The *Dam* case, while decided after the enactment of the 1909 Act, was not decided under it because the action arose prior to its enactment (35 Stat. 1088).

The prior Copyright Statutes contained no express provision for the recovery of profits (Revised Stat. 4964-4967). Equity as an incident to the injunction awarded a recovery of profits. Now by express enactment the infringer is entitled to "all the profits".

Recently this Court had occasion to remark that it is "subtle business, calling for great wariness lest what professes to be mere *rendering* becomes *creation* and *attempted interpretation* of legislation becomes *legislation itself.*"

Palmer et al. v. *Commonwealth*, U. S. ; 84 Law. Ed. 8, 10; No. 7, Oct. Term, 1939; Decided Nov. 6, 1939.

That admonition is indeed relevant here in view of the plain mandate of the Statute which requires that "all the profits" be surrendered, coupled with the untenable distinction of prior decisions of this Court.

This Court has refused to extend the apportionment theory to trademarks because it was found to be "inherently impossible" *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251.

In the *Hamilton-Brown Shoe Co.* case apportionment was urged upon the Court. It considered the analogies suggested between patents and trade-marks, and said (p. 261): "assuming the asserted analogies to patent cases do exist, a sufficient reason for not requiring the complainant in the present case to make an apportionment * * * is that such an apportionment is *inherently impossible.*"

The Court quoted with approval the case of *Graham* v. *Platt*, a trade-mark case reported at 40 Cal. 593, 598, 6 Am. Rep. 639, 640, as follows:

"In sales made under a simulated trade-mark

it is impossible to decide how much of the profits resulted from the intrinsic value of the commodity in the market, and how much of the credit to give to it by the trade-mark. In the very nature of the case it would be *impossible* to ascertain to what extent he could have affected sales and at what prices except for the use of the trade-mark. The difficulty lies in ascertaining what proportion of the profits is due to the trade-mark and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable certainty it is more consonant with reason and justice that the owner of the trade-mark should have the whole profits than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another so that they cannot be distinguished inseparately he shall lose the whole for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party who in no degree contributed to the wrong."

Nor was this Court in the *Hamilton-Brown* case without the benefit of *Westinghouse v. Wagner*, 225 U. S. 604, or *Dowagiac Mfg. Co. v. Minnesota Plow Company*, 235 U. S. 641, the two cases which formed the keystone of the respondents' argument, and of the decision below.

Both were referred to in the *Hamilton-Brown* case, but this Court refused to apply the suggested analogies of patent to trademark cases.

In commenting on them the Court said (pp. 260, 261):

> "The rule invoked is that which, as pointed out in the last two of these cases, is applicable where plaintiff's patent relates to a part only of a machine or combination or process, or to particular improvements in a machine or other device. In such case, where the invention is used in combination with other elements of value not covered by the patent, so that plaintiff's patent creates only a part of the profits, he is entitled to recover only that part, and must give evidence tending to apportion the profits between the patented and unpatented features. But, as pointed out in the *Westinghouse* case (p. 618), there is a recognized exception where the plaintiff carries the burden of proof to the extent of showing the entire profits, but is unable to apportion them, either because of the action of the wrongdoer in confusing his own gains with those which belong to plaintiff, or because of the inherent impossibility of making an approximate apportionment. There, 'on established principles of equity, and on the plainest principles of justice, the guilty trustee cannot take advantage of his own wrong.'"

And it is submitted here that apart from the fact that both a patent and a copyright are statutory monopolies there is nothing in common between them. The subject matter protected, means of securing, requirements for and the scope of the protection when acquired are worlds apart.

Analogies of Patent and Copyright.

The inhibition of the Copyright Act is that one person is prohibited from making copies of another's copyrighted work. The protection is indicated in the name of the word itself, "copyright", *i. e.*, the right to copy.

But a patent goes far beyond a copyright. Two inventors working independently could conceivably invent an identical invention, but he who came first could monopolize the field to the exclusion of the other.

Not so in copyright. Two authors working independently could conceivably write the same work. Both would be entitled to a valid copyright. There can be a *plurality* of copyrights, *Dymow* v. *Bolton*, 11 Fed. (2d) 690, 691; *Sheldon* v. *Metro, etc.*, 81 Fed. (2d) 49, 54 (R. 1302). There can of course be but *one* valid patent.

The protection is from "copying". The Copyright Act (17 U. S. C. A. §6) specifically provides for protection of "abridgements, adaptations, arrangements, *dramatizations*, translations, or other versions of works in the public domain".

A patent is invalidated by reason of prior art or anticipation, but a copyright as provided in Section 6 (17 U. S. C. A.) may be had on the rewriting of *works* "in the public domain".

"Public domain", refers to those *works* upon which copyright has expired or which have been published without its protection, and are therefore open to the public to "make copies thereof".

The Court below confuses this. It said (R. 1264):

"Before fixing a percentage upon the basis of

this testimony we must consider two things peculiar to the case at bar. First, all the witnesses' estimates were based upon the contribution of the entire play; that is, as though it was completely the work of the plaintiffs. As we know, that was not the case; *the plaintiffs worked over old material. The general skeleton was already in the public desmesne.* A wanton girl kills her lover to free herself for a better match; she is brought to trial for the murder and escapes. Nobody can say how far this basic plot is to be credited with whatever the play contributed to the drawing power of the picture. That consideration must therefore count toward reducing the percentage of the profits recovered."

While the Court apparently made no express apportionment on the basis of this statement, the confusion is apparent. But if it can be said that the Court did make an apportionment on the basis of the foregoing, the error is but further aggravated.

These respondents are not charged with or convicted of having copied the trial of Madeleine Smith. They had a perfect right to do that and to dramatize it if they wished.

They have been charged with and convicted of copying *our* dramatization of the trial of Madeleine Smith—a clear violation of petitioners' rights under Section 6.

So, what the trial of Madeleine Smith may or may not have contained is irrelevant.

What they *copied* was our dramatization of it.

The petitioners in writing their play did not need to rely on the trial of Madeleine Smith for their inspiration. History in any stage would have and al-

ways will furnish the identical dramatic plot. A scanning of the sheets of any metropolitan daily will supply the same result.

The fact that the trial of Madeleine Smith inspired them to write a play concerning it, which the respondents copied, does not diminish their rights against the respondents for having done so. "The skeleton was already in the public desmesne",—as what isn't—before Madeleine Smith was ever born and will probably continue to remain so until the end of time.

If the Court's reasoning is right and if Polti* is also right that there are but thirty-six possible dramatic situations, there is little incentive left for any author to redramatize characters such as Washington and Lincoln or for that matter Madeleine Smith. His protection is indeed scant if it is to be eroded by the considerations suggested by the Court below. Fortunately that is not the law and never was.

In *Emerson* v. *Davies*** (Story, *Circuit Justice*), 8 Fed. Cas. 615, 620, it is said:

> "It is a great mistake to suppose because all the material of the work, or some parts of its plan or arrangements and modes of illustration, may be found separately or in a different form, or in a different arrangement in other distinct works that, therefore, if the plan or arrangement or combination of these materials in another work is new or for the first time made, the author or compiler or framer of it (call him what you please) is not entitled to a copyright. The re-

* The Thirty-six Dramatic Situations by Georges Polti published by the Editor Company 1916, 1917; James Knapp Reeve 1921; Writers Digest 1931.

** Approved By Lord Atkinson in *Macmillan* v. *Cooper*, (1923) 40 T. L. R. 186.

verse is the truth in law and as I think in common sense also."

This Court, in *Bleistein* v. *Donaldson*, 188 U. S. 239, 250, said:

> "Personality always contains something unique. It expresses its singularity even in handwriting, and a very modest grade of art has in it something irreducible which is one man's alone. That something he may copyright unless there is a restriction in the words of the act."

A man is entitled to copyright if he goes through the streets of a town and makes a directory.

So is any other man who desires to undertake it.

If both works are accurately performed it necessarily follows that they will both be identical. The material is available for anyone who wishes to take it; but that some one has done it before, does not diminish the rights of him who follows.

In *Jewelers' Circular Pub. Co.* v. *Keystone Pub. Co.*, 281 Fed. 83, 88 (C. C. A. 2), the Court said:

> "The right to copyright a book upon which one has expended labor in its preparation does not depend upon whether the materials which he has collected consist or not of matters which are *publici juris*, or whether such materials show literary skill or originality, either in thought or in language, or anything more than industrious collection. The man who goes through the streets of a town and puts down the names of each of the inhabitants with their occupations and their street number, acquires material of which he is the author. He produces by his labor a merito-

rious composition, in which he may obtain a copyright, and thus obtain the exclusive right of multiplying copies of his work."

The protection is from "copying".

One would not say that the Caterpillar tractor in the fields of Kansas is a "copy" of the Army tank in the fields of France, but surely the inventor of the tractor could recover for the use of the Caterpillar chain on the Army tank.

On the other hand, Shaw could not claim that Ludwig's Napoleon was a copyright infringement of his "Man of Destiny", although the identical subject matter is involved in both works.

The propositions seem self-evident. Yet the Court below seemed to toy with them as furnishing an apportionment basis.

A patent gives a specific defined grant to the patentee. Except for its nature it would, like a piece of real property, be capable of measurement in metes and bounds.

But a copyright only prevents the unauthorized "copying" of the author's work. The issue, therefore, in a patent suit is never similar to that in a copyright suit. The question in the patent suit is, does the device impinge upon the metes and bounds resting in the patent owner under his grant. The sole question in a copyright suit is, has one work been "copied" from the other.

If the work is properly protected, but copied the recovery follows under the statute.

Surely, if the Court below is correct in its statement that "that consideration should have counted toward reducing the percentage of the profits recoverable", then the case of *Callaghan v. Myers* (where nine-tenths the volume—in the form of the Court opin-

ions—was in the public domain), is one of *a fortiori*. As we know, the Court in the *Callaghan* case awarded all profits to the copyright owner and "that consideration" did not count towards reducing the profits recoverable.

In *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric & Mfg. Co.*, 225 U. S. 604, at pages 614 and 615, Mr. Justice Lamar sets forth the four general categories of patent cases wherein questions as to the profits to be recovered might arise. They are as follows:

> "(a) Where the infringer has sold or used a patented article, the plaintiff is entitled to recover all of the profits.
>
> (b) Where a patent, though using old elements, gives the entire value to the combination, the plaintiff is entitled to recover all the profits. *Hurlbut* v. *Schillinger*, 130 U. S. 472, 32 L. Ed. 1016, 9 Sup. Ct. Rep. 584.
>
> (c) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits 'unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him.' *Elizabeth* v. *American Nicholson Pav. Co.*, 97 U. S. 127, 24 L. Ed. 1002.
>
> (d) But there are many cases in which the plaintiff's patent is only a part of the machine and creates only a part of the profits. His invention may have been used in combination with valuable improvements made, or other patents appropriated by the infringer, and each may have jointly, but unequally, contributed to the profits.

In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains. He must therefore 'give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented feature and the unpatented features, and such evidence must be reliable and tangible, and not conjectural or speculative; or he must show, by equally reliable and satisfactory evidence, that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine, as a marketable article, is properly and legally attributable to the patented feature.' *Garretson* v. *Clark*, 111 U. S. 121, 28 L. Ed. 371, 4 Sup. Ct. Rep. 291."

It is submitted that categories a, b and c are all analogous to the situation in a copyright infringement. The respondents here have "sold and used" the article copyrighted. Why therefore are they not within category (a) in such wise as to merit recovery of "all the profits"?

Concerning the Importance of the Questions Presented.

Until the decision below, a copyright owner was thought to be entitled to all profits made by an infringer in the use of his work. The effect of the decision is to overrule this Court's decisions in *Callaghan* v. *Myers*, and *Belford* v. *Scribner*, which granted to the author all profits made from the infringement of his work and to nullify rights which

Congress in conformity with the Constitution has seen fit to give to authors—i. e., "all the profits".

If apportionment is to be had in copyright infringement cases, particularly on the erroneous basis as suggested by the decision below, no one can overstate the possibilities of the decision.

Today the vast and multiple means of dissemination of authors' works, and the almost instantaneous surfeiting of the entire nation therewith, is demonstrated in the fields of radio, motion picture, theatrical and embryonic television industries, to say nothing of the mass publication of books, novels, newspapers and other publications.

The very thing which the injunction is to prevent is today a *fait accompli* before it can be procured.

The authors who create, and the industries which manufacture the copies of their creations lean heavily upon the uniform and correct application of the laws which affect them respectively.

If industry can make a glorified copy of the work of an author; escape the hazard of an injunction because the arm of equity is not quick enough to stop the wrong before it has run, and after eight years of crushing litigation retain 80% of the gains, there is little incentive left for industry to consult with or make contracts with authors.

The law was designed as a deterrent to plagiarism—the copyright owner was given "all the profits" be they great or small. The law was not designed with regard to the ultimate position of the copyright owner—his recovery to be varied with the amount of the profits. The design of the law was to deprive the wrongdoer of *all* profits—not all profits if the infringement is a financial failure—and 20% of the profits if the infringement is a success.

If authors are to be denied rights granted to them by Congress—in language clear beyond peradventure—that "all the profits" shall be theirs—it is well that authors and Congress be now so advised of the inadequacy of the plain language of their Statute.

POINT II.

(Specifications 6 and 7.)

Granting *arguendo* that there should be apportionment, the basis used by the Court below has never been recognized even in the field of patents.

But assuming *arguendo* that an apportionment of profits is to be had, based upon supposed analogies in the patent field; the Court was in complete error even on patent analogy.

Apportionment in Patent law cannot rest upon the skill, science and endeavor which went into the making of the infringing device but must rest upon some item separable from it of a "distinct and independent character" (*Clark* v. *Johnson*, 199 Fed. 116, 122).

An apportionment on the basis used below is merely an apportionment for labor and materials used in manufacturing the infringing copy, the cost of which has already been allowed as an item of expense.

If the contribution said to have been made by the actors and the director was not "labor", it is difficult to justify the payment to them of "salaries".

The energies of the self same actors and director might have been and indeed are expended in making other pictures *not* copies of Petitioner's play. They were no more essential to the making of the picture

than is manpower in general to any endeavor. Of course if respondents had made a "Chinese copy" of the play, in making their picture, they would still require actors, a director, scenery, etc. It affords no basis for an apportionment of profits in Patent much less in Copyright.

It is immaterial whether the infringing copy is good, bad or indifferent. Both the infringer and the infringee alike have to abide by the result of the taking.

Tilghman v. *Proctor*, 125 U. S. 138, 140;
Crosby Valve v. *Consolidated Valve*, 141 U. S. 441;
Elizabeth v. *Am. Nicholson Pavement Co.*, 97 U. S. 126, 138;
Livingston v. *Woodsworth*, 15 How. 559.

The Court below said there were "two kinds" of evidence offered. One was "the price of the picture rights in the play, as both plaintiffs and defendants had agreed to it"; the other was "the opinions of experts".

The Court rejected the agreed price leaving as the sole basis for apportionment the "expert testimony".

"Very generally they ('the experts') professed to believe that the controlling factor in the success of a play (picture) was the popularity of the actors—the stars—* * *; that the other chief factors were the skill and reputation of the producer and the director, the scenery and the costumes, the extent of the advertising, and the reputation and standing of the producing company itself" (R. 1263, 1264).

The Court below, however, refused to allow "the currency which his reputation may have given to the

combined product", *a fortiori*, because, initially, "a plagiarist may not charge for his labor in exploiting what he has taken" (R. 1265). The latter is difficult to follow in view of the 80% apportionment made precisely on the basis of "labor".

On the foregoing categories, less the "currency of the respondents' reputation", the Court predicated its apportionment, stating, however, that it was "aware that out of all this no real standard emerges and that it would be absurd to treat the estimates of experts as being more than expressions of very decided opinions that the play should count for very little" (R. 1265).

The Court was "resolved to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot, with certainty, compute their own share." As justification for this the Court commented that, "where *plaintiffs* failed to prove their *damages* exactly, we often make the best estimate we can, even though it is really no more than a guess" (R. 1265);—although it is to be remembered here that the award to Petitioners was *profits* mathematically and *exactly* ascertained, and not *damages* inexactly determined.

The basis of the apportionment below is founded on the brand of talent and skill used by the infringer in the making of the copy.

We call this nothing more than an apportionment on a "labor and material" basis. It is merely an item of cost to be allowed before arriving at the figure of profit, but not a basis upon which to apportion that profit.

But the Court below, not only allowed the cost of the labor and material, but allowed respondents to share

in the profits to the extent of 80%. Such treatment is never found in patent cases.

In *Duplate Corporation* v. *Triplex Safety Glass, Co. etc.*, 298 U. S. 448, a similar contention was before this Court in a patent case. Justice Cardozo in that case said (at p. 457):

> "But this is to misconceive utterly the position of an infringer accounting for illicit profits. 'An infringer cannot be heard to say that his superior skill or intelligence enabled him to realize profits by his infringement which a person of less skill might not have realized.' *Lawther* v. *Hamilton* (C. C.), 64 F. 221, 224 (citing cases). * * * Whatever is at his call in the service of the enterprise—*brawn* and *intelligence*, *factories* and *lands*, *patents* and *machinery*—will be viewed upon an accounting as if held upon a quasi-trust to contribute what it can to the profits of the business. *The wrong-doer must yield the gains begotten of his wrong.*"

In *Conroy* v. *Penn. Electrical & Mfg. Co.*, 199 Fed. 427, 430, 431 (C. C. A., 3rd), the Court expressed a similar view:

> "As argued by counsel, defendants might as well claim that they had more skilled workmen than other manufacturers or more experienced and efficient managers, or more reputation and prestige in the trade, which enabled them to secure higher prices for their goods. Many such dangerous, vague, and speculative reasons might be advanced in these accountings, were the opportunity afforded."

The same view, very well expressed, is found in the opinion of Judge Geiger in *Christensen* v. *National Brake & Electric Co.*, 10 Fed. (2d) 856, at 866 (D. C. Wis. modified and aff'd 38 Fed. (2nd) 721 and cert. denied 282 U. S. 864):

> "Speaking broadly, I assume that when an infringer claims to have 'improved' the patented structure, so long as he is still within the inhibited field of the patent—either as a whole or respecting any mechanical element or part of the structure—he is still infringing. If by such 'improvements' he really betters, even beyond the contemplation of the patentee, but does not make a new or different structure in a legal sense; if he thereby promotes, no matter in how high a degree, its mechanical or commercial favor; if he thereby increases the gains and profits on an individual sale, or decreases them, but because of its greater favor with the public, increases production and thereby aggregate profits—*he is still exercising the patentee's rights.* He is accountable for the profit whether his infringement embody the most, or the least, favored of possible variant structures. * * * Yet that was simply a means of promoting the infringement. His profit was none the less an infringing profit. * * *. In other words, his liability is not dependent upon his having been lavish or niggardly in the accoutrements of the infringing device, or in the degree of its perfection *within the scope* of the patent. Such a situation, as I conceive it, never presents an issue of segregation in its true sense. * * * It is my judgment, upon the evidence, that at no time was there pre-

sented to the master a situation clearly requiring a determination of any issue of segregation of profits."

The fallacy of the Court below is in attempting to apportion the profits falling *within the scope of the copyright itself*.

If there were to be an apportionment based upon patent analogy, it should be by a segregation of the copyrighted material from the added non-copyrighted portion.

In patent, the profits may be attributable to other portions of the machine *without the scope of the patent* because the unpatented portion may still stand as a useful mass and be viewed in its "distinct and independent character". *Clark* v. *Johnson*, 199 Fed. 116.

Such a case for example is *Garretson* v. *Clark*, 111 U. S. 120, where the improvement was on a mop—although mops had been known and used before "time out of mind".

But a literary composition is so essentially different from a mechanical structure that the same cannot be said. The third act of a comedy will hardly improve the second act of a tragedy, and likewise if the third act of any play is removed, the remaining two will be comparatively useless to anyone.

The courts do not consider what portion of the profit may be ascribed to the defendant's good workmanship in infringing *within the scope of the patent*.

> "But can it be said that a change in materials or in decoration of a device is one of those elements which a court may take into considera-

tion in apportioning the profits? Surely not. It is only a form in which the patented spittoon is clothed. *The items for which allowance of profit may be made must be of a distinct and independent character.*"

Clark v. *Johnson*, 199 Fed. 116, 122 (C. C. A. 7).

If apportionment theories of patent law are to be extended to the copyright law, and perchance to the Trademark Law as well, then at least *the foundation for such apportionment should also be analogous to that in patent cases.*

It follows from the decision below that the right granted to the copyright owner to recover "all the profits" under the Act does not extend to the very good or glorified copies of his work, but only to those inferior or mediocre copies where the profits are not very great. The wrongdoer, if he is skillful, is to be credited with a share of the spoils.

The author of a book or play does not write the play or the book anticipating that he himself will either produce the play or publish the work. His sole function is with the pen.

Yet, any wilful infringer of either the play or book, that did a good job in producing the play or in publishing the book, may be entitled, under the decision of the Court below, not only to receive back his cost, but 80% of the profits as well.

It will be recalled that the evidence supporting apportionment was testimony by producers and exhibitors who testified that in purchasing the picture for exhibition in their theatres they were chiefly influenced by the names of the stars, producer, director, etc., who were concerned with the picture, and that

these in their opinion were responsible for the bulk of the receipts; that they were not concerned greatly with the story upon which the picture was to be made (R. 1263, 1264).

In *Stearns-Roger Mfg. Co.* v. *Ruth*, 87 Fed. (2d) 35, 39 (C. C. A., 10, 1936), similar evidence was presented to the Court and rejected, the Court stating:

> "Either in an effort to apportion the profits, or to carry this burden, appellant offered the testimony of two mining engineers. But the proof so adduced was simply that the witnesses, in recommending this machine to their clients, considered the air control, the hard iron liners, the sands hole, ball bearing, etc., as well as the weir; that the presence of the weir was not the dominating influence in the recommendations. This evidence is without value. The engineers recommended the entire machine, and the appellant sold an entire machine. Resort cannot be had to an analysis of the mental processes of the engineers in recommending the purchase of infringing machines in order to compute profits. *If so, the profits would vary with the state of mind of different purchases.* If the accounting were for damages for lost sales or of savings to a user of an infringing device, then proof that other comparable articles were available at about the same price—the so-called 'standards of comparison' rule—would be pertinent. But where the recovery is limited to *net profits* of sales *actually* made, *such evidence is not pertinent. Page Machine Co.* v. *Dow, Jones & Co.* (D. C. N. Y.), 238 F. 369, 372; Walker on Patents (6th Ed.), Sec. 775."

In *Christiansen v. National Brake, etc.*, 10 Fed. (2d) 856, 866, Judge Geiger remarked that: "Such testimony amounts to little more than an attempt on the part of the witnesses to decide the issue".

POINT III.

(Specification No. 8.)

Since the respondents have been found to be "deliberate plagiarists", they are under no circumstances entitled to an apportionment or other equitable consideration.

The respondents have been stamped by the Court below to be "deliberate plagiarists" (R. 1265).

Nevertheless the Court below has allowed them, not only all their manufacturing costs, including overhead, but also 80% of the net profits.

Such action is not only contra to the policy of the patent decisions but also every legal rule respecting the treatment of wrongdoers.

The unquestioned rule in infringement cases is that an infringer in accounting for profits is viewed as a trustee *ex maleficio*. He is not a true or lawful trustee in such wise as to give a court of equity jurisdiction. The foundation of the court's jurisdiction is its power to grant an injunction, but having acquired the jurisdiction it is retained so as to compel the infringer to disgorge his profits and his liability is then measured as that of a trustee *ex maleficio*. This rule we think is axiomatic.

Hamilton-Brown Shoe Co. v. Wolf Bros. Co., 240 U. S. 251, 259;

Westinghouse v. *Wagner*, 225 U. S. 604, 618, 619;
Root v. *Railway Co.*, 105 U. S. 189;
Wales v. *Waterbury Mfg. Co.*, 101 Fed. 126 (C. C. A. 2, 1900);
Western Glass Co. v. *Schmertz Wire Glass Co.*, 226 Fed. 730, 735 (C. C. A. 7, 1915).

This, that such an infringer may retain no benefit from his wrong.

Duplate Corp. v. *Triplex Safety Glass Co.*, 298 U. S. 448, 457;
Crosby Steam Gage & Valve Co. v. *Consolidated Safety Valve Co.*, 141 U. S. 441;

This Court in softening the previous hard and fast "alternative rule" of *Garretson* v. *Clark*, 111 U. S. 120, as respects burden of proof, by its decisions in *Westinghouse* v. *Wagner*, 225 U. S. 604, and *Dowagiac Mfg. Co.* v. *Minn. Plow Co.*, 235 U. S. 641, has restricted its application to those cases where the infringement was not done in bad faith.

Thus in *Westinghouse* v. *Wagner, supra*, the Court pointed out that the liberation from the heavy burden of proof established by *Garretson* v. *Clark* would not extend to those who had "been guilty of gross wrong" (p. 620).

And in confirming this liberation in *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, the Court rested its view on the express finding of good faith. Thus, it says (p. 644):

> "At the outset it should be observed that, while the defendants were infringers and bound to respond as such to the plaintiff, their infringement was not wanton or wilful."

Again in the trademark case of *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251, 261, 262, this Court, although it refused an apportionment because to do so was "inherently impossible", gave as additional ground for not doing so the bad faith of the defendant.

Also:

Underwood Typewriter Co. v. *Fox Typewriter Co.*, 220 Fed. 880, 886 (C. C. A. 6);
Brennan & Co. v. *Dowagiac Mfg. Co.*, 162 Fed. 472, 476 (C. C. A. 6);
Dowagiac Mfg. Co. v. *Superior Drill Co.*, 162 Fed. 479 (C. C. A. 6).

And as Mr. Justice Lamar in the *Westinghouse* case pointed out, the rule for wrongdoers is the same in infringement cases as in other instances of wrongful acts by a lawful trustee.

He said (p. 619):

> "And the liability is not lessened because the confusion is due to a wrongful appropriation by a trustee *de son tort*, instead of carelessness of a trustee lawfully appointed."

He supported his views with the following authorities wherein the defendant was a *lawful* rather than a trustee *ex maleficio*.

Hart v. *Ten Eyck*, 2 Johns. Ch. (N. Y.) 62, 108;
Lupton v. *White*, 15 Ves., Jr. 432-440.

The Court below was aware of the rule and even

pointed out that potentially a more harsh rule might be enforced.

> "Indeed a constructive trustee, who consciously misappropriates the property of another is often refused allowance even of his actual expenses (Restatement of Restitution Section 158(d))" (R. 1265).

POINT IV.

(Specification No. 9.)

The payment of $922,141.09 to Messrs. Mayer, Rubin and Thalberg, in addition to salaries of $130,000, $104,000 and $208,000 respectively in the year 19?? is a distribution of profits and is not properly allowed as cost.

These three individuals were engaged solely in the *production* of motion pictures. Their percentage compensation is predicated upon the earnings of Loew's, Inc., a holding company, *not* so engaged. It merely owns *some* stock of the producing company (Ex. 17-R. 770, offered R. 327). Its other activities are *distribution* of motion pictures through stock ownership, and *exhibition* of pictures through its theatre subsidiaries, as well as real estate ventures incident thereto (Ex. 17-R. 770—offered R. 327; Ex. L1-R. 900—offered R. 457).

Before these individuals are entitled to the percentage Loew's, Inc. must first earn $2 a share on its outstanding stock (R. 986).

The item has all the earmarks of a division of profits and none of salary or compensation—to be construed as expense. The finding of the Master that this was a mere division of profits is supported by the fact

that the three individuals were all, even in the depth of the depression (1932), receiving tremendous salaries.

Besides this $922,141.09, Mayer, Thalberg and Rubin received weekly salaries of approximately $2,500, $4,000 and $2,000, or annual salaries of $130,000, $200,000 and $104,000, respectively. These, says the Master, "can only be regarded as very substantial salaries, no matter how large the business" (R. 987). He further stated (R. 987):

> "The contract itself, as pointed out above, specifically says (Defendants' Ex. 33, p. 39) that this percentage compensation to the partnership shall *not* be considered as a *cost* in computing the net profits of this enterprise. The percentage as determined on page 31 of Defendants' Exhibit 33 is arrived at after the ascertainment of the consolidated annual net profits of Loew's, Inc., and all its subsidiaries and its companies and ventures. It is perfectly clear from this that the percentage to be paid had no relation whatsoever to the cost of production and *in no sense could it be considered as a part of the cost of production.*"

There is no rational justification for the payment to these three individuals of a sum of money based on a percentage of Loew's profits, unless the payment is in reality a distribution of the profits of Loew's.

What possible reason is there for creating such a norm of compensation? If it were that the producing company were not paying these individuals enough, it would be a simple matter for *it* to raise their pay. Why go through the elaborate mathematical calculations which the agreement calls for in order to *com-*

pensate these individuals on a totally unrelated norm? A full reading of the contract demonstrates that the purpose of the three individuals was to take a profit percentage rather than a stock interest in the new enterprise.

The Court below allowed the item, saying:

> "The payments were never profits of the defendants at all. The contracts effectively laid hold of them the moment they came into existence" (R. 1266).

How *could* existing contracts "lay hold" of profits of Loew's, Inc. which never in equity belonged to it? Even though they did "lay hold" *inter sese* between Loew's and the three individuals, how can that fact alter the petitioners' rights? The profits made by Loew's, Inc. from this picture, were equitably the property of petitioners irrespective of any contract it may have had to pay over part of them to some one else.

This $922,141.09 item is only payable upon *profits* actually made. Indeed, it is only in the nature of a subsequent dividend because the stockholders of Loew's, are entitled to the first profit to the extent of $2 a share.

Since these three individuals' percentage rests upon profit, and since profit is the residuum after payment of creditors, the petitioners, as equitable creditors, should not be called upon to participate in contributing to the claimed profits of Loew's.

Their rights precede the right of these individuals to claim profits.

If there were no profits in 1932 petitioners would not have been called upon to make any contribution to this item. The fact that there were profits does not change the situation.

The Master in disallowing this item followed *Lee* v. *Malleable Iron Range Co.*, 247 Fed. 795, 798, modified on other grounds and affirmed 263 Fed. 896 (C. C. A. 7), and cert. denied 251 U. S. 562, and applied the test therein expressed, as follows:

> "A good way to test out the status of these payments in respect to cost or profits is to consider whether defendant as a manufacturer in endeavoring to make up the yearly budget upon any assumed volume of business in any respect of the matter would have included these payments or any estimate thereof as an item of cost of manufacture. Obviously not."

It is submitted that the size of the percentage item, coupled with the huge annual salaries, alone serve to earmark it as a distribution of profits, particularly when the distribution is made upon the basis of Loew's operations after Loew's stockholders have first received their $2 dividend.

CONCLUSION.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals for the Second Circuit should be reversed and the case remanded with directions in accordance with the foregoing.

Respectfully submitted,

ARTHUR F. DRISCOLL,
Attorney for Petitioners.

DENNIS F. O'BRIEN,
EDWARD C. RAFTERY,
EDWARD J. CLARKE,
Of Counsel.

APPENDIX.

Constitution and Statutes Involved.

The Constitution of the United States (Article I, Section 8, Clause 8) gives to Congress the power:

> "8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The pertinent portions of the Copyright Law (Tit. 17, U. S. C. A.) are:

> "Section 25. *Infringement.* If any person shall infringe the copyright in any work protected under the Copyright Laws of the United States, such person shall be liable:
>
> (a) *Injunction.* (a) To an injunction restraining such infringement.
>
> (b) *Damages and profits; amount, other remedies.* (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * *.
>
> (c) *Impounding during action.* (c) To deliver up on oath, to be impounded during the pendency of the action, upon such terms and conditions as the court may prescribe, all articles alleged to infringe a copyright;
>
> (d) *Destruction of infringing copies and plates.* (d) To deliver up on oath for destruction all the infringing copies or devices, as well as all plates, molds, matrices, or other means for

making such infringing copies as the court may order.

§34. *Jurisdiction of actions under laws.* All actions, suits, or proceedings arising under the copyright laws of the United States shall be originally cognizable by the district courts of the United States. * * *.

§38. *Review of orders, judgments, or decrees.* The orders, judgments, or decrees of any court mentioned in section 34 of this title arising under the copyright laws of the United States may be reviewed on appeal or writ of error in the manner and to the extent now provided by law for the review of cases determined in said courts, respectively."

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IN THE

Supreme Court of the United States

October Term—1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF.

ARTHUR F. DRISCOLL,
Attorney for Petitioners.

DENNIS F. O'BRIEN,
EDWARD C. RAFTERY,
EDWARD J. CLARKE,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETITIONERS' REPLY BRIEF.

Error.

The respondents (Resp. Brief, p. 31) properly point out an error in petitioners' brief. The contention there referred to (Pet. Brief, p. 14) was incorrectly stated to be in the Callaghan brief, was in fact made in the Belford brief.

However, Callaghan's counsel did devote his entire Point V (pp. 96 to 117) to pointing out the small portion which could be ascribed to Freeman's independent effort. This court held that the plea and the proof were ineffectual for any purpose.

Appendix.

Annexed hereto in an Appendix, are the sections of the Revised Statutes in effect prior to the Copyright Law of 1909.

No Precedent for Apportionment of Profits.

Respondents admit that there are no English or American copyright decisions which divide profits between the copyright owner and the infringer. The sole and only authority is an *obiter dictum* in a dissenting opinion by Judge McCormick in *Harold Lloyd Corp.* v. *Witwer*, 65 Fed. (2nd) 1. 44 *et seq.* (C. C. A. 9).

If the division of profits in copyright cases were contemplated, the form of the English Statute is much more amenable to the idea than our statute. Our statute definitely gives to the copyright owner "all profits", conjunctively, with a right to injunction to stop the infringement, a right to impound during litigation, and a right to "destroy the infringing copies or devices, as well as all plates, molds, matrices or other means of making such infringing copies" (Sec. 25).

But there is no such conjunctive collection of remedies under the English Statute.

The English Statute of 1911 (1 and 2 Geo. 5, c. 46) provides that the copyright owner shall "be entitled to all such remedies by way of injunction or interdict, damages, accounts or otherwise, as are or may be conferred by law for the infringement of a right" (Sec. 6).

Yet even under the English Statute there is no known case where the profits were divided between the copyright owner and the infringer.

It is petitioners' contention that the copyright owner under our statute is entitled to *all profits* regardless of whether or not the infringement is deliberate.

But in the case at bar the court need not go so far, since the infringement has been held to be a "deliberate plagiarism" (R. 1264, 1265).

We will show later in this brief that it has been the general policy of equity to refuse to allow to deliberate trespassers even out-of-pocket expenses, and we submit that there is no precedent whatever for the other extreme, namely, allowing to deliberate trespassers not only all theoretical and actual expenses, but sharing with them the profits as well.

Basis of Respondents' Argument.

Respondents' argument is to the effect that the decision of the court below is:

1. In accordance with the Copyright Statute;

2. In accordance with the copyright decisions; and

3. In accordance with equitable principles applicable to the apportionment of profits (Summary of Argument, p. 9).

1. The decision of the Court below is not in accordance with the copyright statute.

(a) The Copyright Statute expressly gives to the copyright owner "all the profits which the infringer shall have made from such infringement".

(b) The Copyright Statute expressly provides "the plaintiff shall be required to prove sales only, and

the defendant shall be required to prove every element of cost which he claims" (Sec. 25 (b)).

(Contemplates an allowance to a defendant of "elements of cost". There is no suggestion that the infringer will be allowed to share profits.)

(c) The Copyright Statute provides that the copyright owner is entitled to enjoin the distribution of the infringement (Sec. 25 (a)).

(It is difficult indeed to justify dividing with the infringer profits made from the distribution of the infringement that the copyright owner has a right to prevent.)

(d) The copyright owner is entitled during the pendency of the action to impound "all articles alleged to infringe a copyright" (Sec. 25 (c)).

(Inconsistent with any right to profits on the part of the infringer.)

(e) The copyright owner is entitled to the destruction of "all infringing copies or devices, as well as all plates, molds, matrices, or other means for making such infringing copies" (Sec. 25 (d)).

(Inconsistent with any right to profits on the part of the infringer.)

2. The decision of the Court below is not in accord with the copyright decisions.

See:

Callaghan v. *Myers*, 128 U. S. 617;
Belford v. *Scribner*, 144 U. S. 488;
Dam v. *Kirk LaShelle*, 175 Fed. 902.

and other cases cited in petitioners' main brief.

3. The decision of the Court below is not in accord with equitable principles.

The respondents have been held guilty of "deliberate plagiarism" (R. 1265) and "tracking (petitioners' play) step by step" (R. 1264).

Respondents fail to point out any "equitable principles" that go so far as to support the sharing of profits with infringers who are not deliberate, much less with those guilty of deliberate plagiarism.

Respondents (p. 16) say "The section (Sec. 25) plainly states that the copyright owner is entitled only to those profits 'made from the infringement'. This would appear clearly to contemplate an apportionment between those profits made from the infringements and those profits of the infringer attributable to causes other than the infringement."

This argument, we submit, is specious.

If the statute did not contain the qualifying words "made from the infringement" no one could say with certainty that the statute meant to limit recovery to profits made from the infringement or to include profits made from all other branches of the infringer's business. If the statute means what we think it does—that all the infringing profits shall be given to the copyright owner—then we submit it is difficult to fashion any language which would state that intent clearer than it has been stated in the present statute.

Compensation and Punishment:

Respondents' argument throughout in support of the sharing of profits, between the copyright owners and the infringers, takes its root in the so-called

MICRO CARD 22
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cause and effect premise. Respondents argue (pp. 18, 19):

> "It is clear then, both in respect of patent and copyright infringement, that *damages* are awarded solely upon *compensatory* principles, measured by what the plaintiff has lost; and that profits are awarded solely on compensatory principles measured by the profits ascribable on the principle of cause and effect to the infringement."

The equitable principles that existed prior to the passing of the 1909 Copyright Statute, and which were formulated in that Statute are *not* based *solely* upon compensation.

The Statute was framed with two objects in mind:

1. To punish the infringer.

2. To compensate the copyright owner for his loss.

Respondents, branded as deliberate plagiarists, would gladly forget the former.

In *Providence Rubber Company* v. *Goodyear*, 76 U. S. 788 at page 804, this court said:

> "The rule is founded in reason and justice. It *compensates* one party and *punishes* the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is, that he shall not profit by his wrong. A more favorable rule would offer a premium to dishonesty, and invite to aggression."

(Italics ours throughout unless otherwise noted.)

In *Dean* v. *Mason*, 20 Howard 198 (61 U. S. 198), this court said:

> "The rule in such a case is, the amount of profits received by the unlawful use of the machines, as this, in general is the damage done to the owner of the patent. It takes away the *motive* of the infringer of patented rights by requiring him to pay the profits of his labor to the owner of the patent."

In *Root* v. *Railroad*, 105 U. S. 189, at page 207, this court said:

> "When relief was sought which equity alone could give, as by way of injunction to prevent a continuance of the wrong, in order to avoid multiplicity of suits and to do complete justice, the court assumed jurisdiction to award compensation for the past injuries, not, however, by assessing damages, which was the peculiar office of a jury, but requiring an account of profits, *on the ground that if any had been made, it was equitable to require the wrong-doer to refund them as it would be inequitable that he should make a profit out of his own wrong.*"

The court then goes on as follows:

> "As was said by Vice-Chancellor Wigram in *Coburn* v. *Simms*, 2 Hare 543, 'The Court does not by an account accurately measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright, by the publication of a cheaper book', but, 'as the nearest approximation which it can make to justice, takes from the wrong-doer all the profits he has

made by his piracy and gives them to the party who has been wronged.'"

At page 214 the court said:

> "The rule adopted was that which the court, in fact, applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage; that is to require them to refund the amount of profit which they have actually realized."

In *Ferris* v. *Frohman*, 223 U. S. 424, 437, this court said:

> "It was not the purpose or effect of the Copyright Law to render secure the fruits of piracy * * *."

The contention of respondents herein is inconsistent with the decision of this court in *Larson* v. *Wrigley*, 277 U. S. 97, where the non-allowance of an item of income taxes paid, would seem to depend upon the "conscious and deliberate wrong-doing."

But there are many precedents and authorities for the proposition that courts of equity will deprive the trespasser or infringer of all profits from his wrong,—and where the trespass is shown to be deliberate, not even allowing him his cost or out-of-pocket expenses.

Deliberate Trespasser Not Entitled to Cost.

A series of cases directly in point are cases having to do with the removal of timber, ore and oil from lands. The principle established by these cases is as follows:

Where the taking was a deliberate taking, the owner is entitled to recover the full value of the property removed, at the point where demand is made, without any allowance whatever to the wrong-doer for expense or cost of the improvements thereto. It is not a question of sharing profits with the wrong-doer—Equity refuses to allow the wrong-doer to get back his expenses.

In *Bolles Woodenware Company* v. *U. S.*, 106 U. S. 432, the action was by the United States to recover the value of timber removed from public lands. The value of the timber at the point where cut was 25c a cord. The timber, at considerable expense, had been transported to the Town of Depere, and the value at the Town of Depere was $3.50 a cord. The plaintiff made its demand at Depere, and sought to recover the value of the timber there. This court held that plaintiff was entitled to recover the value of the timber in Depere without any allowance for the expense or cost of transportation by the wrong-doer, even though the timber was then in the possession of an innocent purchaser who had paid the full value of $3.50 per cord.

This court said that to hold otherwise was "to give encouragement and reward to the wrong-doer."

That case has been followed in a number of other decisions.

Gaffey v. *Smith*, 237 U. S. 101, was a suit in equity by the holders of an oil and gas lease to enjoin operations under a later and similar lease, and to obtain a discovery and an accounting in respect of the oil and gas produced and sold in the course of operations already had. Again this court refused to allow any deduction because of expense connected with oil and gas

taken after actual notice, saying "what was done thereafter cannot be regarded as anything less than a wilful taking and appropriation of the oil which was subject to complainant's superior right" (p. 139).

In *Williamson* v. *Chicago Mill & Lumber Corp.*, 59 Fed. (2nd) 918 (C. C. A. 8), an action was brought in equity to quiet title and for an injunction against trespass. A supplemental complaint for damages resulting from the trespass pending the litigation was filed. The evidence showed that the value of the timber at the time and place where it was cut was $6,240 and the value where it was stacked on the border of the appellant's land was $10,400. The question was the measure of recovery by the property owner; that is, the value of the timber as stumpage or its value as stacked upon the edge of appellant's land. The court, following the *Bolles Woodenware Company* case, found that the evidence established a wilful trespass, and decreed that the enhanced value of the timber without deduction for improvements should go to the complainant because of the wilfullness of the trespass.

See also

Pittsburgh & West Virginia Gas Company, et al. v. *Pentress Gas Company, et al.*, 7 ALR 901, 100 S. E. 296,

and the full annotation therein contained.

"Restatement of the Law" on "Restitution", Section 158 at page 632 (Comment d) states:

> "The conscious wrongdoer is ordinarily not allowed compensation for an improvement or addition to the subject matter. This is consistent with the rule of damages in actions for conver-

sion in which case the conscious wrongdoer is required to pay for the full value of the chattel as improved by him before demand for its return."

Turning then to Section 151 (Comment d), we find:

"Where a person with knowledge of the facts has wrongfully obtained another's chattels and thereafter makes additions to them, he is under a duty of returning them in specie even though the duty is not specifically enforceable, unless the additions or improvements are so great as to transfer the title to him. It follows, therefore, that although the owner is not able to get the things back, either because self-help is not practicable or because the remedy afforded, such as replevin, is not adequate, he is entitled to the full value of such things after the additions have been made but before the title is obtained. This is a form of penalty imposed upon a person who has done a consciously wrongful act."

Expenses or Profits.

The case of *Larson* v. *Wrigley*, *supra*, in which this court refused to the deliberate wrong-doer credit for income taxes paid, is consistent with the aforesaid line of cases in which this Court has refused to allow a deliberate trespasser to get back his out of pocket expenses.

And Judge Hand, in the court below, recognized and made effective that principle when he reversed the ruling of the Special Master as to an item of income taxes. He said (R. 1270, 1271):

"The plaintiffs' first objection is to the master's allowance as a credit of the income taxes

paid by the defendants. He allowed them because he thought that the defendants were not deliberate plagiarists; otherwise the case would have fallen within the ruling of the Supreme Court in *L. P. Larson, Jr. Co.* v. *Wm. Wrigley, Jr., Co.*, 277 U. S. 97 (other cases cited). From what we have already said regarding the defendants' guilt, it appears that the master was wrong."

The learned Court thus refused to allow respondents out of pocket expenses,—income taxes,—because of "defendants' guilt",—and at the same time gave to the same "deliberate plagiarists" 80% of the net profits.

The "In Lieu Of" Provision.

At page 61 of their brief, respondents argue that the award of the court below is sustainable under the so-called "in lieu of" provision of Section 25 (b) of the Copyright Act.

The "in lieu of" provision of Section 25 (b) is not involved in this proceeding.

Pursuant to decree of the District Court the Special Master stated the "profits" and awarded them to petitioners.

The District Court confirmed the award of the Special Master. The provisions of the "in lieu of" clause were not involved and resort thereto was not made necessary as "actual profits" were shown to exist.

The Circuit Court of Appeals modified the award only to the extent of dividing the "profits" between the copyright owners and the infringers, but did not substitute any allowance under the "in lieu of" provisions.

The petitioners herein have specified as error the dividing of the "profits" (See Specification of Errors, Petition for Certiorari, pp. 13-14).

There is no specification of error that involves the "in lieu of" provision either directly or indirectly.

Purpose of the "In Lieu Of" Provisions of the Copyright Statute.

Section 25 of the Copyright Law provides that the infringer shall be liable:

> (b) To pay the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * * or *in lieu* of actual damages and profits, such damages as to the court shall appear to be just, etc.

The aforesaid language would seem in its ordinary meaning to be clear, to the effect that in the *absence* of profits the court has discretion, within the limits of which it may fix such *damages* as might be just.

In *Douglas* v. *Cunningham*, 294 U. S. 207, 209, this court stated:

> "The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law rendered difficult or impossible proof of damages or discovery of profits."

The Circuit Court of Appeals for the Second Circuit so interpreted the statute in *Davilla* v. *Brunswick-Balke-Collender Company*, 94 Fed. (2nd) 567

(cert. denied 304 U. S. 572). The court there points out that the awarding of statutory damages under the "in lieu of" provisions is not a matter of choice with the plaintiff, and that the "in lieu of" provisions are not applicable where *actual profits* exist and are capable of proof.

The same construction was placed upon the provisions of the statute by the Second Circuit Court of Appeals in *Hendricks* v. *Thomas*, 242 Fed. 37. At page 41 the court said:

> "As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits."

In *Dam* v. *Kirk LaShelle*, 175 Fed. 902, at 911, the Circuit Court of Appeals for the Second Circuit, on a petition for modification of order for mandate, said *per curiam*:

> "The decree awards profits and the complainant expressly disclaims any desire to recover damages. We know of no principle upon which a court of equity can compel a complainant to take damages instead of profits when *he* insists upon the latter."

In the case at bar, "profits" were found and stated. Neither side excepts thereto. The only exception is to the amount thereof and the method and means of fixing "profits", and to the fact that the court below

ruled that there could be a division of profits between the copyright owners and the perpetrators of a "deliberate plagiarism".

Allowance of $922,141.09.

Respondents' brief, page 76, *et seq.*, argues for the allowance of this item. They argue that the two cases of *Stromberg Motor Devices Co.* v. *Detroit Trust Company*, 44 Fed. (2nd) 958, C. C. A. 7, and *Stromberg Motor Devices Co.* v. *Zenith-Detroit Corp.*, 73 Fed. (2nd) 62, C. C. A. 2, support their position. The first *Stromberg* case involved the commissions of one Heftler. He received (p. 963) "a small fixed salary and a certain percentage of the business done. This percentage amounted for the infringing period to $98,700.49." It also appears (p. 963) that this commission was compensation "for more than eight years of this accounting period. The whole amount paid represents a compensation to Heftler which is not at all out of reason as such matters go."

In the second *Stromberg* case regarding this compensation, the court said (p. 65):

> "The defendant's contract with its president was made before any question of the infringement of the Mock patent arose and was not an unusual one."

Can it be said that the situation is comparable to that of the three individuals in the case at bar, who received this huge commission plus their extremely large salaries? Theirs could not be termed "a small fixed salary"—so also the $98,000 commission involved in the first *Stromberg* case over a period of "eight years" is not comparable to the $922,000 received by three individuals in *one* year. Surely the contract was an "unusual one".

It is perfectly clear that these individuals have an unquestioned legal right to this compensation *inter se* against Loew's, Inc. No one, or at least, not these petitioners, can question it. But as pointed out in *Lee* v. *Malleable Iron Range Co.*, 247 Fed. 795, 798:

> "The large amount, the terms of corporate resolutions for their contingent award, their progressive increase with increased profits, and their treatment as such dividends or division upon the books, are *alone* sufficient to support the master's view. (Master had found it to be a division of profits.) The resolutions, if lawful, while authority for their ultimate payment, nevertheless placed no obligation upon the beneficiaries not already comprehended within their contracts for service at stipulated salaries."

The amount of the commission salaries in the *Lee* case was $207,486.94, divided between three managers (p. 798) over an accounting period of *six* years (p. 796).

The salaries of the three gentlemen in the case at bar for the year 1932 were (R. 987):

Thalberg—	$200,000
Mayer—	130,000
Rubin—	104,000

If we divide the item of $922,141.09 into thirds, it will provide compensation in addition to salaries of approximately $307,000 to each of the individuals whose total compensation for the year in question will then be in excess of

Thalberg—	$507,000
Mayer—	437,000
Rubin—	411,000

These sums combined with the terms of the documents involved (Ex. 33) and the history of the transaction spell out the *sharing of profits*—not *compensation for services*.

Let us refer once more to the well established principle of equity discussed hereinabove to the effect that equity will not allow a deliberate trespasser to profit by his wrong; and to enforce that principle, equity will not allow to such a trespasser even the recovery of his actual out-of-pocket expenses. Contrary thereto the Court below in the case at bar has made the following allowances:

1. Out-of-pocket expenses.

2. Theoretical expenses which were not out-of-pocket, such as depreciation and interest on investment.

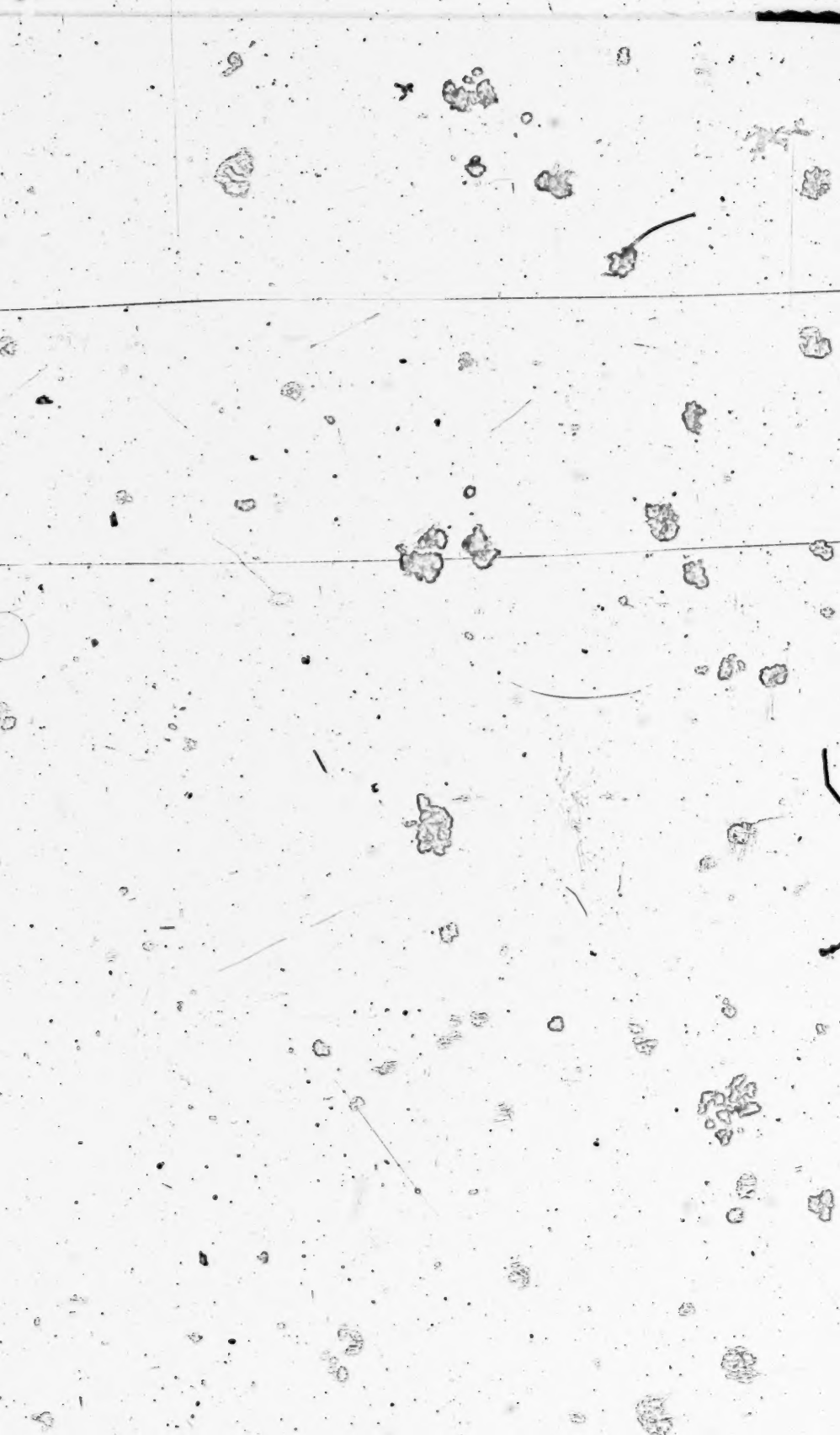
3. A share in the profits to Mayer, Thalberg and Rubin, represented by the proportionate part that the picture LETTY LYNTON contributed to the item of $922,141.09, *prior* to any share for the petitioners.

4. A division of what remained of the profits *after*,—divided between petitioners and respondents on the basis of 20% and 80%.

Respectfully submitted,

ARTHUR F. DRISCOLL,
Attorney for Petitioners.

DENNIS F. O'BRIEN,
EDWARD C. RAFTERY,
EDWARD J. CLARKE,
Of Counsel.



APPENDIX.

Applicable Sections of the Revised Statutes in Effect Prior to the Present Copyright Law of 1909.

Sec. 4964. Every person who, after the recording of the title of any book and the depositing of two copies of such book, as provided by this Act, shall, contrary to the provisions of this Act, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish, dramatize, translate, or import, or knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or exposé to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

Sec. 4965. If any person, after the recording of the title of any map, chart, dramatic or musical composition, print, cut, engraving, or photograph, or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this Act, shall, within the term limited, contrary to the provisions of this Act, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish, dramatize, translate, or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published, dramatized, translated, or imported, shall sell or expose to sale any copy of such map or other

article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in case of a painting, statue, or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale: Provided however, that in case of any such infringement of the copyright of a photograph made from any object not a work of fine arts, the sum to be recovered in any action brought under the provisions of this section shall be not less than one hundred dollars, nor more than five thousand dollars, and: Provided, further, That in case of any such infringement of the copyright of a painting, drawing, statue, engraving, etching, print, or model or design for a work of the fine arts or of a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than two hundred and fifty dollars, and not more than ten thousand dollars. One-half of all the foregoing penalties shall go to the proprietors of the copyright and the other half to the use of the United States.

Sec. 4966. Any person publicly performing or representing any dramatic or musical composition for which a copyright has been obtained, without the consent of the proprietor of said dramatic or musical composition or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than 100 dollars for the first and 50 dollars for every subsequent performance, as to the court shall appear to be just. * * *.

Sec. 4970. The circuit courts, and district courts having the jurisdiction of circuit courts, shall have power, upon bill in equity, filed by any party aggrieved, to grant injunctions to prevent the violation of any right secured by the laws respecting copyrights, according to the course and principles of courts of equity, in such terms as the courts may deem reasonable.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JOHN W. DAVIS.
SAMUEL D. COHEN.
Counsel for Respondents.

J. ROBERT RUBIN.
EARLE L. BEATTY.
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners;

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The petition for writ of certiorari, in opposition to which this brief is submitted, was filed on October 25, 1939. The respondents, as petitioners, also filed a petition for writ of certiorari in this case on November 4, 1939, to secure a review of the interlocutory judgment entered on January 25, 1936. The petition herein is one to review solely the bases taken by the Court below for its award of profits. The petition filed by respondents, as petitioners, seeks a review of the interlocutory judgment of the Circuit Court of Appeals, in which infringement was found and in which the decree of the District Court dismissing the complaint was reversed.

Note—Italics throughout brief supplied by respondents.

Opinions Below.

The opinion of the District Court on the motion to confirm the Special Master's report is reported in 26 Fed. Supp. 134. The opinion on the cross appeals taken from the judgment entered on the Master's report is reported in 106 F. (2d) 45.

The opinion of the District Court directing a dismissal of the complaint is reported in 7 Fed. Supp. 837, and the opinion of the Circuit Court of Appeals, finding infringement and reversing the decree of dismissal, is reported in 81 F. (2d) 49.

Outline of Matters Involved.

The petition filed by the respondents, as petitioners, contains a statement of facts on behalf of the respondents which recites the salient facts involved in the proceedings prior to the interlocutory judgment, and also corrects certain inaccuracies and omissions in petitioners' statement of facts.

Petitioners in their outline state that "both the Master and the District Court refused to apportion the profits." The Master's report (R.* 957) shows that he considered the decree appointing him merely as a peremptory direction "to ascertain and report the amount of complainants' damages herein and the amount of such gains and profits of the defendants," etc. In this he was in error for as was pointed out in

* The record filed with this petition contains the interlocutory decree of July 29, 1936 upon the mandate of the Circuit Court of Appeals, the proceedings before the Special Master and all subsequent proceedings which will be referred to herein as the accounting record, abbreviated "R."; with the petition of respondents, there has been filed the record containing all proceedings prior to the accounting which will be referred to as the prior record, abbreviated "P. R.".

Lawrence-Williams Co. v. Societe Enfants, Etc. (C. C. A. 6), 52 F. (2d) 774, 777, the decree followed the "customary formula."

The District Court assigned as its reason for not making an actual apportionment of profits that it was bound by the decision in *Dam v. Kirk La Shelle Co.* (C. C. A. 2), 175 Fed. 902, saying: "* * * even though I believe it 'runs counter to the course later followed by that Court in apportioning profits in patent infringement cases and to the arguments therein expressed'" (R. 1198), and later added: "In my opinion it is punitive and unjust to award all the net profits of the motion picture 'Letty Lynton' to the complainants in this case" (R. 1200). The Court further stated (R. 1202):

> "If we are 'to avoid instances of grotesque injustice' then 'we must adopt some working rule' similar to that employed in patent infringement cases. *Page Machine Co. v. Dow Jones & Co.* (238 Fed. 369, 376). A result such as we have in the present case may lead to the adoption of such a rule, either through the decision of an appellate court, giving a more reasonable interpretation of Section 25 of the Copyright Act, or by Congress amending the Act. *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 208."

The District Court then made what was in effect a finding that:

> "An allowance to complainants of 25% of the net profits, as restated, or about $133,000 would be such a sum as could be justly fixed as a limit beyond which complainants would be receiving profits in no way attributable to the use

of their play in the production of the picture. Sir James Barrie received 7% of the gross receipts from the motion picture based on 'Peter Pan'. For that he assigned the motion picture rights to his famous play and the right to use the name as the title of the picture. The gross receipts in the case at bar from the picture 'Letty Lynton' were $1,655,269.15 of which 8% would be about $132,500. In my opinion the testimony before the special master would justify a finding in this case that the profits these defendants made from their use of complainants' play 'Dishonored Lady' did not exceed 25% of the net profits from the picture, as hereinafter fixed, or, if a royalty basis should be used, 8% of the gross receipts. It requires no expert testimony to show that the use of complainants' play 'Dishonored Lady' did not contribute the entire 100% of the net profits realized from the picture 'Letty Lynton'. Yet that is what this judgment gives the complainants" (R. 1202).

The failure of the District Court actually to make such an apportionment has been criticized: 48 Yale Law Journal, 1279 (May 1939); 52 Harvard Law Review, 688 (February 1939).

Facts.

Petitioners (at p. 3 of the Petition) in referring to the fact that the parties had agreed on a price and that a formal contract had been prepared, omitted to state that this contract had actually been signed by petitioners and was delivered to respondents pursuant to a written agreement whereby respondents

were also to sign such contract "contingent upon their (plaintiffs) being able to secure the approval of the Hays Office of their use of this play for picture purposes" (P. R. 789). The District Court found that both parties had made *bona fide* efforts to have this ban of the Hays Organization removed (P. R. 892), but such efforts were *unsuccessful* because of the obscenity of the play (P. R. 27, 49, 65; R. 664-6). The final refusal by the Hays Organization to lift such ban was announced on June 1, 1931, and further efforts to acquire these motion picture rights were then abandoned (P. R. 76, 148).

As to the novel "Letty Lynton", of which Marie Belloc-Lowndes was the author, it was conceded by stipulation at the trial (Defts.' Ex. B—P. R. 814-26) that this novel was completed in the latter part of the year 1929, and further that this was done before the author ever saw or heard of the play and that it was entirely her own work (P. R., fol. 2448).

After a period of negotiations, the contract for the purchase of the motion picture rights for this novel from Mrs. Lowndes was executed on December 4, 1931 (Defts.' Ex. D—P. R. 826).

$30,000 was the price which petitioners asked for the motion picture rights to the play "Dishonored Lady" (P. R. 789) and the price at which Mrs. Barnes "hoped very much we would make the sale", etc. (P. R. 50). Petitioners' agent in the sale of these rights testified (R. 668): "It (the $30,000) was the only actual price we had from anybody."

As will be seen, petitioners are seeking to recover an amount approximating $600,000, about twenty times the amount at which they would have been willing to sell outright the motion picture rights. The judgment of the Circuit Court of Appeals, which they

seek by this proceeding to review, awarded an amount approximating $120,000, or about four times the amount at which they would have been willing to sell the motion picture rights.

The Question Presented.

On a finding of a *pro tanto* infringement (R. 1303) by a motion picture of a copyrighted play which the plaintiffs were willing to and actually did contract to sell for $30,000,

(a) Must a court of equity award to the plaintiffs *all* the profits earned from the production, distribution and exhibition of the infringing motion picture, domestic as well as foreign, which in this case amounted to approximately $600,000, without any apportionment whatever of such profits on the basis of the contributions made to the commercial success of such motion picture by the Producing Company, by the stars appearing in such picture, by the producer, by the director and by other factors, separate and apart from the copyrighted property, which made the motion picture a new and distinctive creation and gave it commercial value as a marketable commodity; or,

(b) May the Court in such circumstances, in the administration of the remedy of an award of profits, a remedy which Equity itself devised and controls, and in order to avoid "grotesque injustice", take into consideration all such contributions to the commercial success of the picture and award to the plaintiffs the profits fairly and equitably attributable to the use made of the copyrighted property, in that connection giving the plaintiff the benefit of every reasonable doubt?

The Petitioners' Contention.

The petitioners' contention is that under Section 25(b) of the Copyright Act of 1909 petitioners are entitled to recover all the net profits earned by the motion picture "Letty Lynton", without any apportionment whatever.

The Respondents' Contention.

The contention of the respondents, both before the Special Master and in the Courts below, was that the interlocutory decree of the District Court does not authorize an award of the entire net profits of the picture to the plaintiffs, nor does the Copyright Act of 1909, nor do the decisions of courts of equity in copyright, patent and other cases of infringement. In short, there is no authority whatsoever upon which any recovery by the plaintiffs of the entire profits of the motion picture "Letty Lynton" could be predicated.

The uncontradicted proof in the record in this case afforded adequate bases for separating those profits due solely to the infringement from those profits due to the defendants' own contributions to the success of the motion picture, permitting the Court to render to each party no more than that which was justly his. Among the lines of proof thus offered were the following:

1. *Proof directed to showing that the commercial value of the motion picture was not entirely due to the use of the play.*

It was shown that the play had only a short run in New York City, namely, from February 4, 1930

to May 24, 1930, even with Miss Cornell in the title role (P. R. 37-38). The Special Master went to California and personally inspected the Studio where the picture was produced (R. 38-39). The Studio head and the heads of practically all the departments of the Studio testified as to the methods employed whereby a motion picture is produced and as to the diversified creative operations which enter into this production. This testimony showed that the making of a motion picture is far from being a matter of purely mechanical reproduction and that it involves creative operations from the beginning of the adaptation of the story to the final completion of the motion picture; in fact, that a motion picture is *a distinctively new artistic creation* (R. 83-180; 185-214).

2. *Proof showing that the commercial value and earnings of the picture were principally attributable to factors other than the use made of the story.*

It was shown that the motion picture "Letty Lynton" was licensed to practically all the exhibitors as a *Joan Crawford picture*. In the form of licensing contract it was referred to only as "Production No. 208, Joan Crawford No. 2" (Defts.' Ex. 16, R. 767). 7,315 exhibitors out of 7,666 to whom it was licensed signed the above contracts before the motion picture had any other name or designation (R. 322-326; Defts.' Ex. 15, R. 766). The title "Letty Lynton" was not announced to the trade or to the public until a few weeks prior to the picture's actual release in April, 1932 (R. 325). Only 351 exhibitors licensed the motion picture after its title was announced.

Thus it will be seen that the motion picture was licensed to practically all exhibitors solely on the basis of the popularity and drawing power of Joan Crawford.

Expert witnesses, whom the Court below felt justified in designating as "the best opinion of the calling" (R. 1264), testified that the commercial value of the picture evidenced by its drawing power was principally attributable to the stars, to the skill and reputation of its producer and of its director, as well as to other contributions made by the Metro-Goldwyn-Mayer Organization. These witnesses, consisting both of producers and exhibitors, testified that approximately only 10% of the profits was ascribable to the literary or written material, looking at the copyrighted property as an entirety. The witness most liberal testified to 15%; most of the witnesses allowed 10%; while some placed a valuation of only 5%. All of such testimony is factual, direct and uncontradicted (Producers, R. 146-471, 176-180, 264-268, 278-284, 648-654, 540-562; Exhibitors, R. 562-573, 573-588, 588-592, 596-600, 600-608, 608-616, 616-622).

3. *Proof showing in general that the value of the motion picture rights of a play which is to be reproduced by a motion picture is only a small part of the entire value or cost of the finished motion picture.*

In the first place, we have seen that $30,000 was the value placed on the motion picture rights of the play by its authors. The sale of such rights by an author is the only means open to him for procuring the reproduction of his work as a motion picture (R. 547-8, 558).

Adolph Zukor, a leader in the industry, knew of only one instance where a percentage of the receipts was used as a basis for compensation. In this instance, a payment of 7% of the gross receipts was made to Sir James Barrie for the rights to produce

the story of "Peter Pan" in a motion picture (R. 283).

The arbiter of the Dramatists' Guild, who in general handles the sale of such rights for authors (R. 667), testified as to prices realized from the sale of motion picture rights in plays during the period in and about the year 1932. The list of such plays and prices comprises about 32 plays (R. 675-676).

Testimony was also admitted as to the length of the runs enjoyed by the plays embraced in such list (R. 680-685).

By a striking coincidence the average price shown by such list is approximately $30,000, the price placed by petitioners on the motion picture rights of their play, and the highest prices were materially less than the award sought to be reviewed herein. These latter prices were paid for plays which were far more successful and much better known than petitioners'.

The foregoing proof as to the prices paid for motion picture rights of plays is analogous to that used in patent cases under the so-called "reasonable royalty" rule.

4. *A comparison made of the Play and the Picture, as well as of the Trial and the Novel, for the purpose, not of contesting the finding of infringement, but of showing the extent to which plaintiffs' literary material contributed to the picture.*

The testimony of all the experts was predicated on the hypothesis that the motion picture made use of the entire copyrighted work, which, as the Court below pointed out (R. 1264) "was not the case", adding in the same connection, "Nobody can say how far this basic plot is to be credited with whatever the play contributed to the drawing power of the picture."

On the other hand, the petitioners in answer to this line of proof throughout have stood on the insistence that the Copyright Law did not permit any apportionment whatever. Their claim is that once infringement is found, and regardless of the extent of such infringement, the plaintiffs are entitled to the entire net profits. It was precisely this *reductio ad absurdum* which was presented in the case of *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, and which caused Judge McCormick, writing for affirmance of a finding of copyright infringement in the case of a short story which had been sold to a publisher for $50, to prepare his learned and exhaustive dissenting opinion, explaining that the Copyright Law did not require him by reason thereof to award to the complainants all the profits of the infringing motion picture which were concededly in excess of one million dollars.

As against this contention of the plaintiffs, we direct the Court's attention to the language of Judge Hand in his opinion below (R. 1263):

> "But we are resolved to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share."

And further:

> "We must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure which will favor the plaintiffs in every reasonable chance of error. With this in mind we fix their share of the net profits at one fifth."

As we will point out, there is nothing, either in the Copyright Act or in any of the decided cases, which prevents the Court from avoiding "the one certainly unjust course of giving the plaintiffs everything."

POINT I.

The decision of the Court below is based on well established equitable principles.

Petitioners' statement of their Point I appears to carry the implication that the decision below is one which departs from a supposedly uniform course of decisions in copyright cases.

The opinions of the Courts below consider all the cases in this country having to do with awards of profits in copyright cases. Only two of such cases were decided by the Supreme Court. *Callaghan* v. *Myers*, 128 U. S. 617 (1888), and *Belford* v. *Scribner*, 144 U. S. 488.

Although the case of *Dam* v. *Kirk La Shelle* (C. C. A. 2), 175 Fed. 902, was decided after the passage of the 1909 Act, that Act was not applicable because the infringement had occurred before the passage of the Act. This case was expressly overruled by the Court below (R. 1263).

Judge Hand also refers to Judge McCormick's dissenting opinion in *Harold Lloyd Corporation* v. *Witwer* (C. C. A. 9), 65 F. (2d) 1. This is the only case dealing with an infringement by a motion picture which in any manner considers the subject of an award of profits. There Judge McCormick declared that the profits might be and should be apportioned

(R. 1261) and the majority of the Court did not disagree with Judge McCormick on this point (R. 1196).

In England the copyright act of 1911, Section 6, confers a remedy "by way of injunction or interdict, damages, accounts or otherwise as may be conferred by law".

A search made in the two standard English digests, Halsbury's Laws of England and English and Empire Digest, and Supplements, discloses only one reported case where an actual award of profits in a copyright case was made. (*Delfe* v. *De Lamotte* (1857), 3 K. & J. 581.) That case involved an infringing book which *wholly* infringed the copyrighted work. It simply decided that on the accounting the defendant is entitled to deduct his expenses.

The case of *Mawman* v. *Tegg* (1826), 2 Russ. 385, more fully discussed under our next point, was settled before any decision was made.

In the case of *Colburn* v. *Simms* (1843), 2 Hare 543, the accounting filed with the defendant's answer showed an actual loss and this account was accepted.

The foregoing statement is made to rebut a possible adverse inference from respondents' failure to cite any English authorities in support of an apportionment of profits in copyright cases. The likely explanation of the dearth of English authorities on the subject is that in England the copyright proprietor must elect between damages and profits. He cannot sue for both.

Neilson v. *Betts*, L. R. (1872), 5 H. L. 1;
De Vitre v. *Betts*, L. R. (1873), 6 H. L. 319.

There are three recent English cases in which damages have been awarded on the basis of an apportionment as between non-infringing and infringing parts of a plagiaristic work.

Ash v. *Dickie*, L. R. (1936), Ch. 655;
John Lane, &c. Ltd. v. *Associated Newspapers*, L. R. (1936), 1 K. B. 715;
Caxton Publishing Co. v. *Sutherland Publishing Co.*, L. R. (1939), A. C. 178.

For example, in the *Ash* case, Master of the Rolls Wright said:

> "* * * the matter can only be one of estimate and the Court must act as the jury would act in similar circumstances."

POINT II.

The decision of the Court below is entirely consistent with the decisions in *Callaghan* v. *Myers* and *Belford* v. *Scribner*.

As to these two cases, the Court below stated (R. 1261):

> "They hold no more than that when he (the infringer) makes no effort to discharge the duties resting upon him, he will be cast for the whole profit."

In both cases there were factual findings that the infringer's work was as an entirety an infringement of the copyrighted work.

In *Callaghan* v. *Myers*, 128 U. S. 617 (1888), the infringing volumes of Illinois Supreme Court Re-

ports, published as "Freeman's Reports", infringed as an *entirety* the copyrighted work. Not only were the opinions lifted bodily from plaintiff's reports, but the headnotes, arrangement of cases, indices, annotations, etc., were either copied verbatim, or copied with only colorable alterations. The infringing work was even sold under the same name as the plaintiff's work—"Freeman's Reports"—and carried the same page numbers as those of the copyrighted work.

The Court found that there had been no recourse to the original sources, the entire infringing work having been copied from the plaintiff's volumes (p. 660). There was no basis for apportionment solely because of the inclusion of the opinions, as to which the Court said (p. 649):

> "A publication of the mere opinions of the Court in a volume without more would be comparatively valueless to anyone."

The decision was justified by the Court on the authority of *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, where it was held that the marketable value of the infringing street pavement was wholly attributable to the wrongful use of the plaintiff's patent. "It was this thing, and not another, that the people wanted and required" (p. 141). The defendant in that case also failed to show that any of the profits were due to elements other than the plaintiff's patent. The Court said (p. 142):

> "*A separation of distinct profit* derived from Brocklebank & Trainer's improvement, *if any such profit was made, might have been shown;* but, as before stated, the appellants failed to show that any such distinct profit was realized."

In the *Callaghan* case, the Court quoted a dictum of Lord Eldon's in *Mawman* v. *Tegg*, 2 Russ. 385 (1826) which cannot be read out of its setting. This dictum was expressed at the outset of the hearings which extended over six days. *The case was settled* before any decision was made. Lord Eldon had, prior to settlement, referred the matter to a master for a report as to the relative amounts of infringing and non-infringing matter, and had indicated that he considered a finding on this matter important for the purpose of disposing of the request for an injunction, and in making a disposition of the profits.

In *Belford* v. *Scribner*, 144 U. S. 488, the defendants published and sold two editions of a cook book, a cheaper and a more expensive edition, copied entirely from plaintiff's copyrighted work and without recourse to original sources. The Trial Court, as well as the Supreme Court, based the award of all the profits on the finding of the Special Master that (p. 493)

> "* * * the matter and language of said books is the same as complainant's in every substantial "sense."

It appears clearly from the complete report that the Master found that the entire infringing work was copied from plaintiff's, either verbatim or "with occasional change of phraseology." The report concluded as follows (p. 494):

> "In all of the alleged illegal publications the defendants are shown to have used the material of the complainant instead of 'resorting to original sources of information.'"

The Trial Court in that case disregarded the so-called expert testimony referred to by petitioners clearly because the facts on which it was based were opposed to the express findings of the Master and the Trial Court. While it was true the defendants in the *Belford* case *pleaded* that the infringing portions "do not exceed from 10% to 15% of the entire contents," the complainant's bill *pleaded* (p. 492):

> "that more than 170 receipts contained in said piratical work were copied *verbatim et literatim* from the said copyrighted work of the plaintiff, said receipts comprising a part or the whole of over 150 pages of said piratical work; that many other parts of that work, besides said 170 receipts, are infringements upon the copyrights of the plaintiff, and many of the remaining receipts are in fact copied from the plaintiff's book, with certain changes in the phraseology thereof; and that the subjects in the piratical work and the index thereto are arranged in the same order, and with almost the same headings, as in the plaintiff's work, and were copied and imitated therefrom."

Naturally, the Supreme Court made no reference to any claim of apportionment in the face of a finding that the defendants' work in "matter and language" was substantially the same as plaintiff's.

The decision in the *Belford* case also is based on the decision in *Elizabeth v. Pavement Co., supra*, which the Supreme Court in *Westinghouse Electric & Manufacturing Co. v. Wagner Electric & Manufacturing Co.*, 225 U. S. 604, 614, cited as authority for the proposition, that:

> "(c) Where profits are made by the use of an

> article patented as an entirety, the infringer is liable for all the profits unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him.'"

The trademark case of *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, is entirely consistent with the decision of the Court below. The Court in that case, in speaking of the "inherent impossibility" of an apportionment, had reference only to proof which it was impossible for the *plaintiff* to make. The Special Master below (p. 255) had found for profits in respect of shoes sold (1) bearing the stamp "American Lady" without any other distinguishing marks, and (2) stamped "American Lady" followed by the words "Hamilton-Brown Shoe Co.," but without anything to denote that the shoes were of defendant's manufacture. *Profits were disallowed as to shoes marked "American Lady" followed by "Hamilton-Brown Shoe Co., Makers." No efforts were there made by the defendant to show what shoes were sold solely by use of the trademark and what shoes were not so sold.*

The Trial Court had sustained exceptions to the Master's report and had found for the plaintiff in the sum of $1 nominal damages. On appeal, the Circuit Court of Appeals reversed the Trial Court and sustained the Master's ruling. The Supreme Court affirmed this decision because the defendant had failed to show any basis for apportionment.

The Copyright Statute is Not to the Contrary.

The petitioners conclude their Point II by saying:

> "It is not lacking in significance that the Copyright Law (17 U. S. C.) Section 25b provides for a recovery of 'all profits' whereas the Patent Statute (35 U. S. C.) Section 70 and the Trademark Statute (15 U. S. C.) Section 99 provide for a recovery of 'the profits.'
>
> "'All' is missing in both the Patent and Trademark Statutes."

The phrase "all the profits which the infringer shall have made from such infringement" under Section 25(b) of the Copyright Act was not intended by the framers of the Act to make the Copyright Law in this respect any different from the Patent or Trademark Law. Under Section 4921 of the Revised Statutes applicable to Patents (now 35 U. S. C. A., Sec. 70)

> "the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages * * *."

The House Committee in its report[1] on the bill which became the Copyright Act of 1909 said of Section 25(b):

> "The provision that the copyright proprietor may have such damages as well as[2] the profits

[1] House Report No. 2222, 60th Congress, 2nd Sess., adopted by Senate as its Report No. 1108, same session.

[2] The omission in this connection of the word "all" should be noted.

> which the infringer may have made is substantially the same provision found in Section 4921 of the Revised Statutes relating to remedies for the infringement of patents."

Nowhere in the Committee reports or in any hearings before the Committee was it suggested that any significance was to be given to the use of the word "all" or that Section 25(b) was intended to give a larger measure of recovery of profits in the case of copyright infringement than in the case of patent infringement. In patent and trade mark cases, as well as in copyright cases, the plaintiff is invariably awarded *all* the profits *attributable to the infringement* which is quite different from all the profits earned by the infringing subject.

In the hearings before the Joint Committee of the House and Senate of December, 1906 (p. 174),[3] Mr. Arthur Steuart, who was the spokesman for those who with him drafted the bill, in referring to Section 25(b) (Section 23(b) of the bill then under consideration) said:

> "* * * an attempt was made to put into this clause all of the remedies of the existing law and all of the remedies which have already been enacted by Congress with reference to patents, as well as trade-marks. * * * this clause has been drawn as a consolidation of all the remedies which had existed before with reference to copyrights, patents and trade-marks wherever there is no inconsistency."

After comparing the proposed act with the lan-

[3] Copyright Hearings (1906-1908).

guage above quoted (*supra*, p. 19) from the Patent Law, Mr. Stewart went on to say (p. 175):

> "* * * the attempt has been made in this Act to reproduce identically the same meaning in the language which has been used. Possibly it might have been better to have used exactly the same words."

The Supreme Court, in interpreting the Copyright Act, has frequently resorted to these same congressional reports, as well as the hearings referred to.[4]

This Court in *Jewell-La Salle Realty Co.* v. *Buck*, 283 U. S. 202, 206, after referring to the legislative history of Section 25(b), said:

> "* * * the primary purpose of Section 25 was to incorporate in one section all of the civil remedies theretofore given, including statutory damages where actual proof was lacking."

A study of the history of both copyright and patent legislation shows that the award of profits is a remedy which equity itself adopted without any statutory sanction. As Judge Learned Hand said in *Hods* v. *Feist* (234 Fed. 105, 108): "Equity will control its peculiar remedy of an account of profits according to its own sense of justice."

See, also:

> *Rubber Co.* v. *Goodyear*, 9 Wall. 788, 804;
> *Packet Co.* v. *Sickles*, 19 Wall. 611, 617.

Equity's power to administer "its peculiar remedy" is not, therefore, derived from, extended, or limited

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[4] *Jewell-La Salle Realty Co.* v. *Buck*, 283 U. S. 202, 206; *Westermann Co.* v. *Dispatch Co.*, 249 U. S. 100, 109; *Washingtonian Publishing Co.* v. *Pearson*, 306 U. S. 30.

by any statutes. The Copyright laws contained no express provision as to an award of profits until the 1909 Act, but in a proper case, profits were awarded long prior to 1909.[5] There was no statutory reference to such an award in patent cases until the Act of July 8, 1870 (55th Section, which became Section 4921 of the Revised Statutes, 1873), although an accounting for profits had theretofore been a well recognized remedy in equity both in copyright and patent cases.

Profits were awarded in patent cases as early as 1853 (*Livingston* v. *Woodworth*, 15 How. 546).

In *Root* v. *Railway Co.*, 105 U. S. 189 (1881), Mr. Justice Matthews reviews the entire history of patent legislation and of the procedure for an accounting in equity for patent and copyright infringement. He shows that the effect of Section 4921 of the Revised Statutes was not to change in any manner the powers of an equity court in respect to an award of profits in patents, but only to enlarge the powers of equity courts in order to permit the award of damages in connection with an award of profits.

So also, as pointed out by the lower Court (R. 1262), the amendment made in 1922 to Section 4921 of the Revised Statutes (35 U. S. C. A., Sec. 70) permitting the use of "general evidence, expert testimony and otherwise", in connection with an apportionment was only "a delayed response" to the Supreme Court's decisions in the *Westinghouse* and *Dowagiac* cases.[6]

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[5] *Stevens* v. *Gladding*, 17 How. 447 (1855); *Callaghan* v. *Myers*, 128 U. S. 617 (1888).

[6] *Westinghouse E. & M. Co.* v. *Wagner E. & M. Co.*, 225 U. S. 604; *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641, 647.

POINT III.

The bases of apportionment adopted by the Court below were equitable, reasonable and proper.

The apportionment made by the lower Court takes into consideration only those elements inherent in the motion picture which affect its commercial value as a marketable article, the elements which gave the picture its drawing power and made it "this thing, and not another, that the people wanted and required" (*Elizabeth* v. *Pavement Co.*, 97 U. S. 126, 141).

Equity in determining the gains made by an infringer from his infringement applies the principle of cause and effect in the same manner as a court of law applies that principle in determining the losses of the plaintiff, *i. e.*, legal damages.[7] And it must be borne always in mind that it is compensation to the plaintiff for the use of his property at which equity aims, not punishment of the defendant for his tortious conduct. (*Livingston* v. *Woodworth*, 15 How. 546, 559.)

As the Court said in *Dobson* v. *Hartford Carpet Co.*, 114 U. S. 439, 445-446, in which case a rug had infringed a design patent:

> "* * * to attribute in law the entire profit to the pattern, to the exclusion of the other merits, unless it is shown by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages'

[7] Equity took defendant's *gains*, and not plaintiff's *losses*, as its "rule of computation and measurement"; the analogy between infringement and constructive trust was thus limited to the measurement of plaintiff's compensation. (*Root* v. *Railway Co.*, 105 U. S. 189, 214; *Tilghman* v. *Proctor*, 125 U. S. 136, 148.)

and of 'profits to be accounted for', but confounds all distinctions between cause and effect."

See also *Reed v. Lawrence* (C. C. Mich. 1886), 29 F. 915, 918, 921.

An infringement by a motion picture of a play or script differs vastly from practically all other forms of infringement. In almost all cases the infringement consists merely in mechanical reproduction. The making of a motion picture is a creative process from the beginning of the adaptation of the story to the completion of the picture. Practically all the arts and sciences are extensively drawn upon. The completed motion picture, far from being a mere reproduction or transcription, is a *distinctively new artistic creation.*

The testimony of the defendants' experts which the Court below regarded as "the best opinion of the calling" shows what they considered to be the various elements which gave commercial value to the picture and the relative drawing powers of such elements.

First and foremost of these elements were the stars Joan Crawford and Robert Montgomery. As we have already pointed out the picture was licensed as a *"Joan Crawford picture."* The exhibitors, who were called as witnesses, testified that "the thing that the people wanted" was to see the stars—in this case Crawford and Montgomery—(R. 566, 575, 579, 590, 598, 602, 618). This was not because they had performed what plaintiffs call "labor" but because they as the stars of the picture were more responsible by far for the commercial value of the picture than any other contributing element. The public went to see the picture because their favorite stars appeared in the picture, and this regardless of the story unfolded by the film.

So also, the producer, the director, the scenery and the other original elements supplied by the defendants were held to have added to the drawing power of the picture, apart from the story which it told (R. 1265).

As also pointed out by the Court below, the defendants' experts based their estimates upon the contribution of the *entire* play, and this despite the finding of the Court below that

> "* * * much of the picture owes nothing to the play; some of it is plainly drawn from the novel" (R. 1306).

Nor was the fact taken into consideration that much of plaintiffs' play was not entitled to copyright protection. As to this the Court said:

> "*Nobody can say how far this basic plot is to be credited with whatever the play contributed to the drawing power of the picture. That consideration must therefore count towards reducing the percentage of profits received*" (R. 1264).

The above factors to which drawing power has been assigned by the Court and by the experts are far from being "labor and materials" as contended by the petitioners.

The case of *Duplate Corp.* v. *Triplex*, 298 U. S. 448, 457, and related cases, state a principle which is applicable to infringement by *entirety* of a patent covering a machine or process. Under this principle, where a defendant has manufactured and sold a patented article involving merely mechanical reproduction, he cannot claim any special allowance for

superlative skill that he may have exercised in manufacturing the article; or for any degree of efficiency, intelligence, aggressiveness and the like, which may have been used in the exploitation and sale of such article. The factors for which defendants here claim credit are more than this and are all inherent in the picture and contributed to its "commercial value as a marketable commodity" (*Crosby Valve Co.* v. *Safety Valve Co.*, 141 U. S. 441, 454). In the instant case no allowance whatever was made on account of the standing and reputation of the defendants in the industry, nor for superior skill or intelligence, nor for "factories and lands, patents and machinery", and the like. The only allowance that the respondents received was compensation for converting a play, as to only part of which plaintiffs were entitled to copyright protection, into a successful motion picture; and the plaintiffs have had allowed to them by the judgment of the Court below nearly four times the price for which they would have been glad to sell the motion picture rights to the play provided the sanction of the Hays office could be obtained. Concededly this sanction was not forthcoming.

The admissibility of this expert testimony is sustained not only in the *Westinghouse* case (225 U. S. 604) and the *Dowagiac* case (235 U. S. 641) but in numerous other cases, including *Stromberg Motor Devices Co.* v. *Detroit Trust Co.* (C. C. A. 7), 44 F. (2d) 958, 961; *Herman* v. *Youngstown Car Mfg. Co.* (C. C. A. 6), 216 Fed. 604, 608; *Standard Scale & Supply Co.* v. *Cropp C. M. Co.* (C. C. A. 7), 6 F. (2d) 447, 455.

In *Herman* v. *Youngstown Car Mfg. Co.*, *supra*, Judge Denison gave weight to the testimony of "a

man of experience in the manufacturing and selling field", as one who could "form thereon an intelligent and useful opinion".

In *Stearns-Rogers Mfg. Co.* v. *Rush*, 87 F. (2d) 35, 39 (Petition, p. 23), the Court was not passing on the *admissibility* of the expert evidence there offered, but merely on the *weight* or *value* of such evidence under the facts of that case.

The Court below adopted the bases of apportionment above indicated. In doing so it was "resolved to avoid the one certainly unjust course of giving the plaintiffs everything" and to give the plaintiffs the benefit of all such doubts as existed by taking a "figure which will favor the plaintiffs in every reasonable chance of error" (R. 1265-6).

To avoid injustice, the Courts have ever gone so far as to approve of speculative approximation as a basis for apportionment.

> *Page Machine Co.* v. *Dow, Jones & Co.* (D. C. N. Y., 1916), 238 Fed. 369, 376;
> *Bush & Lane Piano Co.* v. *Becker Bros.* (C. C. A. 2, 1916), 234 Fed. 79;
> *Cohan* v. *Commissioner of Internal Revenue* (C. C. A. 2, 1930), 39 F. (2d) 540, 543, 544;

Furthermore the award of the Court is in any event sustainable as one made "in lieu of actual damages and profits", in an amount which "to the court shall appear to be just".

In *Douglas* v. *Cunningham*, 294 U. S. 207, at page 210, it was stated that the purpose of the so-called "in lieu" provisions was to enable the Court to do justice "in a case where the rules of law render diffi-

cult or impossible proof of damages or discovery of profits".

This is in accord with the explanation as to the purpose of the "in lieu" provisions given by Mr. Arthur Steuart, to whom we have already referred (*supra*, p. 20):

> "The language of the section 'in lieu of actual damages and profits, such damages as to the court shall appear just', would appear to put into the court the *absolute right* where it was an equity case to decide what should be allowed in the way of liquidated damages * * *." (Hearings of December 7-11, p. 176.)

POINT IV.

The effect of the finding of "deliberate plagiarism" is only to impose on the defendants the duty of showing reasonable bases of apportionment.

Before explaining the nature of the finding of "deliberate plagiarism", it should be noted that in *Westinghouse* v. *Wagner*, 225 U. S. 604 (at p. 620), the Court, referring to the privilege extended therein to defendants to show "by general evidence, expert testimony or otherwise" that the patented elements did not "at the utmost" contribute "to more than a given amount of the profits", said that:

> "In such cases, except *possibly* against one *who had concealed or destroyed evidence* or been *guilty of gross wrong*, the plaintiff's recovery cannot exceed the amount thus proved, even

. though it be impossible otherwise more precisely . to apportion the profits."

There has never been any suggestion by the Master or by either of the Courts below that the defendants have "been guilty of gross wrong".

Judge Woolsey upon the trial, in dismissing the complaint, held that the defendants "did not copy anything therein or take anything therefrom which was protected by copyright * * *" (R. 907). The principal question in the case throughout has turned upon the scope of plaintiffs' copyright, a question of law as well as of fact.

Judge Hand in his first opinion said:

> "* * * much of the picture owes nothing to the play; some of it is plainly drawn from the novel" (R. 1306).

The infringement did not involve use of any of the dialogue, but was confined to the plot (R. 1304-6). And, even as to the plot, the Court said (R. 1303):

> "* * * much of the play was borrowed from the story of Madeleine Smith, and the plaintiffs' originality is necessarily limited to the variants they introduced."

Finally, after expressing the conclusion that "the defendants used the play *pro tanto*", the Court said:

> "With so many sources before them they might *quite honestly forget what they took*; nobody knows the origin of his inventions; memory and fancy merge even in adults. Yet *unconscious plagiarism* is actionable quite as much as deliberate" (R. 1303).

Upon the basis of the first opinion, in passing on the question of deductibility of Federal income taxes, the Special Master was of the opinion that the defendants had been found not to have been guilty of wilful and deliberate infringement (R. 1034). So also in Judge Leibell's opinion in the District Court (R. 1204), in sustaining the right to such a deduction, Judge Leibell said:

> "In the present case the District Judge dismissed the bill and his ruling was reversed by the Circuit Court of Appeals. The District Judge certainly believed that the issues raised by the defendants had merit. The Circuit Court of Appeals in its opinion stated that in dismissing the complaint the District Judge was following the Circuit Court's decision in *Nichols* v. *Universal Pictures Corp.* (*supra*) (45 F. (2d) 119). To refuse to permit the defendants to deduct the corporate income taxes they paid on the profits of 'Letty Lynton' would be in effect the imposition of a penalty, superimposed on the judgment for profits herein."

When the case came again before the Circuit Court of Appeals and this time merely on the appeal from Judge Leibell's decree, which sustained with slight modifications the Special Master's report, and without any new evidence on the issue of infringement, one way or the other, Judge Learned Hand stated (R. 1265):

> "No new light has come, and we now hold that the borrowing was a deliberate plagiarism."

Where was this "new light" to come from?

The Special Master was not authorized either by the opinion of the court or by the accounting decree to receive additional evidence on the question of infringement; and even if such additional evidence had been offered before him, we are confident it would not have been received.

The defendants' writers in their depositions offered at the trial had all testified frankly that they had seen the plaintiffs' play, and one of them had testified to having read the script, but all of them had denied that they copied it (P. R. 92, 110, 118-9, 128, 134-5, 140-1). None of these writers was called in the accounting proceedings for the reason hereinbefore set forth. The record discloses no claim that evidence was either concealed or destroyed.

The Court, in rephrasing its decision as to the nature of defendants' infringement, seems to have departed from the cases which hold that a favorable decision below is of itself sufficient to relieve a defendant from a claim of wanton or wilful infringement. Thus the Court below in a case where interest was refused on profits for a period prior to the filing of the Master's report (*Vandenburgh v. Concrete Steel Co.* (1921), 278 Fed. 607, 610), said:

> "There is no evidence of wanton infringement. *The mere fact that the courts held different views as to the claims of the patent is sufficient to negative any such suggestion.*"

The Court below also in a later case (*Stromberg Motor Devices Co. v. Zenith-Detroit Corp.*, 73 F. (2d) 62, 65), relieved a defendant who had deliberately tested a patent, from a charge of wilful infringement, saying:

> "It (the defendant) did deliberately test this patent. It claimed it to be invalid and denied in-

fringement. The issues raised were not without merit, as is made clear by the fact that it prevailed in the District Court and obtained a decree which we reversed on appeal."

See also: *Metallic Rubber Tire Co. v. Hartford Rubber W. Co.* (C. C. A. 2, 1921), 275 Fed. 315, 326; *Philadelphia Rubber Wks. Co. v. U. S. Rubber Reclaiming Wks.* (C. C. A. 2, 1921), 277 Fed. 171, 179; *Rockwood v. General Fire Extinguisher Co.* (C. C. A. 2, 1930), 37 F. (2d) 62, 66; *Vrooman v. Penhollow* (C. C. A. 6, 1915), 222 Fed. 894, 899.

Thus we claim that even if the finding of "deliberate plagiarism" be allowed to stand, the defendants should not in any event be deemed "guilty of gross wrong", for it is obvious that the Court below did not regard this case as falling within the exception expressed in the *Westinghouse* case (*supra*, p. 28).

In *Dowagiac Mfg. Co. v. Minnesota Plow Co.*, 235 U. S. 641, while the Court did, in the course of its opinion, refer to the infringement as not "wanton or wilful", it should be noted that there *plaintiffs* had neither apportioned nor attempted to show that apportionment was impossible, "although the evidence upon the accounting went far toward showing that there was no real obstacle to a fair apportionment" (p. 647).

In the present case, the defendants have assumed the burden of apportionment and established bases of apportionment satisfactory to the Court below.

As to the trademark case of *Hamilton-Brown Shoe Co. v. Wolf Bros.*, 240 U. S. 251, we have already pointed out, *supra*, page 18, that the defendant's

difficulty there was that he had not assumed the burden of apportionment, but sought, rather to cast that burden upon the plaintiff. The only alternatives, therefore, left to the Court were either to award all the profits to the plaintiff or to reduce his award merely to nominal damages.

The other cases cited by petitioners at page 25 of their petition hold no more than that under similar circumstances where the plaintiff has shown the impossibility of his making an apportionment, the defendants must bear the burden of apportionment or suffer the consequences.

The great weight of authority now is that even if one is a conscious wrongdoer, he can avoid a forfeiture by reason of a mingling of funds, etc., by offering satisfactory proof upon which the plaintiff's proportionate recovery can be based. *Restatement on Restitution*, Sections 209, 210 (with comments and illustrations) and 214.

In a recent case in the House of Lords, *Sandeman v. Tyzack* (1913) A. C. 680, at page 695, Lord Moulton says that this subject of confusion is "far from being within the domain of settled law" and that the cases usually are "instances of cutting the Gordian knot" which call for "reasonable adjustments of the rights of the parties".

POINT V.

The payment of $922,141.09 to Messrs. Mayer, Rubin and Thalberg was properly allowed as an expense of the Pictures Corporation and as a proper item of "general studio overhead".

This amount of $922,141.09 was an item of "general studio overhead" which was allowed by the lower Court (R. 1266). Only .018 per cent. of this amount, or the sum of $16,598.54, was chargeable to the motion picture "Letty Lynton". It served to reduce the judgment entered by one-fifth of such amount, or the sum of $3,319.71.

The history of the employment contracts was told by Mr. Rubin (R. 717-733). The actual contracts are printed as Defendants' Exhibit 33 (R. 833-882). The individuals named were paid for their services a fixed salary plus an additional compensation measured by profits. Although the profits of Loew's in February, 1927, became the yardstick whereby the additional compensation was measured, the payments when the amounts thereof were determined were always made by the defendant Pictures Corporation, and not by Loew's Inc. (R. 710-13). Loew's was the owner of all the common stock of the Pictures Corporation (R. 770).

Although this compensation was measured by profits, the *actual* profits of the Pictures Corporation embraced only the sum remaining after this compensation had been paid. The moneys so paid out were never "profits" of the defendants, except as designated in a formula by which the amount thereof was determined. "The infringer was liable for actual, not possible, gains." (*Tilghman* v. *Proctor*, 125 U. S. 136, 146.)

The arrangement long antedated the infringement. The payments were actually made. Their good faith has not been questioned.

As stated in *Larson* v. *Wrigley* (C. C. A. 7, 1927), 20 F. (2d) 830 (at p. 832):

> "Where the injured party seeks the profits of an infringer, he takes the chance of their reduction, or even extinguishment, through expenses and losses actually incurred, however unwisely or even improvidently, so long only as they were incurred in good faith."

As stated by the lower Court (R. 1266):

> "* * * The payments were never profits of the defendants at all; the contracts effectively laid hold of them the moment they came into existence."

In *Stromberg Motor Devices Co.* v. *Zenith-Detroit Co.* (C. C. A. 2, 1934), 73 F. (2d) 62, the Court, at page 65, said:

> "The defendant's contract with its president was made before any question of infringement of the Mock patent arose, and was not an unusual one. *The profits the defendant made from the infringement* were actually used as a part of the measure of the commission paid to its president in addition to his regular salary. The *actual profits* to the defendant as a result of the infringement were by so much reduced, and, as the plaintiff is entitled only to those actual profits, the credit was properly allowed."

See, also, *Stromberg Motor Devices Co.* v. *Detroit Trust Co.* (C. C. A. 7), 44 F. (2d) 958, 963.

It must, therefore, necessarily follow that where a defendant has paid out as an element of cost any sum, whether in the form of salary or as additional compensation measured by profits, it is entitled to deduct that sum in ascertaining its net profits.

CONCLUSION.

It is respectfully submitted that the petition does not present adequate reasons for the allowance of the writ of certiorari applied for.

November 14, 1939.

JOHN W. DAVIS,
SAMUEL D. COHEN,
Counsel for Respondents.

J. ROBERT RUBIN,
EARLE L. BEATTY,
Of Counsel.

Appendix A.

Pertinent Portions of Section 25(b) of The Copyright Law Of The United States (Title 17, U. S. C., Section 25).

"Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

* * * * * * *

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, and in proving profits the plaintiff shall be required to prove sales only and the defendant shall be required to prove every element of cost which he claims, or in lieu of actual damages and profits such damages as to the court shall appear to be just. * * *"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,

against

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC., and CLEVER EXPORT CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

JOHN W. DAVIS,
J. ROBERT RUBIN,
SAMUEL D. COHEN,
EARLE L. BEATTY,
Counsel for Respondents.

THE COURT PRESS, N. Y. C.

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Garretson v. Clark (1884), 111 U. S. 120 24

Gear Grinding Machine Co. v. Studebaker Corp. (C. C. A. 6, 1926), 14 F. (2d) 540 ..... 60*a*

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Larson v. Wrigley (1928), 277 U. S. 97 21

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Goodeve's Modern Law of Personal Property (1937) p. 100 22

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Parkes' History of Chancery, p. 506 29

Patent Statute (35 U. S. C. A.):
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Pomeroy's Equity Jurisprudence (4th Ed.) p. 67 76

Ramsaye, A Million And One Nights, p. 596 69

Restatement on Restitution:
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939.

No. 482.

EDWARD SHELDON and MARGARET AYER BARNES,
Petitioners,

—against—

METRO-GOLDWYN PICTURES CORPORATION, METRO-GOLDWYN-MAYER DISTRIBUTING CORPORATION, LOEW'S, INC. and CULVER EXPORT CORPORATION,
Respondents.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENTS.

Opinions Below.

The opinion of the District Court on the motion to confirm the Special Master's report is reported in 26 F. Supp. 134. The opinion of the Circuit Court of Appeals on the cross-appeals taken from the judgment entered on the Special Master's report is reported in 106 F. (2d) 45.

The earlier opinion of the District Court directing a dismissal of the complaint is reported in 7 F. Supp. 837. The opinion of the Circuit Court of Appeals finding infringement and reversing the decree of dismissal is reported in 81 F. (2d) 49. Both of these latter opinions are relevant herein as to the nature and extent of the respondents' infringement.

Constitution and Statutes Involved.

Article 1, Section 8, Clause 8, of the Constitution of the United States and relevant portions of the Copyright Statute (17 U. S. C. A.) Section 25(b), and of the Patent Statute (35 U. S. C. A.) Section 70, are set out in the Appendix (pp. 83-4).

History of the Case.

The petitioners herein are also referred to as "the plaintiffs", and the respondents are also referred to as "the defendants".

In passing upon the issue of infringement, Judge Woolsey upon the trial had before him the four works, namely: (1) The manuscript of petitioners' play "Dishonored Lady" (P. R. 237-494; Defts.' Ex. R-3; R. 640), called the Play; (2) the continuity of respondents' motion picture "Letty Lynton" (P. R. 495-622; Defts.' Ex. R-4; R. 640), called the Picture; (3) the record of the trial of Madeleine Smith in Scotland in 1857 for the murder of her lover (contained in a volume published in 1927 as one of the series, "Notable British Trials"), called the Trial; and (4) the novel "Letty Lynton" by Mrs. Belloc Lowndes, motion picture rights of which had been

Note: The record filed with the petition herein contains the first opinion of the Circuit Court of Appeals, the interlocutory decree of July 29, 1936, entered upon its mandate, the proceedings before the Special Master, and all subsequent proceedings, constituting the so-called "Accounting Record", which will be referred to herein as "Record" (abbreviated "R.").

With the certiorari petition of respondents, denied on December 4, 1939, No. 505, there was filed the record containing all proceedings prior to the accounting. By consent order (R. 1248) this prior record, as well as certain exhibits described in such order, may be handed up upon the argument and referred to in briefs with the same force and effect as if incorporated as a part of this record, which will be referred to herein as "Prior Record" (abbreviated "P. R.").

acquired by the respondents, called the Novel. The Trial (Defts.' Ex. R-2; R. 640) and the Novel (Defts.' Ex. R-5; R. 641) are contained in separate volumes, which were not printed as part of the record, but by consent order may be referred to on argument or in briefs (R. 1248).

The District Judge in the early decision, made after fifteen months' deliberation, in comparing these four works, made a finding as to the "basic plot—the common denominator" derivable from all four works (7 F. Supp. 837, 840). After pointing out that this basic plot was "the principal obstacle across the plaintiffs' path to a decree (7 F. Supp. 842), he held that the defendants "did not copy anything therein or take anything therefrom (the Play) which was protected by copyright and that as a matter of law, therefore, they did not infringe the plaintiffs' copyright".

Upon appeal from this decision, the Circuit Court of Appeals found that although there was no taking of any dialogue, the Picture followed certain of the dramatic sequences or "variants" of the Play, but that the former differed in many respects from the Play, saying (81 F. (2d) 49, at p. 56):

> "* * * much of the picture owes nothing to the play; some of it is plainly drawn from the novel;"

And even as to the basic plot, the Court said (p. 54):

> "* * * much of the play was borrowed from the story of Madeleine Smith, and the plaintiffs' originality is necessarily limited to the variants they introduced."

In weighing the amount of the award and in considering the effect to be given to the finding of "deliberate plagiarism" on which the plaintiffs lay such

stress, it must be remembered that the District Court by its decision completely absolved the defendants from any wrongdoing, and that the Circuit Court of Appeals in reversing designated the infringement only as one "*pro tanto*", saying (81 F. (2d) at p. 54):

> "With so many sources before them they might quite honestly forget what they took; nobody knows the origin of his inventions; memory and fancy merge even in adults. Yet unconscious plagiarism is actionable quite as much as deliberate."

Plaintiffs in their brief have stated (at p. 3) that "Both the Master and the District Court refused to apportion." The Master's report (R. 957) shows that he considered the decree appointing him merely as a peremptory direction "to ascertain and report the amount of complainants' damages herein and the amount of such gains and profits of the defendants", etc. In this he was in error, for, as pointed out in *Lawrence-Williams Co.* v. *Societe Enfants, Etc.* (C. C. A. 6), 52 F. (2d) 774, 777, such decrees follow a "customary formula", and as was stated in *Dam* v. *Kirk La Shelle Co.* (C. C. A. 2), 175 Fed. 902, 908, "Questions as to the amount of damages or profits ordinarily come up for determination only after the accounting".

The District Judge later on the motion to confirm the Master's report assigned as his reason for not making an actual apportionment of the profits (which he believed that justice required) the fact that he considered himself bound by the decision in *Dam* v. *Kirk La Shelle Co.*, *supra*,

> "* * * even though I believe it runs counter to the course later followed by that Court in appor-

tioning profits in patent infringement cases and to the arguments therein expressed' " (R. 1198), and later added:

> "In my opinion it is punitive and unjust to award all the net profits of the motion picture 'Letty Lynton' to the complainants in this case" (R. 1200).

The District Judge further stated (R. 1202):

> "An allowance to complainants of 25% of the net profits, as restated, or about $133,000 would be such a sum as could be justly fixed as a limit beyond which complainants would be receiving profits in no way attributable to the use of their play in the production of the picture. Sir James Barrie received 7% of the gross receipts from the motion picture based on 'Peter Pan'. For that he assigned the motion picture rights to his famous play and the right to use the name as the title of the picture. The gross receipts in the case at bar from the picture 'Letty Lynton' were $1,655,269.15 of which 8% would be about $132,500. In my opinion the testimony before the special master would justify a finding in this case that the profits these defendants made from their use of complainants' play 'Dishonored Lady' did not exceed 25% of the net profits from the picture, as hereinafter fixed, or, if a royalty basis should be used, 8% of the gross receipts. It requires no expert testimony to show that the use of complainants' play 'Dishonored Lady' did not contribute the entire 100% of the net profits realized from the picture 'Letty Lynton'. Yet that is what this judgment gives the complainants."

The failure of the District Court actually to make such an apportionment has been widely criticized.

48 Yale L. J., 1279 (May 1939); 52 Harv. L. R., 688 (February 1939); 39 Columbia L. R., 869 (May 1939); 8 Fordham L. R., 263 (May 1939).

The Circuit Court of Appeals, after considering the pertinent authorities, including the prior decision of the Court in *Dam v. Kirk La Shelle Co.*, *supra*, expressed the opinion that "A court is justified in basing its decrees upon practices common in other human affairs" and that it could "no longer accept the doctrine of *Dam v. Kirk La Shelle Company*, *supra*; that by no hook or crook can an infringer be relieved of so manifestly unjust a result" (R. 1263).

Accordingly, upon the basis of expert testimony introduced by the defendants, which the Court designated as "the best opinion of the calling", it found that an allowance to the plaintiffs of one-fifth of the net profits was an award "which by no possibility shall be too small", and which would "favor the plaintiffs in every reasonable chance of error" (R. 1264-6). The *rationale* of the decision was expressed as follows:

> "* * * But we are resolved to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share" (R. 1265).

Notwithstanding the fact that Judge L. Hand in his former opinion had apparently referred to the infringement as "unconscious plagiarism" due to the fact that "memory and fancy merge even in adults", in his second opinion he stated:

> "No new light has come and we now hold that the borrowing was a deliberate plagiarism" (R. 1265).

No explanation is given as to where this "new light" was to come from. The Special Master was not authorized, either by the former opinion of the Court or by the accounting decree, to receive additional evidence on the question of infringement; and even if such additional evidence had been offered before him, we are confident that it would not have been received, since the Master sought throughout the accounting to limit the evidence strictly to matters of accounting. The defendants' writers, whose depositions were offered at the trial, had all testified frankly that they had seen the plaintiffs' play and one of them had testified to having read the script, but all of them had denied that they copied from such script (P. R. 92, 110, 118-9, 128, 134-5, 140-1). None of these writers was called in the accounting proceedings for the reasons stated.

Even in the face of this designation of the infringement as deliberate plagiarism, the Court considered as manifestly unjust an award of any amount of profits greater than one-fifth thereof.

The award which the petitioners herein seek is one approximating $600,000, or twenty times more than the $30,000 which they asked for the motion picture rights of the Play. The award of the lower Court herein sought to be reviewed is one which awards them approximately $115,000, which with interest and costs (including counsel fee), materially exceeds five times what plaintiffs asked for their play.

Facts.

The plaintiffs' play was based upon the Madeleine Smith trial, a famous criminal trial of its generation, which took place in Scotland in 1857. The plaintiffs, in the foreword to their play made public acknowledg-

ment of this fact (R. 640, 631, 632). "This was the story which plaintiffs used to build their play" (R. 1293).

During 1930 and 1931, Metro-Goldwyn-Mayer Corporation openly negotiated for the motion picture rights in the play and in the spring of 1931, a written contract was entered into covering such rights, by the terms of which the plaintiffs agreed to sell, and Metro-Goldwyn-Mayer Corporation agreed to purchase, said rights for $30,000, "contingent upon their (plaintiffs') being able to secure the approval of the Hays Office* of their use of this play for picture purposes" (P. R. 789; Defts'. Ex. R-1, R. 635).

The District Court found that both parties had made "*bona fide*" efforts to have this ban of the Motion Picture Producers & Distributors of America, Inc. (also known as the Hays Office) removed (P. R. 892), but such efforts were *unsuccessful* because of the obscenity of the play (P. R. 27, 49, 65; R. 664-6). The final refusal by the Hays Office to lift this ban was announced on June 1, 1931, and further efforts to acquire these motion picture rights were then abandoned (P. R. 26, 27, 76; R. 638).

Late in 1928, or early in 1929, Mrs. Belloc Lowndes wrote a novel in England entitled "Letty Lynton", also based upon the Madeleine Smith trial. It was conceded by stipulation upon the trial that this novel was completed in the latter part of the year 1929, that Mrs. Lowndes never saw or heard of the play until after her novel was completed and that this novel was entirely her own work (P. R. 816).

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* This work of the "Hays Office" is carried on pursuant to agreement between the Motion Picture Producers and Distributors of America, Inc., and the Author's League of America, to maintain the moral and artistic standards of motion picture production (P. R. 59-63; 805-813). One or both of petitioners are affiliated with the Author's League (P. R. 62-63).

Negotiations for the purchase of the motion picture rights in the Novel began in July, 1931, and extended over a period of some months (P. R. 145). Mrs. Lowndes' representative first took up the matter with Mr. Thalberg in London in July, 1931, and later resumed negotiations with him in Los Angeles in September, 1931. The actual contract for the purchase of these rights was not executed until December 4, 1931 (P. R. 826; Defts.' Ex. R-6; R. 641), but, as appears from the exhibit itself, the contract, which was prepared in this country, was executed in London, obviously some time after the negotiations had been concluded.

It was from the novel that the defendants' writers were instructed to prepare the continuity of the picture (P. R. 77; R. 677).

$30,000 was the price at which Mrs. Barnes "hoped very much we would make the sale" (R. 635). Plaintiffs' agent for the sale of these rights testified (R. 668): "It (the $30,000) was the only actual price we had from anybody".

Plaintiffs allege (their brief, p. 5) that the "Novel 'Letty Lynton' served as a screen" and refer to the opinions of both lower courts as their authority for this statement. This charge is without foundation in fact. Nowhere in these opinions or elsewhere does such a statement find support.

Summary of Argument.

The decision of the court below is in accord with the copyright statute, with the copyright decisions and with equitable principles applicable to the apportionment of profits. The equitable remedy of accounting for profits both in copyright and patent cases is one which equity itself created and over

which it has complete control to the end of awarding to the patent or copyright owner *compensation* in the form of the *gains* of the infringer, in substitution for the remedy at law under which damages, or defendants' *losses*, are awarded.

The statutes recognizing the remedy, both copyright and patent, were intended to be merely declaratory of the pre-existing principles applied by equity to accountings for profits. These statutes have neither extended nor limited the powers theretofore exercised by courts of equity in connection with such accountings.

The principles applicable in copyright cases are not different from those applicable in the patent cases which hold that in awarding gains or profits courts of equity will award to the patent owner only such gains or profits as are attributable, on the principle of cause and effect, to the use made of the patent by the infringer.

Section 25(b) of the Copyright Act of 1909 was not intended to give to the copyright proprietor any greater measure of relief than that theretofore accorded to the patent owner.

The patent cases, as well as the copyright cases, show that equity has adopted flexible principles under which it may separate those gains attributable to the use of the patent from those due to elements superadded by the infringer. This result has been reached in the patent cases either by actual apportionment or by awarding to the patent owner a "reasonable royalty" in cases where either the profits or the damages are not susceptible of calculation with reasonable certainty. The "reasonable royalty" rule was adopted by the courts long prior to the incorporation of such rule in the statutes by the 1922 amendment of Section 70 of the Patent Law (Appendix, pp. 83-4).

There are in the record no less than five distinct

lines of proof which furnished to the Circuit Court of Appeals adequate bases for an award to the plaintiffs of a much smaller proportion of the net profits than that which that Court awarded to them.

Moreover, the award of the court below was sustainable as a finding of "such damages as to the court shall appear to be just" under the so-called "in lieu" provision of Section 25(b) of the Copyright Act of 1909.

Equity acts solely for the purpose of awarding *compensation* to the plaintiff and not of inflicting *punishment* upon the defendant. When the characterization of the infringement by the lower Court as "deliberate plagiarism" is understood, viewed in the light of the history of the case, including the decision of the trial Court completely absolving the defendants from any wrong-doing, it will be seen that under no circumstances does the situation here call for the application of punitive principles. Such circumstances, however, may justify the requirement which was actually imposed upon the defendants by the lower Court, viz., that of proving beyond "any reasonable chance of error" the amount of the *gains* made by them which was not attributable to the use of any portion of the copyrighted material (Points I to III).

The allowance by the court below as an item of General Studio Overhead of the sum of $922,141.09 paid to Messrs. Mayer, Rubin and Thalberg was a proper one. These payments were made under a contract whereby such individuals received for their services, in addition to fixed salaries, a compensation measured by 20% of the profits. This contract had been in force since 1924 and the evidence showed no grounds for questioning the good faith of this arrangement. It was not a matter for the courts to question

the *wisdom* or *providence* thereof, although in this regard also, the arrangement was beyond question (Point IV).

POINT I.

The decision of the Circuit Court of Appeals is in accord with the copyright statute, with the decisions of this Court in *Callaghan* v. *Myers* and *Belford* v. *Scribner* and with equitable principles applicable to apportionment of profits.

The position taken by the plaintiffs is that in every case where infringement of copyright is found, whatever the extent of such infringement, quantitatively or qualitatively, the Court *must* award to the copyright owner *all* the profits made by the defendant from the entire enterprise in connection with which the infringement occurs. This argument, by the very nature of things, obviously ignores realities and leads only to rank injustice.

History of Equitable Remedy Independent of Statute.

Before considering the statute, we shall trace the history of equity's "peculiar remedy" of an accounting of profits under which, by the application of ordinary principles of cause and effect, the copyright or patent owner has always been permitted to recover *all the profits made from the infringement*, that is, all the gain or unjust enrichment attributable to the use made by the infringer of the copyrighted work or the patented article. This history will show that any provisions in relation to this remedy which have been incorporated in statutes have been merely declaratory of pre-existing law and have not extended

or limited the general powers of a court of equity to do right and justice.

There was no statutory provision for such an award in copyright cases until the Copyright Act of 1909 though, as in patent cases, profits in a proper case were awarded long prior to 1909. *Stevens* v. *Gladding*, 17 How. 447 (1855); *Callaghan* v. *Myers*, 128 U. S. 617 (1888); *Belford* v. *Scribner*, 144 U. S. 488 (1892).

There was no statutory provision for such an award in patent cases until the Act of July 8, 1870 (55th Section, which became Section 4921 of the Revised Statutes, 1873), although an accounting for profits had theretofore been a well recognized remedy in equity in patent as well as in copyright cases.

Mr. Justice Matthews in his opinion in *Root* v. *Railway Co.*, 105 U. S. 189 (1881), reviews the history of patent legislation and of the procedure for an accounting in equity for infringement. He refers (p. 194) to the case of *Livingston* v. *Woodworth*, 15 How. 546 (decided in 1853), as the one wherein for the first time the question arose "*as to the rule for computing the profits of an infringer upon a decree for such an account.*"*

In the *Livingston* case (p. 559), Mr. Justice Daniel laid down the following fundamental principles which should ever govern a court of equity either as to an award by equity of profits in excess of *actual profits* or as to any award of a punitive nature in the form of profits:

> "We are aware of no rule which converts a court of equity into an instrument for the punish-

* Unless otherwise indicated, italics throughout this brief have been supplied by respondents.

ment of simple torts; * * *. If the appellees * * * had sustained an injury to their legal rights, the courts of law were open to them for redress, and in these courts they might, according to a practice, which, however doubtful, in point of essential right, is now too inveterate to be called in question, have claimed, not compensation merely, but *vengeance* for such injury as they could show that they had sustained. But before a tribunal which refuses to listen even to any, save those whose acts and motives are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal. There they will be allowed to claim that which, *ex aequo et bono*, is theirs, and nothing beyond this."

In all such proceedings for an account of profits, the fact that an equity court may always mold its decrees in accordance with right and justice has never been lost sight of, as illustrated by the following:

"* * * the adjustment of these profits is subject to all the equitable considerations which are necessary to do complete justice between the parties. * * *." (*Packet Co. v. Sicklis*, 19 Wall. 611, 617.) "The jurisdiction of equity is adequate to give the proper remedy, whatever phase the case may assume: * * *." (*Rubber Co. v. Goodyear*, 9 Wall. 788; 804.) "* * * The subject, as a whole, is surrounded with many difficulties, which the courts have not yet succeeded in overcoming." (*Elizabeth v. Pavement Co.*, 97 U. S. 126, 138.) "Equity will control its peculiar remedy of an account of profits according to its own sense of justice." (*Haas v. Feist*, 234 Fed. 105, 108.)

Mr. Justice Matthews in the *Root* case, after his reference to the *Livingston* case, shows that the effect of Section 4921 of the Revised Statutes was not to change in any manner the powers of an equity court in respect to profits, but only to enlarge the powers of such court so as to permit the award of *damages* in connection with an award of profits, where the profits were not adequate compensation to the injured party. Under Section 4921 (35 U. S. C. A., Sec. 70)

> "the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages * * *"

This section remains in effect with the addition by amendment in 1922, of an alternative provision, embodying equitable principles theretofore established by the cases, which permits the court to award "a reasonable sum as profits or general damages" where "damages or profits are not susceptible of calculation and determination with reasonable certainty." (Appendix, pp. 83-4).

This section, excluding such amendment, represents the statutory law applicable to patents at the time of the passage in 1909 of the Copyright Act. Apportionments of profits under the patent statute had been permitted by equity in proper cases long prior to 1909 when the Copyright Statute was passed. See cases cited in *Westinghouse Co.* v. *Wagner Mfg. Co.*, 225 U. S. 604, 614-5 (1912).

Section 25(b) of the Copyright Act of 1909 Is Merely Declaratory of Pre-existing, Recognized Principles.

For the first time, in 1909, there was incorporated in the statutes applicable to copyrights an express provision relating to the pre-existing remedy of an

accounting of profits which, as we have already stated, long antedated the 1909 Act.

The Copyright Act of 1909 is entitled "An Act to Amend and Consolidate the Acts Respecting Copyright". Section 25(b) of the Act, in providing that an infringer shall pay to the copyright proprietor "all the profits which the infringer shall have made from such infringement", was merely declaratory of the existing law applicable to patents as well as to copyrights. It was not intended to give the copyright owner any greater measure of relief than that accorded to patent owners; nor was it intended to extend or limit the principles theretofore applied in equity's peculiar remedy of an account of profits. The section plainly states that the copyright owner is entitled only to those profits "made from such infringement". This would appear clearly to contemplate an apportionment between those profits made from the infringement and those profits of the infringer, attributable to causes other than the infringement.

If there were room for doubt as to the meaning of the statutory provision, an examination of the House and Senate Committees' Report on the Act of 1909 and of statements made by one of the co-authors of the Act at the legislative hearings held before the Joint Committee of the House and the Senate would resolve all uncertainties by showing that the framers of the Act had no intention of laying down a different rule as to copyrights from that which was applicable to patents.

The House Committee in its report* on the bill

* House Report No. 2222, 60th Congress, 2nd Sess., incorporated in the corresponding Senate Report No. 1108.

which became the Copyright Act of 1909 said of Section 25(b):

> "The provision that the copyright proprietor may have such damages as well as the profits which the infringer may have made is substantially the same provision found in Section 4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater. As such a provision was found both in the trade-mark and patent laws, the committee felt that it might be properly included in the copyright laws."

No reference whatever is made in the above report to the use in the Act of the word "all" on which the plaintiffs lay much stress. In fact, nowhere in the Committee reports or in any hearings before the Committee was it suggested that Section 25(b) gave a larger measure of recovery of profits in the case of copyright infringement than in the case of patent infringement.

In the hearings before the Joint Committee of the House and Senate of December, 1906, (p. 174),* Mr. Arthur Steuart, who was the spokesman for those who with him drafted the bill, in referring to Section 25(b), (Section 23(b) of the Act then under consideration), said:

> "* * * an attempt was made to put into this clause all of the remedies of the existing law and all of the remedies which have already been enacted by Congress with reference to patents, as well as trade-marks. * * * this clause has been drawn as a consolidation of all the remedies which

* Copyright hearings, December 7-11, 1906.

had existed before with reference to copyrights, patents and trade-marks wherever there is no inconsistency."

After comparing the proposed Act with the language above quoted from the Patent Act (*supra*, p. 15), Mr. Stewart went on to say (p. 175):

"* * * the attempt has been made in this Act to reproduce identically the same meaning in the language which has been used. Possibly it might have been better to have used exactly the same words."

In *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202 (1931), this Court in interpreting the same Section of the Copyright Act, resorted to the same Report referred to above, saying that (p. 206):

"* * * the primary purpose of Section 25 was to incorporate in one section all of the civil remedies theretofore given, including statutory damages where actual proof was lacking."

The Court overruled the contention that certain provisions of Section 25 were limited to particular infringements by saying:

"The history of the section as revealed in the extended hearings which preceded the Act of 1909, makes the contrary clear."

This Court also relied upon this Report in *Westermann Co. v. Dispatch Co.*, 249 U. S. 100, at page 109 and in *Washingtonian Publishing Co. v. Pearson* (1939), 306 U. S. 30, at page 36.

It is clear then, both in respect of patent and copyright infringement, that *damages* are awarded solely upon *compensatory* principles, measured by what the plaintiff has lost; and that profits are awarded solely

upon compensatory principles measured by the profits ascribable, on the principle of cause and effect, to the infringement. (*Dobson v. Hartford Carpet Co.*, 114 U. S. 439, 445-446.) As the Court said in that case, where a rug had infringed a design patent:

> "* * * to attribute in law the entire profit to the pattern, to the exclusion of the other merits, unless it is shown by evidence, as a fact, that the profit ought to be so attributed, not only violates the statutory rules of 'actual damages' and of 'profits to be accounted for', but confounds all distinctions between cause and effect."

See also

Reed v. Lawrence (C. C. Mich. 1886), 29 Fed. 915, 921.

The application of this simple principle of cause and effect is in no manner changed by the oft-repeated and much misunderstood reference to an infringer as a constructive trustee. When equity awarded *defendant's gains*, and not *plaintiff's losses* as at law, it intended to adopt a purely quantitative yard-stick and not to adopt any principles of substantive law affecting an infringer, who, after all, is a simple tort feasor.

Mr. Justice Matthews in the *Root* case (105 U. S., at p. 214), referring to the fallacy of regarding the defendant infringer as a *trustee*, which he attributed to the loose language theretofore used in some of the cases, said:

> "All that was meant in the opinions referred to, was to declare *according to what rule of computation and measurement the compensation of a complainant would be ascertained by a court of equity*, which having acquired jurisdiction upon

some equitable grounds to grant relief, would retain the cause for the sake of administering an entire remedy and complete justice, rather than send him to a court of law for redress in a second action. The rule adopted was that which the court, in fact, applies in cases of trustees who have committed breaches of trust by an unlawful use of the trust property for their own advantage; that is to require them to refund the amount of profit which they have *actually realized*. This rule was adopted, not for the purpose of acquiring jurisdiction, but, in cases where having jurisdiction to grant equitable relief, *the court was not permitted by the principles and practice in equity, to award damages in the sense in which the law gives them, but a substitute for damages, at the election of the complainant, for the purpose of preventing multiplicity of suits.*"

Mr. Justice Gray in *Tilghman* v. *Proctor* (1888), 125 U. S. 136 (at 148), approves this language of Mr. Justice Matthews and challenges "the theory that the infringer *is converted into a trustee for the owner of the patent*", and says: "it is more strictly accurate to say that a court of equity, * * * will not send the plaintiff to a court of law to recover damages, but will itself administer full relief, by awarding, as an equivalent or a substitute for legal damages, a compensation computed and *measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage.*"

In applying this measure, the court was regarding a defendant's profits as an entirety, *i. e.*, profits indisputably ascribable solely to the infringement. In other words, the defendant was to be treated as *if he were a trustee* only to the extent of the profits indisputably ascribable to the infringement, and not as to profits not so ascribable.

Thus, in the comparatively recent case of *Larson v. Wrigley* (1928), 277 U. S. 97, page 99, Mr. Justice Holmes said:

> "To call the infringer an agent or trustee *is not to state a fact* but merely to indicate a *mode of approach and an imperfect analogy by which the wrongdoer will be made to hand over the proceeds of his wrong.*"

There is no reason to believe that Section 25(b) repealed or ignored the law of cause and effect or was intended to give the copyright owner any greater relief than that accorded under pre-existing principles applicable to accountings in equity. If the plaintiffs have any claim to that portion of the profits due to the defendants' contributions and not to the plaintiffs', they must find support for such a claim outside the statute.

General Principles of Apportionment.

The fact that the defendant, by his wrongful act, has tortiously confused his property with that of the plaintiff, or his profits with those of the plaintiff, does not call for the utter disregard of cause and effect. True, the defendant should not be permitted to profit from his wrong, but this merely requires an inquiry into the proportion of the defendant's profits properly attributable to his wrong. To compel the defendant to surrender the entire fund or property in which the plaintiff's fund or property is intermingled can only be justified as a method for punishing a defendant for deliberately destroying evidence as to the value of the plaintiff's property which he wrongfully appropriated. All the authorities are in unison that even a conscious wrongdoer can avoid such punishment by offering satisfactory proof upon

which the plaintiff's proportionate recovery can be based. Forfeiture of the entire mingled fund is never a rule of substantive law. Thus the Restatement on Restitution, in setting forth the principles applicable where funds of the plaintiff have been mingled with funds of the wrongdoer, contains no provision for forfeiture of the entire fund. Section 209, entitled "Mingling With Funds of Wrongdoer" provides:

> "Where a person wrongfully mingles money of another with money of his own, the other is entitled to obtain reimbursement out of the fund."

In Comment b of Section 210, entitled "Effect of Acquisition of Other Property With Mingled Funds", it is stated:

> "Where the wrongdoer is a conscious wrongdoer, the other is entitled at his option to a *share* of the property acquired with the mingled fund *in such proportion as his money bore to the whole amount of the fund.*"

This principle is clearly shown by Illustration No. 4:

> "4. A wrongfully takes $1000 of B's money, and with this money and with $2000 of his own money A purchases shares of stock which he later sells for $6000. B is entitled to receive one-third of the proceeds. If the shares are sold for $1500, B is entitled to an equitable lien upon the proceeds for $1000."

These rules also apply to the wrongful mingling of things other than money, Restatement on Restitution, Section 214. To the same general effect, see Cooley on Torts (4th Ed.), p. 74; 5 R. C. L., p. 1050; Goodeve's Modern Law of Personal Property (1937), p. 100.

In other words, the plaintiffs in the instant case are, on general principles applicable to the wrongful mingling of money or property, only entitled to such

proportion of the profits as the value of their copyrighted material which the defendants took bore to the total value of the picture "Letty Lynton". There can be no fundamental distinction between a wrongful mingling or intermixture caused by infringement and a wrongful mingling caused by any other tortious act, except, perhaps, in so far as the determination of the method of apportionment is concerned. The applicable methods of apportionment are most clearly demonstrated in the cases involving infringement of patents.

Principles of Apportionment Applicable to Patent Cases.

As will be apparent from the opinion of the Court below, there is a marked dearth of copyright cases involving an award of profits as against an infringer. The facts in the *Callaghan* (1888) and *Belford* (1892) cases were of such a nature as to render wholly ineffectual an assertion of any valid claim for apportionment. However, we submit that it is fairly inferable from the opinions in those cases that an apportionment might have been made if the facts there had permitted the defendants to show a proper basis therefor. Since the rendition of those decisions, there have been marked developments in the law applicable to apportionment of profits in patent cases. This seems to make it desirable that we discuss these developments in that cognate branch of the law before taking up the copyright decisions.

The leading authority on the subject of apportionment in patent cases is *Westinghouse Mfg. Co.* v. *Wagner E. and M. Co.* (1912), 225 U. S. 604. This case makes it apparent that the question of apportionment of profits resolves itself into a question of the burden of proof. Under certain circumstances out-

lined by the Court, the burden of proof is on the plaintiff to apportion the profits under penalty of failing to recover any profits whatsoever, and in other situations as outlined by the Court, the burden of apportioning the profits shifts to the defendant. In the instant case the defendants have voluntarily assumed this burden and consequently the question of burden of proof is not involved. Where the entire profits of the defendant are not factually due to the plaintiff's patent and where the defendant is able to prove this, then, as the *Westinghouse* case and all subsequent patent cases clearly show, the plaintiff is entitled only to his just proportion of the profits. Thus, in the *Westinghouse* case, the Court, speaking of the situation where the infringed patent is used "in combination with valuable improvements made, or other patents", said (p. 615):

> "In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains."

Accordingly the patent owner is entitled to all the profits of the infringer only (1) where the infringer has sold or used the patented article without any superadded elements and (2) where the patent, though used in combination with "old elements", gives the entire marketable value to the combination. The question of apportionment in the instant case should, therefore, depend upon the relative contributions made by the defendants and the plaintiffs to the "marketable" value of the infringing picture. *Crosby Valve Co. v. Safety Valve Co.* (1891), 141 U. S. 441, 454; *Garretson v. Clark* (1884), 111 U. S. 120; *Elizabeth v. Pavement Co.* (1878), 97 U. S. 126, 141.

Shortly after the *Westinghouse* case this Court again considered the problem of apportioning

profits in the patent case of *Dowagiac Mfg. Co. v. Minnesota Moline Plow Co.* (1915), 235 U. S. 641, 646-7. The fundamental rule was expressed as follows:

> "In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants.
>
> * * * * * * *
>
> "Of course, the result to be accomplished is a rational separation of the net profits so that neither party may have what rightfully belongs to the other, and it is important that the accounting be so conducted as to secure this result, if it be reasonably possible."

"The owner of the patent is limited, therefore, to an allocable share of the profits where, as in *Columbia Machine Corp. v. Adriance Works* (C. C. A. 2, 1935), 79 F. (2d) 16, 18, "it would be absurd to say that the (invention) gave the entire value to the bottle capper or made it the article which the defendant's customers wanted", or where, as in *Egry Register Co. v. Standard Register Co.* (C. C. A. 6, 1928), 23 F. (2d) 438, 440, "It cannot be assumed that all defendant's sales were due to the presence of the patented features, and hence that all the profits were caused thereby", since there was "no evidence that the sales made by defendant were particularly due to its incorporation in its device of the patented combination", although "doubtless, as in every such case, the patented improvement contributed to many of the sales, and was the moving cause in some of them".

It will be admitted that the courts have had difficulties in the practical application of the above simple

principles of apportionment. Speaking of this difficulty of allocating profits as between contributing elements, Judge Learned Hand in *Cincinnati Car Co. v. N. Y. R. T. Corp.* (C. C. A. 2, 1933), 66 F. (2d) 592, 593, says:

> "* * * the question is in its nature unanswerable" and "it is generally impossible to allocate quantitatively the shares of the old and the new * * *."

Judge Hand, speaking of the tendency to construe the *Westinghouse* case, where the infringing device was in effect the same as the patented device, as treating the infringer as "subject to the severe standard imposed upon malversators", and therefore liable for all profits, says "the character of the tort ought not really to have such sanguinary results". He then pays tribute to the reasonable royalty rule adopted in the *Dowagiac* case as a satisfactory solution which "abandons the appearance of rationalizing the irrational" (p. 593).

When Judge Hand was sitting in the District Court (*Page Machine Co. v. Dow, Jones & Co.* (1916), 238 Fed. 369, 376), he made just such an apportionment to avoid "grotesque injustice". There he allocated one-sixth of the profits to the plaintiff, saying: "Exactness is obviously out of the question, and it would be a sham to pretend to it." He then continued:

> "The fact is that the relative contribution of two or more essential factors to a common result cannot be ascertained quantitatively. *But we must adopt some working rule to avoid instances of grotesque injustice.*" It shocks the sense of justice of any one to take away the whole of the profits of a business because its owner has used a single small patented detail; for long courts stood powerless before this situation, but now

we have a different rule. If, however, we are to apply it with ruthless logic, our second situation will be as bad as our first, and a single patent infringement may become the signal of financial ruin, though it was accompanied by the best of faith. *I think that we must show that the law can be more plastic even at the expense of formal consistency. Surely it is a strange habit of mind which at once tolerates the extreme latitude allowed to juries in the assessment of damages, because their processes are not disclosed, while it insists upon an impossible nicety of calculation even at the expense of any justice whatever, when they are.*"

In *Stearns-Roger Mfg. Co. v. Ruth* (C. C. A. 10, 1936), 87 F. (2d) 35, 39, Judge McDermott advocates "a *practical* approach" as "a better solvent * * * than the theoretical" one. After speaking of the perplexity which "persists in many cases" and the absence of "magic in words which leads directly to a just result", he commends Judge Hand's opinion in the *Cincinnati Car Co.* case as going far "toward clearing up the problem" and relieving the court from the effect of the conventional distinction which, although it "suffices in most cases, * * * may be pressed to the point, as Judge Hand points out, where the conscience of the Chancellor rebels". He then continued:

> "A practical approach is a better solvent of the problem here than the theoretical. If the case is such that it is practicable for the patentee to apportion the profits between what is new and what is old, he should do so or fail. If it is not, then the infringer should either make the apportionment or yield up all the profits *unless such a decree would be shockingly unjust, in which event the patentee should be relegated to*

a royalty. This, as we understand it, is the rationale of Judge Denison's opinion in *Egry Register Co.* v. *Standard Register Co., supra.*"

In *Standard Scale & Supply Co.* v. *Cropp Concrete Mach. Co.* (C. C. A. 7, 1925), 6 F. (2d) 447, 454, 455, the court, though treating the principle of confusion as being applicable, said that:

> "* * * whenever the court reaches a point or sum where it is demonstrable that to go beyond that point or exceed that sum is to set over to plaintiff profits to which the infringing elements make no contribution, that point or sum is the proper place to stop in enforcing the rule.
>
> "*With these observations before us, it is clear that all profits of the defendant which can with reasonable accuracy be attributed to non-infringing parts are to be deducted, before the rule which attends confusion of profit is applied.*"

There the court apportioned on a practical basis (⅓ and ⅔ as to a portion of the infringement period and ½ and ½ as to the remainder of such period), although "unable to make the apportionment in the ordinary sense by allocating to each a certain sum."

The petitioners in their brief (pp. 7, 22-8) argue that patent cases are not analogous in that there is some inherent difference between the infringement of a patent and the infringement of a copyright.

It is a complete answer to petitioners' contention that the courts have, in determining questions in relation to profits in copyright cases, referred to patent cases, and conversely. In the *Westinghouse* case (225 U. S. 604), this Court, as authority for its rules as to apportionment, cites both *Callaghan* v. *Myers* (128 U. S. 617) and *Mawman* v. *Tegg* (2 Russ. 385) copyright cases; and in *Callaghan* v. *Myers* it will be

recalled that the Court cited *Elizabeth v. Pavement Co.*, 97 U. S. 126, a patent case.

We submit that in its final analysis the question of apportionment in both patent and trade-mark cases, as well as in copyright cases, rests upon the application of the principle of cause and effect. This is the same principle which is applicable at law to the determination of damages where the inquiry is as to the plaintiff's losses. In equity the sole inquiry is as to the amount of defendant's gain or unjust enrichment *attributable to the infringer's use of the plaintiff's property.*

The foregoing principles upon which apportionment has been permitted and even required in patent cases in order to avoid injustice are equally applicable in a copyright case such as this. These principles of apportionment are not due to any peculiarities of the patent law but are governed entirely by the fact that equity should *always* control its decrees in order to avoid injustice. This universal power of the courts of equity (see *Harms & Francis, etc. v. Stern* (C. C. A. 2, 1916), 231 Fed. 645, 648; Parkes' History of Chancery, p. 506) is the same principle which controls in patent cases (see *supra*, pp. 13, 14). Nor can the difficulties surrounding the question of apportionment of profits in copyright cases justify the Court in evading the issue. In the patent cases the courts have uniformly recognized the necessity of overcoming almost insuperable difficulties of apportionment. The District Judge here, although he felt bound by ruling precedent to deny actual apportionment, stated that (R. 1200), "The rule for apportioning profits, followed in patent infringement cases, should not be difficult of application to copyright infringement cases."

Copyright Decisions.

We have seen that the Copyright Act itself did not contemplate any change or limitation in the power of a court of equity to control its own remedy of an accounting of profits in accordance with its own established principles, including the power to mold its decree in the interests of justice.

The cases relied on by the plaintiffs as requiring an award to them of all profits (*Callaghan* v. *Myers* (1888), 128 U. S. 617; *Belford* v. *Scribner* (1892), 144 U. S. 488; *Dam* v. *Kirk La Shelle Co.* (1910), 175 Fed. 902), were, with the exception of the last case, decided prior to the Copyright Act of 1909, but we submit that the lower Court has properly held that these cases do not lay down any such general rule.

While the *Kirk La Shelle Co.* case was decided subsequent to 1909, the Act by its express terms was not applicable since the infringement occurred before its passage. Much is made by plaintiffs of the fact that Judge Hand in his opinion below referred to the *Callaghan* and *Belford* cases as "not to be taken as holding the infringer must always be unsuccessful, no matter what evidence he may bring forward" but that such cases hold "no more than that when he (the infringer) makes no effort to discharge the duty resting upon him, he will be cast for the whole profit" (R. 1260-1).

Plaintiffs complain that this distinction has no basis in fact. On the contrary, we submit that an examination of the records in both of these cases fully supports Judge Hand's statements. In the *Callaghan* case, we find nothing in the entire record of that case to indicate that the defendant Callaghan made any effort whatsoever to apportion profits, either by way of evidence or by argument. Our opponents

state (Brf., p. 14) that "Callaghan's counsel in his brief to this Court (p. 7), urged that apportionment be made on the physical content measured separate from the opinions, * * *." An examination of the 155 page Callaghan brief does not disclose any such contention at page 7 or elsewhere. In the *Belford* case, the so-called "effort to discharge the duty" was based upon the testimony of a witness (Brf., p. 13) who made an ineffectual effort to divide the infringing work into infringing and non-infringing parts on a basis which was not supported by the facts as found by the Master and the trial Court. Judge Hand might well have added that there were no bases for apportionment in either of those cases, since in both cases the lower Courts had found that the copyright works had been appropriated in their entirety.

Both cases involved compilations based upon copyrighted works wherein neither infringer had resorted to original sources of information. Both infringing works were found factually to have been entirely copied from the copyrighted works, either literally or with only colorable alterations. It seems fairly inferable from the opinions in both cases that the Court might have made actual apportionments of profits if the respective defendants had been able to show that they had made contributions to the commercial success of the infringing works to which any portion of the profits were properly ascribable. This was a necessary foundation for an apportionment. In no event did the Court in these cases intend to lay down a rule that under no circumstances can a defendant in a copyright case claim an apportionment of profits.

The *Callaghan* case involved certain infringing volumes of Illinois Supreme Court Reports which were published as "Freeman's Reports". The infringed copyrighted works had been similarly desig-

nated and sold by their author, one Freeman. Not only were the opinions of the Court, admittedly in the public domain, lifted bodily from the plaintiff's reports (p. 630), but the headnotes, arrangement of cases, indices, annotations, etc., were either copied verbatim, or copied with only colorable alterations. The infringing work carried the same page numbers as those of the copyrighted work, so that it could be used in connection with citations intended to be applicable only to the copyrighted work.

In rejection of any possible claim of apportionment based on the inclusion of the public domain material, the opinions, the Court said (p. 649):

> "A publication of the mere opinions of the Court in a volume without more, would be comparatively valueless to anyone."

The Court based its decision in the *Callaghan* case on the decision in *Elizabeth* v. *Pavement Co.*, 97 U. S. 126, where it was held that the marketable value of the infringing street pavement was wholly attributable to the wrongful use of the plaintiff's patent. "It was this thing, and not another, that the people wanted and required" (p. 141). The defendant in the *Elizabeth* case also failed to show that any of the profits were due to elements other than the plaintiff's patent. The Court said (p. 142):

> "A *separation of distinct profit* derived from Brocklebank & Trainer's improvement; *if any such profit was made, might have been shown;* but, as before stated, the appellants failed to show that any such distinct profit was realized."

In the *Callaghan* case, the Court also quoted (p. 666) a purely obiter statement of Lord Eldon's in *Mawman* v. *Tegg*, 2 Russ. 385 (1826) which cannot be read out

of its setting. This statement was made at the outset of hearings before him which extended over six days. *The case was settled* before any decision was made. Lord Eldon had, however, prior to settlement, referred the matter to a master for a report as to the relative amounts of infringing and non-infringing matter, and had indicated that he considered a finding on this subject important for the purpose of deciding on the request for an injunction and in making a disposition of the profits. We have been unable to find a single reported English copyright case where the principles stated by Lord Eldon have been applied to defeat an apportionment.

In *Belford* v. *Scribner*, the defendants published and sold two editions of a cook book, a cheaper and a more expensive edition, copied entirely from plaintiff's copyrighted work and without resort to original sources. The trial court there, as did this Court, based its award of all the profits on the finding of the Special Master that (pp. 493, 508)

> "* * * the matter and language of said books is the same as the complainant's in every substantial sense."

It appears clearly from the report of the Master in the *Belford* case that he had found that the entire infringing work was copied from plaintiff's, either verbatim or "with occasional change of phraseology." The report concluded as follows (p. 494):

> "In all of the alleged illegal publications the defendants are shown to have used the material of the complainant instead of 'resorting to original sources of information.'"

The trial court in that case disregarded the so-called expert testimony referred to by petitioners

clearly because the facts on which it was based were opposed to the express findings of the Master, which it adopted as its own. While it is true that the defendants in the *Belford* case *pleaded* that the infringing portions "do not exceed from 10% to 15% of the entire contents," the complainant on the other hand *pleaded* (p. 492):

> "that more than 170 receipts contained in said piratical work were copied *verbatim et literatim* from the said copyrighted work of the plaintiff, said receipts comprising a part or the whole of over 150 pages of said piratical work; that many other parts of that work, besides said 170 receipts, are infringements upon the copyrights of the plaintiff, and many of the remaining receipts are in fact copied from the plaintiff's book, with certain changes in the phraseology thereof; and that the subjects in the piratical work and the index thereto are arranged in the same order, and with almost the same headings, as in the plaintiff's work, and were copied and imitated therefrom."

The petitioners in their brief (p. 13) emphasize the fact that no testimony was offered by Scribner, the plaintiff, to rebut the defendants' testimony that a part only of plaintiff's book was infringed. The best rebuttal offered by the plaintiff was the defendants' books themselves, from which it appeared, and the Court so found, that the "matter and language of said books is the same as the complainant's in every substantial sense." Naturally, in such circumstances, this Court quite properly paid little heed to any claim for an apportionment.

The decision in the *Belford* case is based, as was that in the *Callaghan* case, on the decision in *Elizabeth* v. *Pavement Co.* *supra*, which the Supreme

Court in *Westinghouse Electric & Manufacturing Co. v. Wagner Electric & Manufacturing Co.*, 225 U. S. 604, 614, cited as authority for the proposition that:

> "(c) Where profits are made by the use of an article patented as an entirety, the infringer is liable for all the profits 'unless he can show—and the burden is on him to show—that a portion of them is the result of some other thing used by him.'"

The only other case dealing with the subject of apportionment of profits (*Dam v. Kirk La Shelle Co.* (C. C. A. 2, 1910), 175 Fed. 902) is the one which in the opinion of the District Court in the instant case, although contrary to its own sense of justice, compelled it to award all the profits to the plaintiffs. As already shown the 1909 Act was not applicable to that case. This case as we have stated was expressly overruled by the Circuit Court of Appeals in the instant case.

The *Kirk La Shelle* case was one involving infringement of a copyrighted story by a stage production presenting a dramatized version of the story. The defendant there had been given notice shortly after the commencement of the production that the play was an unlawful dramatization of the copyrighted story. In connection with the decision, the fact has usually been overlooked that prior to the Act of 1909 there was no provision whatever for statutory damages in the case of *an infringement of an undramatized story by a dramatic production*. It was this fact alone which led the Court there to state (175 Fed. at p. 908):

> "* * * unless the complainant is entitled to all the profits arising from the production of the play, she is, as a practical matter, entitled to no pecuniary recovery at all."

We shall point out later in another connection that the so-called "in lieu" provisions of the Copyright Act of 1909 if they had been applicable in that case, would have enabled the Court to make an award of "such damages as to the court shall appear to be just." Even under the difficulties presented by the circumstances of that case, the Court (at p. 908) described the award of all the profits as "most unjust" and as imposing "hardships" on the defendant. On petition for modification of mandate, the Court showed that it was averse to awarding profits if there were "a lawful and practicable method of ascertaining substantial damages" (p. 911). However, we submit there was not then, nor is there now, an equitable precedent for so severely punishing the offender, in disregard of the court's general equity powers to make a just award. We submit that in the interest of justice an equity court has the power even to make a wild guess, or to apportion on intuition alone rather than to make what it characterizes as a "most unjust" decree.

Speculative approximation has been resorted to in order to avoid obviously unjust results. See *Cohan* v. *Commissioner of Internal Revenue* (C. C. A. 2, 1930), 39 F. (2d) 540, 543-4.

Furthermore, as pointed out by Judge McCormick, in his dissenting opinion in *Harold Lloyd Corporation* v. *Witwer* (C. C. A. 9, 1933), 65 F. (2d) 1, 46, the *Kirk La Shelle* case is also distinguishable on the ground that it had nothing to do with infringement by a motion picture which is "*of an entirely different character than infringements of literary works by the spoken drama.*" The Court below evidently did not think it worth while to distinguish the *Kirk La Shelle* case but instead met the issue by expressly overruling it.

The case of *Harold Lloyd Corporation* v. *Witwer*,

above referred to, is the only case dealing directly with the subject of an award of profits in connection with an infringement by a motion picture film. This case was decided as recently as 1933. It might have served as a decisive precedent in the instant case, except for the fact that the majority of the court reversed the finding of infringement by the District Court, primarily on the ground that the infringement was unsubstantial. Judge McCormick in his dissent expressly disapproved, under circumstances closely related to those involved here, an award of all the profits made from the motion picture. The suit was brought to enjoin the exhibition of a silent photoplay on a claim that it infringed the plaintiff's rights in a copyrighted short story. Plaintiff, who had acquired the copyright by assignment from the magazine, sought to recover profits claimed by the plaintiff to amount to $2,300,000, which the defendant admitted to be over $1,000,000.

The lower Court ruled that the copyright had been infringed and entered a decree in broad terms for an accounting of damages and profits. Upon appeal by the defendant, the appellate court reversed and directed a decree of no infringement. The dissenting Judge, who was voting for affirmance, apparently wrote his opinion to rebut the idea that he ever had in contemplation any award to the plaintiff of all the profits of the motion picture. If speculation were permitted, it would seem that the third Judge (Sawtelle, *C. J.*) had not voted until after the two opinions had been written. On the subject of an award of all the profits, all the judges were apparently in agreement in opposing such an award. After making an argument based upon the supposed hazard the defendants were taking in spending $330,000 on a motion picture and in incurring liability for all its

profits, and at the same time refusing to pay a negligible amount for the right to produce the story with the authority of the copyright owner, Judge Wilbur said for the majority (p. 18):

> "We are assuming in making this statement that the copyright owner is entitled to all the profits derived from the infringing play. *We do not wish to be understood as approving that doctrine which is one of the main issues in the case at bar, if infringement is found.*"

The language, "if infringement is found" would not, we submit, be included in an opinion which at the time of writing was known to be one reversing a finding of infringement.

Judge McCormick, who dissented, undoubtedly felt he owed a duty to jurisprudence to perpetuate the results of his elaborate research, as well as to explain his dissent. In the first part of his opinion (pp. 28-44), he gave his reasons for wishing to hold in the plaintiff's favor on the issue of infringement. In the latter part of his opinion (pp. 44-48), he repudiated the plaintiff's claim for all the profits. The grounds for this repudiation are as follows:

(1) By Section 25, an equity court is "invested with discretion in copyright infringement cases upon granting an injunction to administer such monetary relief as appears to the court to be just under the particular facts and circumstances of the suit". A suitor cannot "control the conscience of the chancellor" or "prevent him from entering the decree that the equities of a case require", etc. (p. 45).

(2) The history of Section 25, considered in connection with the amendment of 1912 (Townsend Act of August 24, 1912), shows that infringement by a

motion picture was regarded as "of an entirely different character than infringements of literary works by the spoken drama", and this difference was recognized when such amendment was drawn (pp. 45, 46).

(3) "* * * in fact much of the value and merit of the picture has no relation whatever to the story, and many of the episodes and sequences in the picture are in no way suggested by Witwer in the story" (p. 47).

(4) "* * * under all the facts, circumstances, and equities of this case, any award of all the profits is inequitable and should not be allowed", and when the "in lieu" clause of Section 25(b) was enacted, it was intended to "enable the court of equity to adapt its processes to meet the specific requirements of concrete cases independently of the precise demands of suitors" (p. 46).

It seems to border on absurdity to say that under such circumstances, an equity court, whether its award be one of a proportionate share of the profits or an award of "such damages as to the court shall appear to be just", is powerless to do justice to both parties by making a "reasonable adjustment of the rights of the parties". This is the guide to all cases involving a confusion of profits or property, given by the comparatively recent English case in the House of Lords of *Sandeman v. Tyzak* (1913), A. C. 680, 695. There, Lord Moulton said (p. 695) that this subject of confusion is "far from being within the domain of settled law" and that the cases usually are "instances of cutting the Gordian knot" which call for "reasonable adjustments of the rights of the parties".

As to the trade-mark case of *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U. S. 251, the plaintiffs

apparently fail to comprehend the grounds for that decision. The difficulty there was that the defendant attempted to throw the burden of apportionment upon the plaintiff, claiming that it was the plaintiff's duty to show what sales made by the defendant were attributable to the use of the trade-mark and what sales were not so attributable. The Special Master below (p. 255) had found for profits in respect of shoes sold (1) bearing the stamp "American Lady" without any other distinguishing marks, and (2) stamped "American Lady" followed by the words "Hamilton-Brown Shoe Co.", but without anything else to denote that the shoes were of defendant's manufacture. *Profits were disallowed by the Master as to shoes marked with the trade-mark followed by the name of the defendant as maker.* The trial Court sustained exceptions to the Master's report and held that the plaintiff had failed to make out a case, except for nominal damages. The Circuit Court of Appeals overruled the exceptions and sustained the Master, thus awarding to the plaintiff the entire profits in cases (1) and (2) above. This award was sustained by this Court. Thus in that case the Court was confronted with the alternative of awarding to the plaintiff all the profits or reducing the award to nominal damages merely. We submit that this Court, when it spoke of "inherent impossibility" of apportionment, was speaking entirely as to such impossibility on the part of the *plaintiff*. If apportionment were possible, it was a burden which the defendant alone could discharge, failing which it should have been required to surrender all its profits rather than to relegate the plaintiff to merely nominal damages. It is well to note in this connection that the language of the trade-mark statute in reference to an award of profits is the same as that of the patent statute (Tit. 15; U. S. C., A., Sec. 99).

In order to understand the reference by this Court in the *Hamilton-Brown Shoe Co.* case to the *Westinghouse* case, quoted at page 21 of petitioners' brief, it must be borne in mind that the main purpose of the holding in the *Westinghouse* case was to relieve the plaintiff from an impossible burden of apportionment in order to obtain a recovery for more than nominal damages. It is entirely likely that the defendant in the *Hamilton-Brown Shoe Co.* case might have been able under some principles of apportionment to show that certain of the sales were not connected with the use of plaintiff's trade-mark. In any event the burden of such proof was one which should have been borne by the defendant. In the instant case the defendants have assumed and discharged that burden.

Petitioners in their brief (p. 7) state that the lower Court, in making an apportionment of profits, "has rendered the first decision of its kind in this country or in England that counsel has been able to find".

In England, the Copyright Act of 1911, Section 6, by its very terms in giving a remedy to the copyright owner, provides that such remedy shall be "by way of injunction or interdict, damages, accounts *or otherwise as may be conferred by law*", thus showing in respect of an accounting, or "accounts", that the equitable proceeding remains unaffected by the statute. While it is true that there are no reported English cases expressly permitting an apportionment, it is also true that there are no cases laying down any rule that the copyright owner is entitled to all the profits of the infringer.

A search made in the two standard English digests, Halsbury's Laws of England and English and Em-

pire Digest, and in their Supplements, discloses only one reported case where an actual award of profits in a copyright case was made. (*Delfe* v. *De Lamotte* (1857), 3 K. & J. 581.) That case involved an infringing book which *wholly* infringed the copyright work. It simply decided that on the accounting the defendant is entitled to deduct his expenses.

In the case of *Colburn* v. *Simms* (1843), 2 Hare, 543, the accounting filed with the defendant's answer showed an actual loss and this account was accepted.

We mention the foregoing for the purpose of rebutting a possible adverse inference from defendants' failure to cite any English authorities in support of an apportionment of profits in copyright cases. The likely explanation of the dearth of English authorities on the subject is that in England the copyright proprietor must elect between damages and profits.

Neilson v. *Betts*, L. R. (1872), 5 H. L. 1;
De Vitre v. *Betts*, L. R. (1873), 6 H. L. 319.

There are, however, three recent English cases in which *damages* have been awarded on the basis of an apportionment as between non-infringing and infringing parts of a plagiaristic work.

Ash v. *Dickie*, L. R. (1936), Ch. 655;
John Lane, etc. Ltd. v. *Associated Newspapers*, L. R. (1936), 1 K. B. 715;
Caxton Publishing Co. v. *Sutherland Publishing Co.*, L. R. (1939), A. C. 178.

For example, in the *Ash* case, Master of the Rolls Wright said:

> "* * * the matter can only be one of estimate and the Court must act as the jury would act in similar circumstances."

The Record Here Affords Adequate Bases for Apportionment of Profits in the Instant Case.

As stated many times in patent cases, apportionment is a practical problem and the method must in the nature of things depend upon the facts and circumstances of the particular case.

The factual and uncontradicted proof in this record afforded adequate bases for the separation of those profits which were due solely to the infringement from those profits due to the defendants' own contributions to the success of the motion picture, thus permitting the court to render to each party no more than that which was justly his and to avoid an unjust result. No less than five lines of proof support the finding that "at the utmost" the contribution made by the copyrighted play to the commercial success of the motion picture was only a fractional part of the total profits. Among the lines of proof thus offered were the following:

1. Proof of a general nature showing that the Picture was marketed or licensed to exhibitors in such a manner that the Play at the utmost necessarily made only a small contribution to its commercial success.

The play, "Dishonored Lady", starring Katherine Cornell, had opened in New York City on February 4, 1930, and ran until about May 24, 1930,—a short run in the case of a play starring Katherine Cornell. It had a short run in London in May of that year, played in Los Angeles from September 8 to September 20, 1930, and then went on the road, playing in Boston, Philadelphia, Baltimore and Chicago. It ended its run about Christmas of that year (R. 631). Such a run would not stamp it as a successful play. Obviously, the play acquired no universal reputation

because of this showing or "novelty" of plot. It is not unlikely that even such run as the play had was due largely to the acting of Katherine Cornell, and only partially due to the story itself.

There was nothing in the Play's title, the names of its characters, or in the exhibition or marketing of the Picture to cause the public in any manner to associate the Picture with the Play.

It was shown that the motion picture, "Letty Lynton", was licensed to practically all exhibitors as a *Joan Crawford* picture. In the form of licensing contract it was referred to only as "Production No. 208, Joan Crawford, No. 2" (Defts'. Ex. 16, R. 324, 767). 7315 exhibitors out of 7666 to whom it was licensed signed contracts in such form before the motion picture had any other name or designation (R. 322-326; Defts'. Ex. 15, R. 324, 766). The title "Letty Lynton" was not announced to the trade or to the public until a few weeks prior to the Picture's actual release in April, 1932 (R. 325). Only 351 exhibitors licensed the Picture after its title was announced.

Thus it will be seen that the Picture was licensed to practically all exhibitors solely on the basis of the popularity and drawing power of the actress star, Joan Crawford.

2. Proof showing that the production of the motion picture, far from being a mere mechanical reproduction or transcription of the play as a spoken drama, was in itself a new, artistic creation requiring the exercise of creative faculties throughout its period of production.

The Special Master went to the defendants' Studio at Culver City, California, to take the testimony of witnesses. While there, he went over the Studio where the motion picture was produced (R. 38-39).

This physical view of the Studio and its extensive equipment afforded him an opportunity to observe and fully appreciate the enormous facilities and vast organization required to make a motion picture. The Master was shown how this organization, built up over a period of many years and divided into many technical and artistic departments, functioned in the process of producing a motion picture.

After this view of the Studio, Mr. Louis B. Mayer, the Studio head, and the numerous departmental heads, were called before the Master to explain the diversified creative operations entering into the making of a motion picture (R. 83-180, 185-214).

This testimony showed that the making of a motion picture, far from being a mere matter of mechanical reproduction as in the case of practically all other forms of infringement, was from beginning to end, a series of creative operations, starting with the adaptation of the story, and continuing to the completion of the picture, and that this process throughout called for the exercise of the creative faculties, both artistic and scientific, as to production, direction, scenic effects, photographic and sound reproduction, and the like.

3. Proof that the commercial value of the Picture was principally attributable to factors other than the use therein of portions of the Play, and that the maximum possible contribution of the Play to the profits of the Picture was 10% thereof.

Experts testified that the drawing power of the Picture was not due to the Play or to the fact that certain sequences of the Play were found in the Picture. The fact that the Picture was sold to exhibitors as a *Joan Crawford* picture is in itself conclusive.

There is much testimony—entirely uncontradicted—that the largest share of the drawing power of a motion picture—75% or more in the case of a picture with Crawford and Montgomery as stars, and a title not identified with any well known play or novel—is attributable exclusively to the stars. (Mayer, R. 165-167; Jaycocks, R. 566-7; Skouras, R. 575; Benas, R. 590; Rinzler, R. 598; Blumberg, R. 602; Notarius, R. 610; Yoost, R. 618). The remainder of the drawing power of the Picture was due for the most part to the fame of the producer and of the director, and to some extent to Metro-Goldwyn-Mayer's reputation, great organization and investment, and its good-will among exhibitors and with the public (Jaycocks, R. 567; Rinzler, R. 598). As previously noted, this testimony is in accord with what anyone familiar with the motion picture business knows. Indeed, Lichtman, who had served in an executive capacity in the industry for 27 years, testified that in the cases of such outstanding stars as Mary Pickford, Charles Chaplin and Harold Lloyd, they constituted "practically the whole drawing power" of the pictures in which they appeared (R. 558-9).

The defendants' witnesses testified as to the share of the profits of a motion picture which was attributable to the use therein of a play which had only a short run, and which was not advertised or shown by the picture as having any connection with such play. They all testified that the share of such profits represented by the drawing power of the play was very small. Some of the witnesses when pressed for an answer felt constrained to assign no drawing power whatever to such a play or story. The witness most liberal set 12% (Blumberg, R. 602). Most of the witnesses set 10% as the highest that could reasonably be assigned to the literary or written mate-

pal (Rinzler, R. 598; Notarius, R. 610). Other witnesses set 5% (Cohn, R. 267; Jaycocks, R. 567; Zukor, R. 282-3). Mr. Lichtman found all the figures suggested by the others too high and finally gave as his estimate "nothing" (R. 544, 561; and see Mayer, R. 166-7, and Skouras, R. 576, 579). The complete testimony in accordance with the foregoing line of proof is in the following pages of the record (R. 151-169, 264-284, 540-622). All the foregoing testimony is factual, direct and uncontradicted.

From the beginning of motion pictures, through the period of the silent pictures and of the talking pictures, the stars are what give the motion picture its principal value as a "marketable commodity". The defendants' publicity man, Strickling, testified as to the meaning of star popularity and drawing power in the cases of Joan Crawford and Robert Montgomery, the stars of "Letty Lynton" (R. 173-180). The title "Letty Lynton" had no more significance to the exhibitors and the public than would the title "Mary Smith". Such is the uncontradicted testimony of the exhibitors themselves (R. 569, 591, 599, 603, 619). The same witnesses have also testified as to the value of the reputation of the producer, Hunt Stromberg, and of the director, Clarence Brown, in the distribution and exhibition of motion pictures.

4. Proof showing that the value or cost of motion picture rights of a play such as "Dishonored Lady" was, as a matter of simple mathematics, only a small part of the entire value or cost of a finished motion picture such as "Letty Lynton".

The maximum value of the motion picture rights to the play, "Dishonored Lady", as we have seen was fixed at $30,000 (*supra*, pp. 8, 9). This amount was shown by the evidence to have been not more than 1/10th of the capital devoted by the defendants to the production of the motion picture.

This comparison of values corroborates the testimony of experienced witnesses to the effect that the plot or story of a motion picture accounts for not more than 10% of its net profits. Furthermore, relative cost or value is a recognized basis of apportionment in all cases involving the confusion or mingling of a wrongdoer's money or property with that of the plaintiff (*Restatement on Restitution*, Sections 209, 210 and 214, 39 Col. L. R. 869). This method has also been applied in patent cases. See *Walker on Patents* (Deller's Ed. 1937), Section 853, page 2205.

The comparative contribution of the plot or story to the completed picture is graphically shown by a comparison of some of the costs of producing the picture "Letty Lynton". Even assuming that the defendants took the entire plot from the plaintiffs' play, still it will be seen that around $30,000 (the identical amount at which the plaintiffs were willing to sell their play) was spent on the preparation of the script or continuity. One writer alone received $23,333.34 for his work in making the story suitable for motion picture purposes (Defts'. Ex. 18 D 2, R. 328, 782).

An even greater amount of money was spent upon the sets for the action of the picture or "Cost of sets"—$36,849.55 (Defts'. Ex. 18 D 4, R. 328, 786-7). This involved not only technical work, but required in addition artistic conception and creative activity.

Of significance is the fact that the director of the picture, Clarence Brown, was paid $75,000 for this single picture (Defts'. Ex. 18 D 1, R. 328, 780). This amount is several times the usual price of a play or story, and two and a half times the price at which the plaintiffs were willing to sell the motion picture rights of their play. The very magnitude of the director's salary shows that the finished work is to a large extent the original creation of the di-

rector, working, of course, in co-operation with the producer of the picture.

So, also, the cameramen are paid not as mechanics, but as creative artists. On this picture one man alone was paid $2,933.32 out of the total cost of the work of photographing, lasting thirty-three days, viz. $5,230.80 (Defts'. Ex. 18 D 1, R. 328, 780). The Copyright Law itself recognizes that photography is an art, as well as a science, and permits the copyright of mere photographs, if showing artistic originality. *Burrow-Giles Lith. Co.* v. *Sarony* (1884), 111 U. S. 53.

When the schedules showing direct costs of the picture (Defts'. Ex. 18 D 1 to 18 D 4, R. 780-7) are read in conjunction with the testimony of the Studio Head and of the various departmental heads (R. 83-180, 185-214), it will be seen that the motion picture is from first to last a work involving creative artistic conception and embodying the composite result of the intellectual efforts of leading artists and technicians in every line (Mayer, R. 146-172).

5. Proof analogous to a showing of "reasonable royalty" in patent cases to establish by current sales of motion picture rights in other plays that the motion picture rights to the play "Dishonored Lady" were worth not more than $30,000.

The reasonableness of this figure as a royalty for the motion picture rights of the play was fixed by the plaintiffs themselves in their negotiations with the defendants for the sale of those rights. Furthermore, expert testimony was adduced, corroborating the reasonableness of this figure.

It was shown that, except in one or more rare cases, profits or a portion of the profits of a motion picture have never been the basis for compensating an author of a story or play for this contribution

to a motion picture. The witness Zukor of the Paramount organization, having had long experience in motion picture production, knew of only one instance where a percentage of the receipts was the basis of such compensation. For the right to make the motion picture of the world famous book and play "Peter Pan" with the right to use that famous title, the producers contracted to pay the author, Sir James Barrie, 7% of the gross receipts (R. 283).* A flat sum, plus a percentage of the gross receipts, was said to have been paid for the use of the exceptionally successful play, "Abie's Irish Rose". With these two possible exceptions, authors always receive a fixed sum or license fee for the use of their literary material in motion pictures.

There is in the record (R. 675-6) a list of plays, the motion picture rights of which were sold in and about 1932, and the prices paid for such rights. At pages 680-85 of the record, certain testimony was admitted by stipulation (Defts. Ex. 50 for Identification by Ligon Johnson) giving a brief statement as to the runs of the plays embraced in this list of plays. By a striking coincidence, the average price shown by the list is a little under $30,000, the price placed by plaintiffs on the motion picture rights of their play, and the highest prices on the list were materially less than the amount of the award now being reviewed. These latter prices were paid for plays which were far more successful and better known than the plaintiffs' play.

The sale of the picture rights in his copyrighted

* Indeed, the testimony of Mr. Zukor is worthy of special attention, for he was for many years the President of Paramount Corporation, and at the time of testifying he was Chairman of its Board of Directors. The Paramount Corporation owned, through its subsidiary, Charles Frohman Company, a 50% interest in the motion picture rights of the play "Dishonored Lady" (R. 279, 637).

material is in fact the only means open to the author for the exploitation of his work in motion picture (Lichtman, R. 547, 548, 558). The facilities and equipment necessary to make motion pictures, with the technical personnel and the special and unique properties and equipment required, take years to acquire and involve such a large investment, that as a practical matter, only a restricted number of motion picture producers are able to make motion pictures. This circumstance is of the utmost importance in fixing the compensation of the plaintiffs (see Robinson on Patents, Sections 1055 *et seq.*).

Although the Special Master made no attempt to apportion the profits, the District Court, on the basis of the proof stated above, did form a conclusion as to a "just" sum that should be payable to the plaintiffs, either as an apportionment of the profits or as a finding of "such damages as to the court shall appear to be just". That court found that more than 75% of the net profits of the picture "Letty Lynton" was *not* attributable to the use which the defendants made of the plaintiffs' play, saying that

> "An allowance to complainants of 25% of the net profits, as restated, or about $133,000 would be such a sum as could be justly fixed as a limit beyond which complainants would be receiving profits in no way attributable to the use of their play in the production of the picture" (R. 1202).

6. A comparison was made of the Play and the Picture, as well as of the Trial and the Novel, for the purpose, not of contesting the finding of infringement, but of showing the proportionately small contribution which plaintiffs' literary material made to the Picture.

The testimony of all the experts was predicated on the hypothesis that the motion picture made use

of the entire copyrighted work. The Court below, in making its apportionment, pointed out that this was not the case, saying (R. 1264):

> "* * * all the witnesses' estimates were based upon the contribution of the entire play; that is, as though it was completely the work of the plaintiffs. As we know, that was not the case; the plaintiffs worked over old material; the general skeleton was already in the public demesne. A wanton girl kills her lover to free herself for a better match; she is brought to trial for the murder and escapes. *Nobody can say how far this basic plot is to be credited with whatever the play contributed to the drawing power of the picture.* That consideration must therefore count towards reducing the percentage of profits recoverable."

As already shown, Judge Woolsey found that the defendants had taken nothing from the Play which was protected by copyright (*supra*, p. 3). The Circuit Court of Appeals found no taking of any of the dialogue but only of certain ideas embodying dramatic sequences or "variants" from the Play; that "much of the picture owes nothing to the play; some of it is plainly drawn from the novel"; that "much of the play was borrowed from the story of Madeleine Smith", and that the infringement was only one "*pro tanto*" (*supra*, pp. 3, 4). Even as to "those similarities which seem to us to pass the limits of 'fair use'" (P. R. 937) defendants showed in their petition for rehearing (P. R. 944-971) that much of the force of the so-called "parallelism of incident" was broken by similar "parallelism of incident" in respect of matter either in the Trial or in the Novel both of which works were available to the defendants' use.

In connection with this so-called "parallelism of incident", there was submitted to the Special Master a brief entitled "Comparative Analyses of Play and Picture, Trial and Play, submitted by Defendants" (R. 961). With this brief, there were also submitted to him all the four works which were in evidence. The Play (P. R. 238-494) and the continuity of the Picture (P. R. 495-622) are printed in the prior record at the pages indicated. The Trial (Defts.' Ex. R-2, R. 639) and the Novel (Defts.' Ex. R-5, R. 641), each in separate bound volumes, are not printed as part of the record but will be filed with the Court.

In connection with the foregoing proof, it must be noted that motion pictures present a novel and unique problem in so far as copyrights are concerned. The modern talking motion picture, which did not exist prior to 1926, is essentially more novel than the silent picture. Even as to silent pictures, Judge McCormick in the *Harold Lloyd Corporation* case (65 F. (2d) at pp. 45, 46) pointed out the great difference between an infringement of a copyright by the spoken drama and an infringement of a copyright by a motion picture. We repeat that a motion picture is not a mere "transcription or record", even where the copyrighted play or story is used in its entirety. It creates a new problem, from the standpoint of a determination of profits, in finding out what was the "thing and not another, that the people wanted and required", the test for determining the commercial value of the infringing article as a *marketable commodity*, set forth in *Elizabeth v. Pavement Co.* (97 U. S. 126, at 141).

The play or story may be utterly drab, and still the picture may be made not only saleable but financially successful (Mayer, pp. 146-171). The fairy

story "Snow White and the Seven Dwarfs", viewed apart from a motion picture created by the genius of a Walt Disney, could hardly be said to have any drawing power for adults as well as children, as a "dramatic work". Clearly the marketability of the motion picture of that title was not due to any present "novelty" in the story. The commercial value of the finished motion picture is due to the good-will and reputation of the director and producer, to the technical and artistic perfection of each separate picture, to the continuity of the picture as a whole, to the skillful transitions, to the elimination or "cutting" of the superfluous material and, finally and chiefly, to the personality of the stars as depicted in the film itself and imparting to it its principal drawing power,—in our case Joan Crawford and Robert Montgomery who were great favorites with the motion picture public.

The foregoing evidence as to the proportional contribution to the profits of the infringing work affords a well recognized basis for the apportionment of profits in cases of copyright and patent infringement, as shown by the *Westinghouse* case (225 U. S. at 620), where the Court said:

> "So that where, *by general evidence, expert testimony, or otherwise*, it is shown that his patent is of relatively small value, it will often be possible to prove that, at the utmost, it could not have contributed to more than a given amount of the profits. * * * In such cases, except possibly against one who had concealed or destroyed evidence or been guilty of gross wrong, *the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits.*"

In the *Dowagiac* case, Justice Van Devanter said (235 U. S. at p. 647):

> "It well may be that mathematical 'exactness' was not possible, but, as is shown in *Westinghouse Electric & Mfg. Co.* v. *Wagner Electric & Mfg. Co.*, *supra*, * * * that degree of accuracy is not required, *but only reasonable approximation, which usually may be attained* through the testimony of experts and persons informed by observation and experience."

No case better illustrates the attitude of the courts in seeking to rationalize the principle of apportionment than *Stromberg Motor Devices Co.* v. *Detroit Trust Co.* (C. C. A. 7, 1930), 44 F. (2d) 958, 961, where Judge Alschuler, upon the basis of expert testimony apportioned to the plaintiff 55.558 per cent. of the total profit. After speaking of a situation where one set of experts would apportion on a 5%-95% basis and the other set on a 95%-5% basis, he said:

> "In such situation the trier of the fact, be it master, jury, or judge, must decide as best may be under the conflicting evidence, and this was what the District Court said the master should here have done, but failed to do (or did erroneously). While reams upon reams of evidence were given as to the comparative contributions of Ahara and Baverey to the profits of the infringing carburetor, we do not find that any witness indulged in definite estimates of dollars or percentages of contribution. But without giving figures they expressed their several views of the contribution of Ahara and Baverey by employing adjectives, such as 'little', 'much', 'slightly', 'very', etc., all of which were more or less useful in assisting the inquirer to arrive at some fair conclusion of the contribution of these elements, and were perhaps not less helpful than would

have been extreme figures submitted by the opposite sides of the controversy."

In *Herman v. Youngstown Car Mfg. Co.* (C. C. A. 6, 1914), 216 F. 604, 608, Judge Denison gave weight to the testimony of "a man of experience in the manufacturing and selling field", as one who could "form thereon an intelligent and useful opinion". He said further that "an equal division of the profits among these parties is both arbitrary and reasonable; arbitrary, because of its form, but reasonable, because obviously fair and just".

Accordingly, upon the basis of such testimony of experts and persons experienced in the particular business, apportionments have been made on the basis of the percentage of the total profits attributable to plaintiff's invention. *Stromberg Motor Devices Co. v. Detroit Trust Co.* (C. C. A. 7, 1930), 44 F. (2d) 958, 962; *Standard Scale & Supply Co. v. Cropp C. M. Co.* (C. C. A. 7, 1925), 6 F. (2d) 447, 455; *Herman v. Youngstown Car Mfg. Co.* (C. C. A. 6, 1914), 216 Fed. 604, 608; *Baseball Display Co. v. Star Ballplayer Co.* (C. C. A. 3, 1929), 35 F. (2d) 1, 3; *Dowagiac Mfg. Co. v. Deere & Webber Co.* (C. C. A. 8, 1922), 284 F. 331, 348; *Superior Machine Tool Co. v. Cincinnati Lathe, etc. Co.* (C. C. A. 7, 1922), 284 Fed. 267, 269.

Applicability to the Instant Case of Principles Analogous to the "Reasonable Royalty" Rule in Patent Cases.

The "reasonable royalty" rule became an established equitable principle, following the decisions in such cases as the *Dowagiac* case (235 U. S. 641) and *United States Frumentum Co. v. Lauhoff* (C. C. A. 6, 1914), 216 Fed. 610. It was not until 1922 that it

became incorporated into the patent statutes by the amendment of Section 70 of the Patent Law (35 U. S. C. A.). This amendment expressly permits the use of "opinion or expert testimony" where it appears that the "damages or profits are not susceptible of calculation and determination with reasonable certainty". As was pointed out by Judge Haind, this amendment was adopted in "rather delayed response to these decisions" (R. 1262). As will appear later, it would seem that the so-called "in lieu" provision of Section 25(b) was intended to accomplish this same purpose.

This equitable principle, even before the amendment, became one to be applied even though all other methods of apportionment fail. As the Court in the *Dowagiac* case stated, by this method "a rational separation of the net profits" can be effected "so that neither party may have what rightfully belongs to the other" (p. 647). The Court observed that, after all, the matter taken was property, and that the question resolved itself into one relating to the value of the property taken, saying (p. 648):

> "As the exclusive right conferred by the patent was property and the infringement was a portions taking of a part of that property, the normal measure of damages was the value of what was taken."

After pointing out the absence of "any course of granting licenses" which would have been "indicative of the value of what was taken", the Court said:

> "But, as the patent has been kept a close monopoly, there was no established royalty. In that situation it was permissible to show the value

> by proving what would have been a reasonable royalty, considering the nature of the invention, its utility and advantages, and the extent of the use involved."

It must be noted that there, as here, there were substantial profits which the plaintiff was seeking. At pages 650, 651, Justice Van Devanter said:

> "The infringing sales covered 2500 or more drills, the profits were substantial, and the damages, if rightfully measured, were evidently more than nominal."

While the case was *sub judice*,* Judge Denison wrote his masterful decision in *United States Frumentum Co. v. Lauhoff* (C. C. A. 6, June 30, 1914), 216 Fed. 610. Speaking of the difficulty of finding a measure of recovery as to personal property without a market value, he said (p. 616):

> "In the same general class are all personal injury cases. Pain and suffering, the loss of earning power, the loss of support, are all things which have no market value and all present situations where the damages cannot be ascertained or computed *according to any arithmetical formula;* but the jury is put in possession of all the facts and circumstances, it has the benefit of such testimony, from experts as may show the *rules and methods in force in the particular field*, and it estimates, as best it may, how much money will compensate plaintiff for the wrong done."

Among other criteria in fixing that value, Judge Denison speaks of "what share of the profits or of the

* The *Dowagiac* case was under consideration by the court for a period of twenty-one months after the argument.

selling price, it may be customary in that or similar business to allow for the use of an invention." He then explained the measure of liability proposed by him as being either in the nature of "reasonable royalty" or "general damages".

In this connection, it is interesting to note that Judge Denison was a prominent advocate of the 1922 amendment to the Patent Statute, as shown by the legislative history of the amendment.

In *Merrill Soule Co.* v. *Powdered Milk Co.* (C. C. A. 2, 1925), 7 F. (2d) 297, 299, Judge Hough pointed out that it was the decision in the *U. S. Frumentum* case "which turned the scale in favor of liberality", and said of Judge Denison:

> "That learned judge has done more than any other one man to liberalize the matter of damages for infringement of a patent."

The "reasonable royalty" rule in patent law was established to cover just such a situation as here, where it is difficult to determine with mathematical accuracy the portion of the profits attributable to the infringement. It is applicable also as a measure of damages where other legal damages could not be determined.*

So in fixing a reasonable royalty, the primary inquiry is the price which the parties would presumably have agreed upon for the use of the invention.

* See in addition to above cases *Columbia Machine & Stopper Corp.* v. *Adriance Machine Works* (C. C. A. 2, 1935), 79 F. (2d) 16; *Cincinnati Car Co.* v. *N. Y. Rapid Transit Co.* (C. C. A. 2, 1933), 66 F. (2d) 592; *Rockwood* v. *General Fire Extinguisher Co.* (C. C. A. 2, 1930), 37 F. (2d) 62; *Alliance Securities Co.* v. *De Vilbiss Mfg. Co.* (C. C. A. 6, 1935), 76 F. (2d) 503.

In *Egry Register Co. v. Standard Register Co.* (C. C. A. 6, 1925), 23 F. (2d) 438, 443, Judge Denison said:

> "In fixing a reasonable royalty, the primary inquiry, often complicated by secondary ones, is what the parties would have agreed upon, if both were reasonably trying to reach an agreement."*

Judge Hough in *Bush & Lane Piano Co. v. Becker Bros.* (C. C. A. 2, 1916), 234 Fed. 79, 82, had before him as difficult a question of apportionment of profits as could be imagined which he thought should be resolved by using, in proof of a proper apportionment of profits, the same principles as are applied in the reasonable royalty cases. He said, after referring to the principles established in the *Dowagiac* case:

> "There is no reason why this view of proper evidence should not be applied to the estimation of profits * * *."

The defendant had infringed a design patent, covering a case for a piano. The court held the infringer entitled to an apportionment of the profits as between the piano mechanism and the piano case. Expert opinion was used in making this apportionment.

The question of apportionment in the instant case, involving no conflict of evidence, is much simpler. In the instant case, there would, of course, be no difficulty in arriving at the reasonable royalty or license fee the parties "would have agreed upon", because as a matter of fact the parties did agree upon $30,000.

* See also: *Merrill Soule Co. v. Powdered Milk Co.* (C. C. A. 2, 1925), 7 F. (2d) 297; *Rockwood v. General Fire Extinguisher Co.* (C. C. A. 2, 1930), 37 F. (2d) 62; *Austin, etc. Co. v. Disc., etc. Co.* (C. C. A. 8, 1923), 291 Fed. 301; *Gear Grinding Machine Co. v. Studebaker Corp.* (C. C. A. 6, 1925), 4 F. (2d) 510.

In any event the award of the Court below is sustainable under the so-called "in lieu" provision of Section 25(b), which permits the Court to award "in lieu of actual damages and profits, such damages as to the court shall appear to be just".

As we have already seen, in considering the case of *Dam v. Kirk La Shelle* (C. C. A. 2, 1910), 175 Fed. 902, a court of equity is no longer faced with the dilemma of either awarding to the plaintiff the entire profits made by the infringer or of denying him any pecuniary recovery whatsoever. Even where there is no possible basis upon which an apportionment of profits can be made, still, as we have seen, the Court may avoid manifest injustice by awarding to the plaintiff general damages "in lieu of actual damages and profits", pursuant to Section 25(b) of the Copyright Act of 1909. See Judge McCormick's opinion in *Harold Lloyd Corporation v. Witwer* (C. C. A. 9, 1933), 65 F. 1, 46 *et seq.*

In the case at bar, where the evidence shows that the plaintiffs' contribution to the profits of the picture "Letty Lynton" was 10% or less, the award to the plaintiffs of all the profits of the picture "Letty Lynton" would impose a harsh and wholly unwarranted penalty upon the defendants.

Even if this Court should hold that the award below is improperly based upon an apportionment of profits, still the actual award made should in any event be sustained as an award of "such damages as to the Court shall appear to be just", "in lieu of actual damages and profits".

The purpose of the "in lieu" provision of Section 25(b) of the Copyright Act of 1909 was the same as that of the 1922 amendment of the Patent Law:

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viz., to confer upon the Court discretionary power in cases where the actual damages or profits to which a plaintiff is entitled are difficult "of calculation and determination with reasonable certainty". Mr. Arthur Steuart, to whom we have already referred (pp. 17, 18 above), at the December, 1906, hearings, said with reference to this identical clause (Section 23(b) of the bill then under consideration):

> "The language of the section, 'In lieu of actual damages and profits, such damages as to the court shall appear just,' would appear to put into the court the *absolute right* where it was an equity case to decide what should be allowed in the way of liquidated damages * * *." (Hearing of December 7-11, p. 176.).

This discretion is one to be exercised by the Court. *Westermann Co.* v. *Dispatch Printing Co.*, 249 U. S. 100, at page 106. The effect of Section 23(b) of the Act is, as the Court there stated, that "the court's conception of what is just in the particular case, considering the nature of the copyright, the circumstances of the infringement, and the like, is made the measure of the damages to be paid".

So the Court in *Douglas* v. *Cunningham*, 294 U. S. 207, at 209, stated that the provision was intended to be applicable "in a case where the rules of law render difficult or impossible proof of damages or discovery of profits". The District Court plainly misconstrued that case when it cited it (R. 1197) for the proposition that the "in lieu" provision is inapplicable where total, unapportioned profits are discoverable. That case did not involve profits at all, but an absence of any showing whatever as to damages. If there is merit in our claim that the plaintiffs are equitably entitled only to a portion of

the profits, then if the Court is unable to make a proper apportionment, it follows that the profits are in fact "difficult or impossible" to discover,—a situation calling for a finding under the "in lieu" provision.

The courts now definitely accept the construction that "Whether profits shall be awarded or statutory damages allowed is not a matter of choice with a plaintiff".*

In the *Davilla* case the Circuit Court of Appeals held that the plaintiff was entitled to all the profits made by the infringer from the sale of the infringing phonograph records since the defendants had not submitted satisfactory proof of apportionment. These *total* profits were easily ascertainable, and accordingly the Court held that the award by the District Court of statutory damages greatly in excess of ascertained profits was under the facts of that case a punitive one, not justified under the "in lieu" provision of Section 25(b) of the Copyright Act.

The early cases evidenced some doubt as to the meaning of the phrase "in lieu of actual damages and profits," possibly indicating that the power of the Court to award general damages could only be exercised where the "actual damages and profits" were indeterminate or non-existent. See *Hendricks Co., Inc.* v. *Thomas Pub. Co.* (C. C. A. 2, 1917), 242 Fed. 37, 42. There is no sound reason why the award cannot also be made where "actual damages and profits" are *determinate* and *existent*, for "in lieu of" neces-

* *Davilla* v. *Brunswick-Balke-Collender Co.* (C. C. A. 2, 1938), 94 F. (2d) 567; *Harold Lloyd Corporation* v. *Witwer* (C. C. A. 9, 1933), 65 F. (2d) 1, 45; *Fargo Mercantile Co.* v. *Brechet & Richter Co.* (C. C. A. 8, 1924), 295 Fed. 823, 829; *Atlantic Monthly Co.* v. *Post Pub. Co.* (D. C. Mass., 1928), 27 F. (2d) 556, 560.

sarily means the substitution of something existent for another thing that exists, and is not synonymous with "in the absence of" or "in default of". See *National Sewing Machine Co.* v. *Wilcox & Gibbs Machine Co.* (C. C. A. 3, 1896), 74 Fed. 557, 560; *State* v. *Escalade*, 150 La. 638; *Lamb* v. *Milliken*, 78 Colo. 564, 567.

However the words "in lieu of" are to be construed, the courts cannot be precluded from making a *just* award by either interpretation. If the Court is to award "actual profits", it can only award those profits actually ascribable to the infringement upon the basis of a fair apportionment. If, on the other hand, the Court is unable to determine the "actual profits" properly attributable to the infringement, then it is still authorized "in lieu" thereof to render a just award. In this way the Court will in effect apply what the patent cases have accomplished by the "reasonable royalty" rule, established on equitable principles independent of statute, but later expressed in the 1922 amendment.

In arriving at a just award weight has been given to the price fixed by the parties in their negotiations. (*Sebring Pottery Co.* v. *Steubenville Pottery Co.*, 9 F. Supp. 384, 390.)

POINT II.

The bases for apportionment adopted by the Court below are supported by the principles adopted in cases of patent infringement.

The petitioners' argument under Point II, in which it is claimed "the Court was in complete error even on patent analogy," shows a complete misapprehension or disregard of the principles established in the

patent cases. The *Westinghouse* case (225 U. S. 604) and the numerous other cases to which we have referred involving apportionment of profits show that apportionment is always primarily dependent upon the relative contributions to the commercial success of the infringing venture. Theoretically, the problem is a simple one, if it is reasonable to attribute the entire commercial success of the infringing venture to the infringement; but if, as here, the profits of the infringer were due in part only to the infringement, then there must be an apportionment. It is possible that in many situations it is less difficult to attribute a particular effect to a particular cause where there is a physical separation than where there is a physical blending of two or more possible causes. But in patent cases, the courts have found no difficulty in resolving the question regardless of whether or not the non-infringing elements are blended with the infringing elements.

The *Westinghouse* case contains the latest authoritative discussion on this general question, classifying in this regard the patent cases into the four categories quoted by petitioners on page 27 of their brief. The principles therein stated are based entirely upon factual considerations involving the application of the law of cause and effect. Nowhere does this Court in that case attempt to enter into such refinements as underlie the petitioners' argument.

In *Herman* v. *Youngstown Car Mfg. Co.* (C. C. A. 6, 1914), 216 F. 604, there was a claim that in order to permit apportionment, the non-infringing elements must be of a "distinct and independent character" from the infringing elements. Judge Denison said, speaking of the *Westinghouse* case:

"We do not find in that case any broad rule that a patentee is entitled to all the profits in

every case where his device is a part of a larger structure and where the fraction of profits attributable to the invention cannot be mathematically demonstrated. The converter invented by Westinghouse was of the class of the folding seat in *Yeshora* v. *Hardesty; it was an integer;* the invention, through the rule of combination, extended to every part of the whole structure which defendant marketed. *Even in a case of that class, it does not follow, from anything decided, that the apportionment must be precisely accurate; nor that intelligent expert estimate may not furnish all necessary certainty.*"

Judge Denison then made it clear that the relative contributions to the *marketability* of an infringing device are always the criteria in an apportionment of profits. The copyright cases, with the possible exception of *Dam* v. *Kirk La Shelle Co.*, 175 Fed. 902, have not departed from these principles. In both *Callaghan* v. *Myers* (128 U. S. 617) and *Belford* v. *Scribner* (144 U. S. 488) the failure to apportion was based upon the factual finding that the marketability of both infringing works was attributable entirely to the use of the plaintiffs' copyrighted works. In the *Kirk La Shelle* case, the Court proceeded on the false assumption that the entire commercial value of the infringing play was due to the copyrighted story and declined *in advance of an accounting* to permit the infringer to offer any proof to the contrary.

The plaintiffs in their argument under this heading proceed on an assumption, by no means sustainable in the light of the obvious facts, that the infringing motion picture must be deemed in effect an exact pictorial reproduction of the plaintiffs' copyrighted drama. This has been conclusively rebutted not only by the bases of proof submitted by the re-

spondents, but also by both opinions of the Court below. Upon this false assumption, the plaintiffs claim that any allowance made for the contribution of the stars, director, producer, etc., is one made for "labor and materials," the exact cost of which should be allowed only as an expense.

The plaintiffs overlook the fact that the motion picture itself was copyrighted and that as to the original matter contained therein, the copyright was undoubtedly valid and enforceable. That original matter included *as an inherent part of the film itself* the acting and portrayal of Joan Crawford, Robert Montgomery and the other actors, as well as the original creation of the director, the producer, the photographers, etc. The film "Letty Lynton" was their *new artistic creation*. By the uncontradicted evidence, it appears that the drawing power of the picture, that is, its "commercial value as a marketable commodity", was due to the contributions which these numerous artists of the defendants had made to it. The film itself was separate and distinct from the energy, time and labor and creative invention expended in its production. We seek no apportionment based upon the time and money expended in the production, distribution and exhibition of the picture, but one based upon the various elements contributed to the motion picture by the defendants themselves, apart from the literary property of the plaintiffs, which elements constitute the drawing power or commercial value of the film. There is no more justification for calling such elements "labor and materials", as plaintiffs do, than there would be in describing the "Mona Lisa" as "labor and materials".

An adequate distinction between art and labor may be a difficult one to make in that art always results from labor and labor sometimes results in art. The

labor of Joan Crawford at the studio, for example, did not draw the crowds to the box office, but the result of her labors, indelibly inscribed on the film, was undoubtedly the major reason for the commercial success of the picture with the public. Perhaps as good a distinction as any between art and mere mechanical labor is that art can command a premium with the public. The argument that the contributions made to the picture "Letty Lynton" by the defendants' stars, director, producer, etc., were mere labor is completely answered by the testimony of the expert witnesses that these contributions brought in more than ninety per cent. of the profits.

The authorities cited by plaintiffs under their Point II are wide of the mark in that they relate solely to labor and materials expended in mere mechanical reproduction and do not extend to matters of artistic or original creation such as are mainly responsible for the profits in the instant case. The *Callaghan* case (128 U. S. 617) is itself typical in this respect, in that there the only copyrightable material in the law reports published by the infringer were the headnotes, arrangements and indices which the infringer had appropriated from the copyrighted work; the entire commercial value of the infringing reports, after the deduction of cost and labor, was attributable to the copyright owner's material. As to the public domain material it was found by the court that a work containing merely the opinions of the court would not have any commercial value. Clearly under such facts, the infringer was not entitled to any apportionment of profits on the basis of labor and materials furnished by him or on any other basis.

As pointed out by Judge McCormick in the *Harold Lloyd Corporation* case (65 F. (2d), at pp. 45, 46), it was not until the passage of the copyright amend-

ment of 1912 that motion pictures and photoplays were specifically made the subjects of copyright legislation. The Townsend Act of 1912 (*supra*, p. 38) amended only Sections 5, 11 and 25 of the Act of 1909, and left undisturbed Section 1 which defined the exclusive rights of the copyright owner in relation to his copyrighted work.

The history of the industry shows that prior to 1912 there existed no so-called "feature" films. Motion pictures prior to that date were limited almost exclusively to one or two reelers which represented very limited subjects. The first feature film exhibited in America was that of "Queen Elizabeth", a French film which was presented at the Lyceum Theatre in New York City, in July, 1912 (Ramsaye, A Million And One Nights, p. 596). Thus we see that in 1906, when the Copyright Act of 1909 in its essential particulars was framed, there was no such thing in contemplation as the modern feature motion picture.

The case of *Duplate Corporation* v. *Triplex*, 298 U. S. 448, as well as the other cases cited on pages 33-36 of petitioner's brief, states a principle which is applicable to an infringement of a patent covering a machine or process, where the infringement itself involves merely mechanical reproduction of the patented article. In such case the infringer cannot claim special allowance for any superlative skill exercised in manufacturing the article, or for any degree of efficiency, intelligence, aggressiveness and the like, used in its exploitation and sale. As we have indicated, the factors upon the basis of which the defendants here claim an apportionment, are all inherent in the motion picture and contribute to its "commercial value as a marketable commodity" (*Crosby Valve* [illegible] v. *Safety Valve Co.*, 141 U. S. 441, 454). The Court below has made no allowance in the instant

case for the standing and reputation of the defendants in the industry, nor for superior skill or intelligence, nor for "factories and lands, patents and machinery", and the like.

The allowances made to defendants by way of apportionment represent compensation for converting a play, as to only part of which complainants were entitled to copyright protection, into a successful motion picture, and the plaintiffs have had allowed to them by the judgment of the Court below over five times the price for which they would have been glad to sell the motion picture rights to the play, provided sanction of the Hays Office could be obtained. It is conceded that this sanction was not forthcoming.

In the case of *Stearns-Rogers Mfg. Co.* v. *Rath*, 87 Fed. (2d) 35, 39 (Petitioners' Brief, p. 27), the Court was not passing on the admissibility of the expert evidence there offered, but merely on the weight or value of such evidence under the facts of that case. There are many typical patent cases in addition to the *Westinghouse* and *Dowagiac* cases where expert testimony similar to that offered in this case has been held to afford a proper basis for apportionment (*supra*, pp. 54-60, 65). Moreover, such testimony was later expressly authorized by the 1922 amendment of Section 70 of the Patent Law.

While the Court below stated that it was aware that the defendants' evidence did not constitute a "real standard" and that the estimates of the experts were only "expressions of very decided opinions", representing "the best opinion of the calling", still the Court felt that any speculative element was entirely removed by making "an award which by no possibility shall be too small" and by taking for such purpose "a figure which will favor the plaintiffs in every reasonable chance of error" (R. 1264-6).

POINT III.

The effect of the finding of "deliberate plagiarism" is only to impose on the defendants the duty of showing reasonable bases of apportionment.

Before explaining the nature of the finding of "deliberate plagiarism", it should be noted that in *Westinghouse v. Wagner*, 225 U. S. 604 (at p. 620), the Court, referring to the privilege extended therein to defendants to show "by general evidence, expert testimony or otherwise" that the patented elements did not "at the utmost" contribute "to more than a given amount of the profits", said that:

> "In such cases, except *possibly* against one *who had concealed or destroyed evidence or been guilty of gross wrong*, the plaintiff's recovery cannot exceed the amount thus proved, even though it be impossible otherwise more precisely to apportion the profits."

There has never been any suggestion by the Master or by either of the Courts below that the defendants have "been guilty of gross wrong".

Under the "History of the Case" (*supra*, pp. 2-4) we have discussed as bearing on the nature and extent of defendants' infringement the purport and effect of Judge Woolsey's decision which found no infringement and dismissed the complaint and of the first decision of the Court below reversing Judge Woolsey.

Upon the basis of the first opinion of the Court below, the Special Master, in passing on the question of deductibility of Federal income taxes, was of the opinion that the defendants had not been found guilty of wilful and deliberate infringement (R. 1034). So

also Judge Leibell in the District Court (R. 1204), said:

> "In the present case the District Judge dismissed the bill and his ruling was reversed by the Circuit Court of Appeals. *The District Judge certainly believed that the issues raised by the defendants had merit.* The Circuit Court of Appeals in its opinion stated that in dismissing the complaint the District Judge was following the Circuit Court's decision in *Nichols* v. *Universal Pictures Corp.* (*supra*) (45 F. (2d) 119)."

When the case came again before the Circuit Court of Appeals, and this time merely on the appeal from Judge Leibell's decree which sustained with slight modifications the Special Master's report, and without any new evidence on the issue of infringement, one way or the other, Judge Learned Hand stated (R. 1265):

> "No new light has come, and we now hold that the borrowing was a deliberate plagiarism."

Where was this "new light" to come from? We have already explained (*supra*, pp. 6, 7), the absence of this "new light".

The Court, in rephrasing its decision as to the nature of defendants' infringement, seems to have departed from the cases which hold that a favorable decision below is of itself sufficient to relieve a defendant from a claim of wanton or wilful infringement. Thus the Court below in a case where interest was refused on profits for a period prior to the filing of the Master's report (*Vandenburgh* v. *Concrete Steel Co.* (1921), 278 Fed. 607, 610), said:

> "There is no evidence of wanton infringement. *The mere fact that the courts hold different views as to the claims of the patent is sufficient to negative any such suggestion.*"

The Court below also in a later case (*Stromberg Motor Devices Co. v. Zenith-Detroit Corp.*, 73 F. (2d) 62, 65), relieved a defendant who had deliberately tested a patent, from a charge of wilful infringement, saying:

> "It (the defendant) did *deliberately* test this patent. *It claimed it to be invalid and denied infringement. The issues raised were not without merit, as is made clear by the fact that it prevailed in the District Court and obtained a decree which we reversed on appeal.*"

In *Vrooman v. Penhallow* (C. C. A. 6, 1915), 222 Fed. 894, Judge Denison, speaking of a defendant claimed to have been a wilful infringer, said (p. 899): "Baker cannot well be regarded as intending a wilful injury, *when the trial court deemed his conduct rightful.*"

We submit that in characterizing the defendants' borrowing as a "deliberate plagiarism" the lower Court did not intend to charge the defendants with *conscious wrongdoing* and in no event with "*gross wrong*". The situation was closely analogous to the *Stromberg Motor Devices Co.* case, *supra*, in that while the defendants here may be said to have acted deliberately, they did so with the honest belief that they were not making an unfair use of the plaintiffs' copyrighted material. Certainly this was the view entertained by District Judge Woolsey, who had the case under consideration for many months. If *he* felt that the acts done were not in fact *y* olative of the rights of the plaintiffs then under the cases the defendants are not chargeable with conscious wrongdoing. Their mistake must therefore be deemed one of law. For other cases supporting the proposition stated in the *Vandenburgh* and *Stromberg Motor Devices Co.* cases, *supra*, see: *Metallic Rubber Tire Co. v. Hartford*

Rubber W. Co. (C. C. A. 2, 1921), 275 Fed. 315, 326; *Philadelphia Rubber Wks. Co.* v. *U. S. Rubber Reclaiming Wks.* (C. C. A. 2, 1921), 277 Fed. 171, 179; *Rockwood* v. *General Fire Extinguisher Co.* (C. C. A. 2, 1930), 37 F. (2d) 62, 66.

In no event should the defendants be deemed to have been found "guilty of gross wrong," for obviously the Court below did not regard the defendants as in the class of offenders falling within the exception expressed in the *Westinghouse* case (*supra*, p. 71). The discoveries made by the defendants on the accounting have been full and complete and plaintiffs' counsel have never throughout the case even suggested that any evidence had been concealed, withheld or destroyed.

In *Dowagiac Mfg. Co.* v. *Minnesota Plow Co.*, 235 U. S. 641, while the Court in the course of its opinion referred to the infringement as not "wanton or wilful," it should be noted that there it was *plaintiffs*, and not the *defendants*, who had neither apportioned nor attempted to show that apportionment was impossible, "although the evidence upon the accounting went far toward showing that there was no real obstacle to a fair apportionment" (p. 647). In the present case, the defendants have assumed the burden of apportionment and established bases of apportionment satisfactory to the Court below.

As we have already pointed out in relation to *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U. S. 251 (*supra*, pp. 39-41), the defendant's difficulty was that it had not assumed the burden of apportionment, but sought rather to cast that burden upon the plaintiff. The only alternative, therefore, left to the Court was either to award all the profits to the plaintiff, as it did, or to reduce its award merely to nominal damages.

The other cases cited by plaintiffs at page 40 of their brief hold no more than that under similar circumstances where the plaintiff has shown the impossibility of *his* making an apportionment, the *defendant* must bear the burden of apportionment or suffer the consequences.

The great weight of authority now is that even if one is a conscious wrongdoer, he can avoid a forfeiture by reason of a mingling of funds, etc., by offering satisfactory proof upon which the plaintiff's proportionate recovery can be based. *Restatement on Restitution*, Sections 209, 210 (with comments and illustrations) and 214. But be the defendants "unconscious" or "deliberate" infringers, the law requires of them no more than that they shall return to plaintiffs compensation for that which they have taken.

As has already been pointed out in *Sandeman* v. *Tyzack* (*supra*, p. 39), cases involving confusion usually call for "reasonable adjustments of the rights of the parties." (See other authorities cited, *supra*, pp. 21-23.)

As a conclusion to what we have said in the preceding pages of this brief, we adopt the language of protestation used by Judge Hand in the *Dow, Jones & Co.* case (*supra*, p. 26) and ask why should courts of equity, in deciding as to "the relative contribution of two or more essential factors to a common result," insist "upon an impossible nicety of calculation even at the expense of any justice whatever" because *their processes are disclosed*, when "extreme latitude" is tolerated "to juries in the assessment of *damages*, because *their processes are not disclosed*"? After all, the infringement is but a simple tort in compensation for which equity uses defendant's *profits* merely as its "rule of compensation and measure-

ment" instead of plaintiffs' *losses*, as at law. Both cases involve the mere application of the law of cause and effect. A determination of defendant's *gains* in the former case in the nature of things approaches more closely to certainty than a determination of plaintiffs' *losses* in the latter case.

We respectfully submit that the Court below acted strictly in accordance with true equitable principles in divorcing itself from legalistic dogma, aggravated by mathematical intricacies, which lead only to *vengeance* and *punishment* and not to *compensation* and *justice*. In so doing the Court below recognized and applied that cardinal principle stated by Pomeroy in his Equity Jurisprudence (4th Ed., p. 67):

> "* * * *yet the truth stands, and always must stand, that the final object of equity is to do right and justice.*"

POINT IV.

The allowance by the Court below of the sum of $922,141.09, paid to Messrs. Mayer, Rubin and Thalberg, was a proper one.

The plaintiffs have failed to point out that this item of $922,141.09 is one of *general studio overhead*, which *in toto* was apportioned among the fifty odd feature pictures (or the equivalent) produced at the Studio during the year in question. Only .018 of this total amount, or the sum of $16,598.54, was chargeable to the motion picture "Letty Lynton". On the basis of the apportionment allowed by the Circuit Court of Appeals, it served to reduce the judgment entered by one-fifth of such amount, or the sum of $3,319.71.

This item represented payments actually made during the infringement period by the defendant Metro-Goldwyn Pictures Corporation (for brevity hereinafter called "Pictures Corporation"), under a contract dated April 7, 1924, as modified and extended (Defts' Ex. 33, R. 719, 832-882), to Louis B. Mayer Pictures, a partnership consisting of Messrs. Mayer, Rubin and Thalberg. Under this contract the individuals named were to be paid salaries, and the partnership was to be paid as additional compensation an amount equal to 20% of the profits of the Pictures Corporation. Under their agreement with the Pictures Corporation the individuals undertook "to supervise, manage and generally control the manufacture of all pictures to be produced by Metro Pictures Corporation for a period of three years" (R. 832). This period was thereafter extended to a time beyond the infringement period. For a history of the agreement, see testimony of Rubin (R. 717-723).

This contract provided for the rendition of services by the individuals for a fixed salary and an additional compensation measured by earnings. If they produced pictures that had popular appeal and profits resulted; their total compensation would be in proportion to the success of their labors. If their productions lacked popular appeal and no profits resulted, their compensation would be limited strictly to their salaries.

As the defendant Pictures Corporation was willing to pay this additional compensation, measured by 20% of the "profits", it obviously calculated that the putative 80% which it was to retain would exceed the profits which it could realize without the services of those three individuals. On no other basis would the defendant have paid this percentage compensa-

tion to individuals who never in the aggregate owned more than a 1% stock interest (R. 728), if their services could have been obtained on better terms.

By the contract of February 16, 1927 (R. 861), to which the defendant Loew's Incorporated (for brevity hereinafter called "Loew's") was an additional party, the "profits" of Loew's were substituted as the measure of compensation instead of those of the Pictures Corporation, but when so determined, *the payments were made by the defendant Pictures Corporation* (R. 710-713), *and not by the defendant Loew's.*

The plaintiffs have confused the term "profits" as applied to the enterprise with the term "profits" as applied to the defendant Pictures Corporation. The plaintiffs' only interest is in this defendant's "actual profits," and not in earnings designated as "profits" in a formula used to determine the amount of this important deductible expense. *Stromberg Motor Devices Co.* v. *Zenith-Detroit Corporation* (C. C. A. 2, 1934), 73 F. (2d) 62, 64. "The infringer is liable for actual, not for possible gains" (*Tilghman* v. *Proctor*, 125 U. S. 136, 146). Where the defendant has paid out as an *element of cost* any sum, whether called salary or profits, it is entitled to that deduction. It is true that the amount to be paid is a percentage of the yearly profits of the enterprise, as computed in the first instance; but it is only the profits remaining after this percentage has been deducted which constitute the true and *actual profits* of the defendant, for which it must account.

There is no question that this arrangement long antedated the infringement and that the payments were actually made. The good faith of the payments has not been questioned. The principle applicable

has been properly stated in *Larson* v. *Wrigley* (C. C. A. 7, 1927), 20 F. (2d) 830, 832, as follows:

> "*Where the injured party seeks the profits of an infringer, he takes the chance of their reduction, or even extinguishment, through expenses and losses actually incurred, however unwisely or even improvidently, so long only as they were incurred in good faith.*"

Both the District Court and the Master in the instant case seemed to think that the two *Stromberg* cases, the one cited above and *Stromberg Motor Devices Co.* v. *Detroit Trust Co.* (C. C. A. 3, 1930), 44 F. (2d) 958, 963, did not favor the defendant's position because they considered that in those cases the Courts passed on the *wisdom* and the *providence* of those payments as well as their *bona fides*. In the first case (73 F. (2d) 65), the Court simply said:

> "The defendant's contract with its president was made before any question of infringement of the Mock patent arose, and was not an unusual one. *The profits the defendant made from the infringement* were actually used as a part of the measure of the commission paid to its president in addition to his regular salary. The *actual profits* to the defendant as a result of the infringement were by so much reduced, and, as the plaintiff is entitled only to those actual profits, the credit was properly allowed."

Can there be any question but that in that case there was in a sense a division of *profits*? The *actual profits* of the defendant, which alone were subject to plaintiff's claim, consisted of the *profits* left after that portion of the enterprise profits had been paid out as an operating expense.

In the second *Stromberg* case (44 F. (2d) 963), it was admitted that the payments, though made from profits, were for "remuneration for services". The Court did say that the business was very profitable and that the compensation was "not at all out of reason," but it is clear that the Court spoke only of this as bearing on good faith.

It is clear from the reasoning in both cases that the examinations there made as to the nature of the profit-sharing arrangements had for their only object a determination of the *bona fides* of the arrangements. The Courts were not concerned with the *wisdom* or *providence* of the arrangements. Since in the instant case there can be no reasonable question as to the *bona fides* of the payments in question, the situation falls squarely within the rulings in the two *Stromberg* cases. See also *Macbeth-Evans Glass Co.* v. *Smith Glass Co.* (C. C. A. 3, 1927), 23 F. (2d) 459, 461.

In *Lee* v. *Malleable Iron Range Co.* (D. C., E. D. Wisc. 1918), 247 F. 795, 798 (R. 984), relied on by the Master, the Court was not called upon to determine whether the agreement was one for personal services or for a division of the profits, for, whatever it was, it pronounced such arrangement to be one without consideration and, therefore, unenforceable (R. 984).

In the present case, there was always the compensation *measured* by profits as well as the salary compensation. One did not exist without the other. The two were ever present and equally binding on the parties. The additional compensation was not a mere afterthought, for it had been in force since 1924.

The Master in his report erred in examining the contracts with the partnership to see what was regarded in those contracts as *costs or deductible expenses* in arriving at *profits* to be divided (R. 985-6). Naturally in those contracts amounts paid to the partnership measured by *profits* could not be listed as an expense of operation in determining *profits*. A determination of *profits* for the purpose of payment to the partnership would not be based upon a formula providing for such a deduction from earnings. It matters not how in such contracts the term "profits" is defined. The parties for that purpose might have provided for the exclusion of any item of debit or credit usually taken into account according to established bookkeeping methods, as in fact they did when they provided for a deduction from earnings of $2 per share, regardless of whether paid as a dividend to stockholders (R. 863). The material fact is that this compensation was in fact paid to the partnership from earnings, including earnings from the infringement; that such payment was made in good faith, and that the *actual profits* made by the defendant were not determinable without a deduction from such earnings of this compensation as a proper "element of cost".

The plaintiffs (Brief, p. 43), criticize the Court below for its statement that: "The payments were never profits of the defendants at all; the contracts effectively laid hold of them the moment they came into existence". (R. 1266). They assert that the profits were equitably the property of plaintiffs' irrespective of any contract under which the defendant may have become obligated to pay over part of them to some one else. They entirely overlook the fact that profits as such are never awarded to the plaintiff but are used merely as the measure of liability in equity

of the defendant as a simple tortfeasor. There is no authority for enforcing anything in the nature of an equitable trust against the profits themselves. On the plaintiffs' theory it might be argued that the defendants were not entitled to pay their ordinary running expenses, including salaries and the like, from the proceeds of the exploitation of the picture "Letty Lynton". Although the formula of the contract may have designated the net earnings of the defendant, before payment of this amount to the partnership, as *profits*, it is clear that such net earnings did not constitute *profits* within the meaning of the Copyright Law until after the sums payable to the partnership had been deducted.

We, therefore, submit that the lower Court correctly allowed the credit.

CONCLUSION.

It is therefore respectfully submitted that the decision of the Circuit Court of Appeals for the Second Circuit should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
J. ROBERT RUBIN,
SAMUEL D. COHEN,
EARLE L. BEATTY,
Counsel for Respondents.

APPENDIX.

Constitution and Statutes Involved.

The Constitution of the United States (Article 1, Section 8, Clause 8) gives to Congress the power:

> "8. To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

The pertinent portions of the Copyright Law (Tit. 17, U. S. C. A.) are:

> "Section 25. *Infringement.* If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:
>
> * * * * * * * * *
>
> (b) *Damages and profits; amount; other remedies.* (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * * or in lieu of actual damages and profits such damages as to the court shall appear to be just, * * *."

The pertinent portions of the Patent Law (Tit. 35, U. S. C. A.) are:

> "Section 70. * * * and upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. *If on the

* All matter which follows asterisk comprises the so-called 1922 Amendment (Act of Feb. 18, 1922).

proofs it shall appear that the complainant has suffered damage from the infringement or that the defendant has realized profits therefrom to which the complainant is justly entitled, but that such damages or profits are not susceptible of calculation and determination with reasonable certainty, the court may, on evidence tending to establish the same, in its discretion, receive opinion or expert testimony, which is hereby declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony; and upon such evidence and all other evidence in the record the court may adjudge and decree the payment by the defendant to the complainant of a reasonable sum as profits or general damages for the infringement."

pp 9 + 10

SUPREME COURT OF THE UNITED STATES.

No. 482.—October Term, 1939.

Edward Sheldon and Margaret Ayer Barnes, Petitioners, *vs.* Metro-Goldwyn Pictures Corporation, Metro-Goldwyn-Mayer Distributing Corporation, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 25, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The questions presented are whether, in computing an award of profits against an infringer of a copyright, there may be an apportionment so as to give to the owner of the copyright only that part of the profits found to be attributable to the use of the copyrighted material as distinguished from what the infringer himself has supplied, and, if so, whether the evidence affords a proper basis for the apportionment decreed in this case.

Petitioners' complaint charged infringement of their play "Dishonored Lady" by respondents' motion picture "Letty Lynton", and sought an injunction and an accounting of profits. The Circuit Court of Appeals, reversing the District Court, found and enjoined the infringement and directed an accounting. 81 F. (2d) 49. Thereupon the District Court confirmed with slight modifications the report of a special master which awarded to petitioners all the net profits made by respondents from their exhibitions of the motion picture, amounting to $587,604.37. 26 F. Supp. 134, 136. The Circuit Court of Appeals reversed, holding that there should be an apportionment and fixing petitioners' share of the net profits at one-fifth. 106 F. (2d) 45, 51. In view of the importance of the question, which appears to be one of first impression in the application of the copyright law, we granted certiorari. December 4, 1939.

Petitioners' play "Dishonored Lady" was based upon the trial in Scotland, in 1857, of Madeleine Smith for the murder of her

lover,—a *cause célèbre* included in the series of "Notable British Trials" which was published in 1927. The play was copyrighted as an unpublished work in 1930, and was produced here and abroad. Respondents took the title of their motion picture "Letty Lynton" from a novel of that name written by an English author, Mrs. Belloc Lowndes, and published in 1930. That novel was also based upon the story of Madeleine Smith and the motion picture rights were bought by respondents. There had been negotiations for the motion picture rights in petitioners' play, and the price had been fixed at $30,000, but these negotiations fell through.

As the Court of Appeals found, respondents in producing the motion picture in question worked over old material; "the general skeleton was already in the public demense. A wanton girl kills her lover to free herself for a better match; she is brought to trial for the murder and escapes". But not content with the mere use of that basic plot, respondents resorted to petitioners' copyrighted play. They were not innocent offenders. From comparison and analysis, the Court of Appeals concluded that they had "deliberately lifted the play"; their "borrowing was a deliberate plagiarism". It is from that standpoint that we approach the questions now raised.

Respondents contend that the material taken by infringement contributed in but a small measure to the production and success of the motion picture. They say that they themselves contributed the main factors in producing the large net profits; that is, the popular actors, the scenery, and the expert producers and directors. Both courts below have sustained this contention.

The District Court thought it "punitive and unjust" to award all the net profits to petitioners. The court said that, if that were done, peitioners would receive the profits that the "motion picture stars" had made for the picture "by their dramatic talent and the drawing power of their reputations". "The directors who supervised the production of the picture and the experts who filmed it also contributed in piling up these tremendous net profits". The court thought an allowance to petitioners of 25 per cent. of these profits "could be justly fixed as a limit beyond which complainants would be receiving profits in no way attributable to the use of their play in the production of the picture". But, though holding these views, the District Court awarded all the net profits to petitioners, feeling bound by the decision of the Court of Appeals in *Dam* v. *Kirk La*

Shelle Co., 175 Fed. 902, 903, a decision which the Court of Appeals has now overruled.

The Court of Appeals was satisfied that but a small part of the net profits was attributable to the infringement, and, fully recognizing the difficulty in finding a satisfactory standard, the court decided that there should be an apportionment and that it could fairly be made. The court was resolved "to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share". The court would not deny "the one fact that stands undoubted", and, making the best estimate it could, it fixed petitioners' share at one-fifth of the net profits, considering that to be a figure "which will favor the plaintiffs in every reasonable chance of error".

First.—Petitioners insist fundamentally that there can be no apportionment of profits in a suit for a copyright infringement; that it is forbidden both by the statute and the decisions of this Court. We find this basic argument to be untenable.

The Copyright Act in Section 25(b)[1] provides that an infringer shall be liable—

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, . . . or in lieu of actual damages and profits, such damages as to the court shall appear to be just, . . . ".

We agree with petitioners that the "in lieu" clause is not applicable here, as the profits have been proved and the only question is as to their apportionment.

Petitioners stress the provision for recovery of "all" the profits, but this is plainly qualified by the words "which the infringer shall have made from such infringement". This provision in purpose is cognate to that for the recovery of "such damages as the copyright proprietor may have suffered due to the infringement". The purpose is thus to provide just compensation for the wrong, not to impose a penalty by giving to the copyright proprietor profits which are not attributable to the infringement.

Prior to the Copyright Act of 1909, there had been no statutory provision for the recovery of profits, but that recovery had been

[1] Act of March 4, 1909, sec. 25, 35 Stat. 1081, as amended by Act of August 24, 1912, 37 Stat. 489. 17 U. S. C., sec. 25(b).

allowed in equity both in copyright and patent cases as appropriate equitable relief incident to a decree for an injunction. *Stevens* v. *Gladding*, 17 How. 447, 455. That relief had been given in accordance with the principles governing equity jurisdiction, not to inflict punishment but to prevent an unjust enrichment by allowing injured complainants to claim "that which, *ex aequo et bono*, is theirs, and nothing beyond this". *Livingston* v. *Woodworth*, 15 How. 546, 560. See *Root* v. *Railway Company*, 105 U. S. 189, 194, 195. Statutory provision for the recovery of profits in patent cases was enacted in 1870.[2] The principle which was applied both prior to this statute and later was thus stated in the leading case of *Tilghman* v. *Proctor*, 125 U. S. 136, 146:

"The infringer is liable for actual, not for possible gains. The profits, therefore, which he must account for, are not those which he might reasonably have made, but those which he did make, by the use of the plaintiff's invention; or, in other words, the fruits of the advantage which he derived from the use of that invention, over what he would have had in using other means then open to the public and adequate to enable him to obtain an equally beneficial result. If there was no such advantage in his use of the plaintiff's invention, there can be no decree for profits, and the plaintiff's only remedy is by an action at law for damages".

In passing the Copyright Act, the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent cases. Not only is there no suggestion that Congress intended that the award of profits should be governed by a different principle in copyright cases but the contrary is clearly indicated by the commitee reports on the bill. As to section 25(b) the House Committee said:[3]

"Section 25 deals with the matter of civil remedies for infringement of a copyright. . . . The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in section 4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater. As such a provision was found both in the trade-mark and patent laws, the committee felt that it might be properly included in the copyright laws".

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[2] Act of July 8, 1870, sec. 55, 16 Stat. 198, 206; R. S. 4921.

[3] House Report No. 2222, 60th Cong., 2d sess., p. 15. See, also, Senate Report No. 1108, 60th Cong., 2d sess., p. 15.

We shall presently consider the doctrine which has been established upon equitable principles with respect to the apportionment of profits in cases of patent infringement. We now observe that there is nothing in the Copyright Act which precludes the application of a similar doctrine based upon the same equitable principles in cases of copyright infringement.

Nor do the decisions of this Court preclude that course. Petitioners invoke the cases of *Callaghan* v. *Myers*, 128 U. S. 617, and *Belford* v. *Scribner*, 144 U. S. 488. In the *Callaghan* case, the copyright of a reporter of judicial decisions was sustained with respect to the portions of the books of which he was the author, although he had no exclusive right in the judicial opinions. On an accounting for the profits made by an infringer, the Court allowed the deduction from the selling price of the actual and legitimate manufacturing cost. With reference to the published matter to which the copyright did not extend, the Court found it impossible to separate the profits on that from the profits on the other. And in view of that impossibility, the defendant, being responsible for the blending of the lawful with the unlawful, had to abide the consequences, as in the case of one who has wrongfully produced a confusion of goods. A similar impossibility was encountered in *Belford* v. *Scribner*, a case of a copyright of a book containing recipes for the household. The infringing books were largely compilations of these recipes, "the matter and language" being "the same as the complainant's in every substantial sense", but so distributed through the defendants' books that it was "almost impossible to separate the one from the other". The Court ruled that when the copyrighted portions are so intermingled with the rest of the piratical work "that they cannot well be distinguished from it", the entire profits realized by the defendants will be given to the plaintiff.

We agree with the court below that these cases do not decide that no apportionment of profits can be had where it is clear that all the profits are not due to the use of the copyrighted material, and the evidence is sufficient to provide a fair basis of division so as to give to the copyright proprietor all the profits that can be deemed to have resulted from the use of what belonged to him. Both the Copyright Act and our decisions leave the matter to the appropriate exercise of the equity jurisdiction upon an accounting to determine

the profits "which the infringer shall have made from such infringement".

Second.—The analogy found in cases of patent infringement is persuasive. There are many cases in which the plaintiff's patent covers only a part of a machine and creates only a part of the profits. The patented invention may have been used in combination with additions or valuable improvements made by the infringer and each may have contributed to the profits. In *Elizabeth* v. *Pavement Company*, 97 U. S. 126, 142, cited in the *Callaghan* and *Belford* cases, *supra*, it had been recognized that if a separation of distinct profit derived from such additions or improvements was shown, an apportionment might be had. See *Garretson* v. *Clark*, 111 U. S. 120, 121. The subject was elaborately discussed in the case of *Westinghouse Company* v. *Wagner Company*, 225 U. S. 604, where it was distinctly ruled that "if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains". There, the Court was concerned with the question of burden of proof. It was said that the plaintiff suing for profits was under the burden of showing that they had been made. The defendant had submitted evidence tending to show that it had added non-infringing and valuable improvements which had contributed to the making of profits; and the plaintiff in reply had insisted that these additions had made no such contribution. But assuming, as had been found, that the additions were non-infringing and valuable improvements, and a *prima facie* case of contribution to profits thus appearing, the burden of apportionment would rest upon the plaintiff. But in that relation it had still to be considered that the act of the defendant had made it "not merely difficult but impossible to carry the burden of apportionment" and in such case, as the "inseparable profit must be given to the patentee or infringer", the law placed the loss on the wrongdoer.

The question of burden of proof does not arise in the instant case, as here the defendants voluntarily assumed that burden and the court below has held that it has been sustained. What is apposite, however, is the ruling in the *Westinghouse* case as to apportionment and the sort of evidence admissible upon that question. The Court pointed to the difficulties of working out an account of profits and thought that the problem was analogous to that presented where it is necessary to separate interstate from intrastate earnings and expenses in order to determine whether an intrastate

rate is confiscatory. The Court observed that "while recognizing the impossibility of reaching a conclusion that is mathematically exact", there has been received, in addition to other relevant evidence, "the testimony of experts as to the relative cost of doing a local and through business". *Chicago, M. & St. P. R. Co.* v. *Tompkins*, 176 U. S. 167, 178. The Court thought that "What is permissible in an effort to separate costs may also be done in a patent case where it is necessary to separate profits".

The principle as to apportionment of profits was clearly stated in the case of *Dowagiac Company* v. *Minnesota Company*, 235 U. S. 641,—a case which received great consideration. The Court there said:

"We think the evidence, although showing that the invention was meritorious and materially contributed to the value of the infringing drills as marketable machines, made it clear that their value was not entirely attributable to the invention, but was due in a substantial degree to the unpatented parts or features. The masters and the courts below so found and we should hesitate to disturb their concurring conclusions upon this question of fa[illegible] even had the evidence been less clear than it was.

"In so far as the profits from the infringing sales were attributable to the patented improvements they belonged to the plaintiff, and in so far as they were due to other parts or features they belonged to the defendants. But as the drills were sold in completed and operative form the profits resulting from the several parts were necessarily commingled. It was essential therefore that they be separated or apportioned between what was covered by the patent and what was not covered by it, for, as was said in *Westinghouse Co.* v. *Wagner Co.*, *supra* (225 U. S. 615): 'In such case, if plaintiff's patent only created a part of the profits, he is only entitled to recover that part of the net gains'". *Id.*, 646.

In the *Dowagiac* case, we again referred to the difficulty of making an exact apportionment and again observed that mathematical exactness was not possible. What was required was only "reasonable approximation" which usually may be attained "through the testimony of experts and persons informed by observation and experience". Testimony of this character was said to be "generally helpful and at times indispensable in the solution of such problems". The result to be accomplished "is a rational separation of the net profits so that neither party may have what rightfully belongs to the other". *Id.*, p. 647.

We see no reason why these principles should not be applied in copyright cases. Petitioners cite our decision in the trade-mark case of *Hamilton Shoe Company* v. *Wolf Brothers*, 240 U. S. 251, but the Court there, recognizing the rulings in the *Westinghouse* and *Dowagiac* cases, found on the facts that an apportionment of profits was "inherently impossible". The burden cast upon the defendant had not been sustained.

In 1922, some years after the *Dowagiac* decision, and in harmony with it, Congress amended Section 70 of the patent law[4] so as to provide expressly that "if damages or profits are not susceptible of calculation and determination with reasonable certainty, the court may, on evidence tending to establish the same, in its discretion, receive opinion or expert testimony, which is hereby declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony". The amendment, so far as it relates to the reception of expert testimony, recognized and cannot be deemed to enlarge the rules already applied in courts of equity, and the fact that the copyright law was not similarly amended cannot be considered to detract from the jurisdiction of the Court to receive similar evidence in copyright cases whenever it is found to be competent.

Petitioners stress the point that respondents have been found guilty of deliberate plagiarism, but we perceive no ground for saying that in awarding profits to the copyright proprietor as a means of compensation, the court may make an award of profits which have been shown not to be due to the infringement. That would be not to do equity but to inflict an unauthorized penalty. To call the infringer a trustee *ex maleficio* merely indicates "a mode of approach and an imperfect analogy by which the wrongdoer will be made to hand over the proceeds of his wrong". *Larson Company* v. *Wrigley Company*, 277 U. S. 97, 99, 100. He is in the position of one who has confused his own gains with those which belong to another. *Westinghouse Company* v. *Wagner Company*, *supra*, p. 618. He "must yield the gains begotten of his wrong". *Duplate Corporation* v. *Triplex Company*, 298 U. S. 448, 457. Where there is a commingling of gains, he must abide the consequences, unless he can make a separation of the profits so as to

[4] Act of February 18, 1922, Sec. 8, 42 Stat. 392, amending R. S. 4921. 35 U. S. C. 70.

assure to the injured party all that justly belongs to him. When such an apportionment has been fairly made, the copyright proprietor receives all the profits which have been gained through the use of the infringing material and that is all that the statute authorizes and equity sanctions.

Both courts below have held in this case that but a small part of the profits were due to the infringement, and, accepting that fact and the principle that an apportionment may be had if the evidence justifies it, we pass to the consideration of the basis of the actual apportionment which has been allowed.

Third.—The controlling fact in the determination of the apportionment was that the profits had been derived, not from the mere performance of a copyrighted play, but from the exhibition of a motion picture which had its distinctive profit-making features, apart from the use of any infringing material, by reason of the expert and creative operations involved in its production and direction. In that aspect the case has a certain resemblance to that of a patent infringement, where the infringer has created profits by the addition of non-infringing and valuable improvements. And, in this instance, it plainly appeared that what respondents had contributed accounted for by far the larger part of their gains.

~~Petitioners~~ had stressed the fact that, although the negotiations had not ripened into a purchase, the price which had been set for the motion picture rights in "Dishonored Lady" had been but $30,000. And ~~petitioners~~' witnesses cited numerous instances where the value, according to sales, of motion picture rights had been put at relatively small sums. But the court below rejected as a criterion the price put upon the motion picture rights, as a bargain had not been concluded and the inferences were too doubtful. The court also ruled that respondents could not count the effect of "their standing and reputation in the industry". The court permitted respondents to be credited "only with such factors as they bought and paid for; the actors, the scenery, the producers, the directors and the general overhead".

The testimony showed quite clearly that in the creation of profits from the exhibition of a motion picture, the talent and popularity of the "motion picture stars" generally constitutes the main drawing power of the picture, and that this is especially true where the title of the picture is not identified with any well-known play or novel.

Here, it appeared that the picture did not bear the title of the copyrighted play and that it was not presented or advertised as having any connection whatever with the play. It was also shown that the picture had been "sold", that is, licensed to almost all the exhibitors as identified simply with the name of a popular motion picture actress before even the title "Lady Lynton" was used. In addition to the drawing power of the "motion picture stars", other factors in creating the profits were found in the artistic conceptions and in the expert supervision and direction of the various processes which made possible the composite result with its attractiveness to the public.

Upon these various considerations, with elaboration of detail, petitioners' expert witnesses gave their views as to the extent to which the use of the copyrighted material had contributed to the profits in question. The underlying facts as to the factors in successful production and exhibition of motion pictures were abundantly proved, but, as the court below recognized, the ultimate estimates of the expert witnesses were only the expression "of their very decided opinions". These witnesses were in complete agreement that the portion of the profits attributable to the use of the copyrighted play in the circumstances here disclosed was very small. Their estimates given in percentages of receipts ran from five to twelve per cent; the estimate apparently most favored was ten per cent as the limit. One finally expressed the view that the play contributed nothing. There was no rebuttal. But the court below was not willing to accept the experts' testimony "at its face value". The court felt that it must make an award "which by no possibility shall be too small". Desiring to give petitioners the benefit of every doubt, the court allowed for the contribution of the play twenty per cent. of the net profits.

Petitioners are not in a position to complain that the amount thus allowed by the court was greater than the expert evidence warranted. Nor is there any basis for attack, and we do not understand that any attack is made, upon the qualifications of the experts. By virtue of an extensive experience, they had an intimate knowledge of all pertinent facts relating to the production and exhibition of motion pictures. Nor can we say that the testimony afforded no basis for a finding. What we said in the *Dowagiac*

case is equally true here,—that what is required is not mathematical exactness but only a reasonable approximation. That, after all, is a matter of judgment and the testimony of those who are informed by observation and experience may be not only helpful but, as we have said, may be indispensable. Equity is concerned with making a fair apportionment so that neither party will have what justly belongs to the other. Confronted with the manifest injustice of giving to petitioners all the profits made by the motion picture, the court in making an apportionment was entitled to avail itself of the experience of those best qualified to form a judgment in the particular field of inquiry and come to its conclusion aided by their testimony. We see no greater difficulty in the admission and use of expert testimony in such a case than in the countless cases involving values of property rights in which such testimony often forms the sole basis for decision.

Petitioners also complain of deductions allowed in the computation of the net profits. These contentions involve questions of fact which have been determined below upon the evidence and we find no ground for disturbing the court's conclusions.

The judgment of the Circuit Court of Appeals is affirmed.

Affirmed.

Mr. Justice McREYNOLDS took no part in the decision of this case.

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